A TREATISE

ON THE

LAW OF CRIMES

BY

WM. L. CLARK

AND

WM. L. MARSHALL

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BY

HERSCHEL BOUTON LAZELL

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PREFACE.

In the preparation of this work, the purpose has been to present the general principles of the common law in relation to crimes, and to show in a general way the extent to which they have been modified by statute. The principal statutory crimes, as embezzlement and the obtaining of money or property by false pretenses, have also been treated at some length. Much care has been taken in the analysis, and in the insertion of catch lines, in order that each principle of the law may stand out before the eye, separate from other principles. This plan will not only make it easy for one to find any given principle without unnecessary loss of time in searching, but it will also make it easier for him to comprehend and remember what he reads.

The cases cited have all been carefully examined, and will be found to be in point. Indeed the work has been almost entirely prepared from the cases themselves. It may, perhaps, be thought by some that more cases have been cited than are necessary for the use of the student, but it is believed by the authors that this will make the work more useful.

By the courteous permission of Professor Joseph Henry Beale, of the Harvard Law School, the cases in his excellent selection of cases on the criminal law have been exhaustively cited throughout the work.

Since the American Decisions, American Reports, and American State Reports are to be found in the libraries of most of the law schools, and in the libraries of many practitioners, it has been deemed advisable to cite these publications.

It is not out of place to refer here to the idea which seems

to be prevalent among practitioners who have little or no practice in the criminal courts, and among students, that the criminal law is of so little importance to them that it is not necessary to know much about it. This idea is very erroneous. Aside from the fact that no one can be a well-educated lawyer who has not a comprehensive knowledge of the criminal law, a knowledge of the criminal law is often of the utmost importance in the practice of every lawyer, whatever may be his specialty. This is well illustrated by a late case, in which an action was brought on an insurance policy, and the question arose whether the insured, at the time he was injured, was engaged in an attempt to kill game in the close season, and therefore engaged in the commission of a crime, so as to prevent a recovery on the policy. It appeared that he had merely started out with a loaded gun with intent to shoot game, and it was held that this was not an attempt to kill game, but mere preparation. It is perhaps safe to say that a large majority of insurance lawyers in the country would not make this distinction without looking the question up. Every lawyer should at least be familiar with the general principles of the criminal law, whether he expects to practice in that branch of the law or not.

One who uses this work will find it of benefit to examine and refer to the table of contents printed at the beginning, as it is a complete analysis of the entire work. The index has been prepared with care, and is very full.

WILLIAM L. CLARK,
WILLIAM L. MARSHALL.

New York City, December 8, 1900.

PREFACE TO SECOND EDITION.

This edition has been written to meet a very general demand that the original work be brought down to date. It is also believed that the appearance of the work in one volume of full size will meet with the approval of its users.

The scope of the original work has not been enlarged or changed in any manner. Neither has any attempt been made to vary the original classification except the addition of a very few, and perhaps inconsequential, sections to the sub-analysis.

An effort has been made to preserve the original text so far as possible. At the same time the revisor has not hesitated to make such changes as the decisions warrant. Some considerable matter has been added by way of elucidation whenever such seemed advisable.

It is believed that every criminal case decided since the issuance of the original edition has been examined. Those merely cumulative have been rejected, but the aim has been to preserve every case which serves in any manner to aid the student in understanding the principles. Few, if any, cases can be said to lay down new principles, but many adaptations of the old principle to new states of fact have been found. These illustrative, novel cases have been carefully and fully presented.

H. B. L.

Sept. 25, 1905.

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LAW OF CRIMES.

CHAPTER I.

NATURE OF CRIME IN GENERAL.

1. Definition.
2. Public and Private Wrongs Distinguished.
3. Treason, Felonies, and Misdemeanors.
4. Infamous Crimes.
5. Crimes Mala in Se and Mala Prohibita.
6. Merger of Offenses.

1. Definition of Crime.—A crime is any act or omission prohibited by public law for the protection of the public, and made punishable by the state in a judicial proceeding in its own name.[1] It is a public wrong, as distinguished from a mere private wrong or civil injury to an individual.

Other Definitions.—Various definitions of the term "crime" have been given in the text-books and in the cases, but few of them are satisfactory. Blackstone's definition—"An act committed or omitted in violation of a public law, either forbidding or commanding it"[2]—has frequently been quoted with ap-

[1] In re Bergin, 31 Wis. 383; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124; State v. Ostwalt, 118 N. C. 1208, 24 S. E. 660.

"A crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." 1 Bish. New Crim. Law, § 32.

A crime, "in a general sense, implies any act done or omitted in violation of public law, and for which the person is liable to punishment by indictment, presentment, or impeachment." Smith v. Smith, 2 Sneed (Tenn.) 473, 477.

[2] 4 Bl. Comm. 15.

proval,[3] but it is inaccurate. In the first place, it is not the "act omitted" that constitutes a crime, but the omission to act, and, in the second place, the term "public law" is too broad, for it includes many other laws besides those which define and punish crimes. An act is not necessarily a crime because it is prohibited by a public law. It is necessary to look further, and ascertain the ground upon which the act is punished, and by whom the punishment is imposed. To constitute a crime, it must be punished to protect the public, and it must be punished by the state or other sovereign power.

Violations of Municipal Ordinances.—By the weight of authority, the violation of a municipal ordinance, enacted by a city under legislative authority, as in the case of ordinances prohibiting and punishing gaming, and the keeping of gaming houses, bawdy houses, etc., is not a crime, in the proper sense of the term, for such ordinances are not public laws, and the punishment for their violation is imposed by the municipality, and not by the state.[4] For this reason, it has often been held that the state may punish the keeping of a gaming house, bawdy house, or other common nuisance as a crime, notwithstanding the same act has already been punished by the city in

[3] State v. Bishop, 7 Conn. 185; State v. Collins, 1 McCord (S. C.) 355; Slattery v. People, 76 Ill. 220; State v. Peterson, 41 Vt. 511; U. S. v. Eaton, 144 U. S. 677; Withers v. State, 36 Ala. 252; Schick v. U. S., 195 U. S. 65.

[4] Williams v. City Council of Augusta, 4 Ga. 509, 513; Withers v. State, 36 Ala. 252, 261; State v. Heuchert, 42 La. Ann. 270, 7 So. 329; State v. Boneil, 42 La. Ann. 1110, 8 So. 298, 21 Am. St. Rep. 413; City of Greeley v. Hamman, 12 Colo. 94, 20 Pac. 1; Wiggins v. City of Chicago, 68 Ill. 372; State v. Rouch, 47 Ohio St. 478, 481, 25 N. E. 59; Schmeider v. McLane, 36 Barb. (N. Y.) 495, 4 Abb. App. Dec. 154; City of Oshkosh v. Schwartz, 55 Wis. 483, 13 N. W. 552; Ex parte Hollwedell, 74 Mo. 395; City of Kansas v. Clark, 68 Mo. 588; Same v. Neal, 122 Mo. 232, 26 S. W. 695; Cooper v. People, 41 Mich. 403, 2 N. W. 51.

Contra, People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124; State v. West, 43 Minn. 147, 43 N. W. 845; Bautsch v. State, 27 Tex. App. 342, 11 S. W. 414; Jaquith v. Royce, 42 Iowa, 406; State v. Vail, 57 Iowa, 103, 10 N. W. 297.

which it was committed, as a violation of its ordinances, and that this is not punishing twice for the same offense.[5] The decisions on this question are in conflict, however, the opposite conclusion having been reached in some cases.[5a]

2. The Distinction between Public and Private Wrongs.

Wrongs are of two kinds,—public and private. A *private* wrong, otherwise termed a "tort" or "civil injury," is "an infringement or privation of the civil rights which belong to individuals, considered merely as individuals."[6] A *public* wrong, or crime, is "a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity."[7] It is a wrong that affects

[5] State v. Lee, 29 Minn. 445, 13 N. W. 913; State v. Ludwig, 21 Minn. 202; State v. Stevens, 114 N. C. 873, 19 S. E. 861; Koch v. State, 53 Ohio St. 433, 41 N. E. 689; City of Yankton v. Douglass, 8 S. D. 441, 66 N. W. 923; State v. Fourcade, 45 La. Ann. 717, 13 So. 187; Hankins v. People, 106 Ill. 628; Levy v. State, 6 Ind. 281; Ambrose v. State, 6 Ind. 351; Town of Bloomfield v. Trimble, 54 Iowa, 399, 6 N. W. 586; State v. Gustin, 152 Mo. 108, 53 S. W. 421; Robbins v. People, 95 Ill. 175; Wragg v. Penn Tp., 94 Ill. 11; Ex parte Hongshen, 98 Cal. 681, 33 Pac. 799; Hughes v. People, 8 Colo. 536, 9 Pac. 50; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735; Howe v. Treasurer of Plainfield, 37 N. J. Law, 145; Johnson v. State, 59 Miss. 543; State v. Recorder, 30 La. Ann. 454; City of Mobile v. Allaire, 14 Ala. 400; Shafer v. Mumma, 17 Md. 331; State v. Sly, 4 Or. 277; Hamilton v. State, 3 Tex. App. 643; Greenwood v. State, 65 Tenn. (6 Baxt.) 567; Rogers v. Jones, 1 Wend. (N. Y.) 237; McLaughlin v. Stephens, 2 Cranch, C. C. 148, Fed. Cas. No. 8,874.

The same act may be an offense against the laws of a state and of the United States, and punishable by both. Cross v. North Carolina, 132 U. S. 131; Moore v. Illinois, 14 How. (U. S.) 13; Fox v. Ohio, 5 How. (U. S.) 410; Ex parte Siebold, 100 U. S. 371; U. S. v. Marigold, 9 How. (U. S.) 560.

[5a] State v. Thornton, 37 Mo. 360; State v. Cowan, 29 Mo. 330; State v. Welch, 36 Conn. 215.

[6] 4 Bl. Comm. 5.

[7] 4 Bl. Comm. 5. See 8 Am. & Eng. Enc. Law (2d Ed.) 279, and cases there cited.

the whole community, and not merely individual members of the community, and therefore the public good requires the state to interfere and punish the wrongdoer. The punishment is imposed for the protection of the public, and not because of the injury to the individual. The latter must seek redress in a civil action.

Illustrations.—For example, if I go upon another man's land wrongfully, but without committing a breach of the peace, I commit a wrong which does not affect the other members of the community to such an extent as to require the state to punish me. I am merely liable in an action for damages by the individual whose rights I have infringed. This is not a public wrong, or crime, but a mere private wrong, or tort.[8] On the same principle, it is a mere private wrong if I maintain a nuisance which affects a single individual only,[9] or, at common law, if I obtain another man's property by a mere lie.[10]

On the other hand, it is public wrong, or crime, if I go upon another's land under such circumstances as to render me guilty of a breach of the public peace,[11] or if I maintain a nuisance on or near a public highway, so as to affect all who pass, or in a thickly-settled community, so as to affect the whole community,[12] or if I cheat another out of his property by using false weights or measures.[13] In these cases the wrong affects the whole community to such an extent that the public welfare requires the state to interfere and punish me.

[8] Rex v. Turner, 13 East, 228; Henderson v. Com., 8 Grat. (Va.) 708; Kilpatrick v. People, 5 Denio (N. Y.) 277; post, §§ 17, 418.

[9] See Com. v. Webb, 6 Rand. (Va.) 726; post, §§ 18, 447.

[10] Rex v. Wheatly, 2 Burrow, 1125, Beale's Cas. 97; Com. v. Warren, 6 Mass. 72; People v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256; post, §§ 16, 351.

[11] Henderson v. Com., 8 Grat. (Va.) 708; post, §§ 17, 418.

[12] State v. Rankin, 3 S. C. 438; Com. v. Webb, 6 Rand. (Va.) 726; Douglass v. State, 4 Wis. 387; State v. Close, 35 Iowa, 570; post, §§ 18, 447.

[13] People v. Babcock, 7 Johns. (N. Y.) 201; post, §§ 16, 351.

Crimes Both Public and Private Wrongs.—A public wrong, or crime, is also a private wrong. Though it affects the community at large, it also affects the individual.[14] Thus, an assault and battery is a crime because of the breach of the public peace, and renders the wrongdoer liable to punishment by the state. It is also a private wrong, for which the individual assaulted may maintain an action for damages.[15] The same is true of a public nuisance, resulting in special damage to an individual, as where a log is placed in a highway, and a traveler is injured by driving against it.[16] So, in the case of the more grievous crimes, like murder, robbery, larceny, etc., a private wrong is involved, and, in most jurisdictions, a civil action, as well as a criminal prosecution, will now lie.[17] At common law, the punishment for these offenses—felonies—was so great, being death and forfeiture of property, that it was not possible to make any reparation for the private wrong.[18]

The Distinguishing Characteristic.—Since the same act may be both a crime and a civil injury,—a crime for the purpose of a prosecution by the state, and a civil injury for the purpose of an action by the individual injured,—it is obvious that the tendency of the act cannot be relied upon alone to determine in any particular case whether it is a crime, and whether the proceeding therefor is a criminal prosecution. The purpose and nature of the proceeding must be considered. As was said by Austin: "The difference between crimes and civil injuries is not to be sought in a supposed difference between their tendencies, but in the difference between the mode wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party, or his representative, is a civil injury.

[14] 4 Bl. Comm. 6.

[15] Post, § 197 et seq.

[16] 4 Bl. Comm. 6.

[17] 4 Bl. Comm. 6.

[18] 4 Bl. Comm. 6. As to the right to maintain a civil action for acts constituting crime, see works on Torts.

An offense which is pursued by the sovereign, or by a subordinate of the sovereign, is a crime."[19]

Principles of Law Based upon This Distinction.—It is well to bear in mind the distinction between public wrongs or crimes and mere private wrongs or civil injuries, for many important principles of law are based upon it. Thus, by reason of the fact that a crime is punished for the protection of the public, and not merely because of the injury to the individual, there are many acts which render the doer criminally responsible, notwithstanding the consent of the individual on or against whom they are committed.[20] For the same reason, it is ordinarily no defense in a criminal prosecution to show that the individual particularly injured was himself committing or attempting to commit an offense,[21] or that he was guilty of contributory negligence,[22] or that he has settled with the wrongdoer, or condoned the offense, or recovered damages in a civil action.[23]

3. Treason, Felonies, and Misdemeanors.—Crimes are divided into three classes or grades. These are:

1. Treason.
2. Felonies.
3. Misdemeanors.

The term "crime" is not limited to any particular class, but includes all. A misdemeanor is as much a crime as treason or felony, though not so grievous, and not so severely punished.[24]

[19] Aust. Jur. § 17.
[20] Post, § 150 et seq.
[21] Post, § 157.
[22] Post, § 158.
[23] Post, §§ 155, 156.
[24] Blackstone speaks of "crimes and misdemeanors" (4 Bl. Comm. 5), and there are reported cases in which the distinction is made. This, however, is wrong. The term "crime" includes every offense, whether it be treason or felony, or merely a misdemeanor. Thus, in the case of In re Bergin, 31 Wis. 383, it was held that any wrong against the public which is punishable in a criminal proceeding prosecuted by the state

Treason.—At common law, treason was divided into high treason and petit treason. *High* treason was the compassing of the king's death, and aiding and comforting of his enemies, the forging or counterfeiting of his coin, the counterfeiting of the privy seal, or the killing of the chancellor, or either of the king's justices; and *petit* treason was where a wife murdered her husband, an ecclesiastic his lord or ordinary, or a servant his master.[25]

In this country, treason against the United States is defined by the constitution of the United States, and consists in the levying of war against the United States, or adhering to their enemies, giving them aid and comfort.[26] In state constitutions or statutes there are similar definitions of treason against the state.[27] What was petit treason at common law is in this country simply murder or manslaughter, and a felony.

Felonies.—The chief division of crimes is into *felonies* and *misdemeanors.* The distinction is of great importance.[28]

in its own name, or in the name of the people, or of the sovereign, is a "crime," within the meaning of the constitutional prohibition against involuntary servitude, except as a punishment for a crime, and that the term, therefore, includes both felonies and misdemeanors. See, also, State v. Savannah, T. U. P. Charlt. (Ga.) 235, 237; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124; Slaughter v. People, 2 Doug. (Mich.) 334, note; Van Meter v. People, 60 Ill. 168; State v. Sauer, 42 Minn. 258, 44 N. W. 115; State v. Peterson, 41 Vt. 511; Smith v. Smith, 2 Sneed (Tenn.) 473, 477.

A misdemeanor is a "crime," within the meaning of the clause of the federal constitution relating to the surrender of fugitives from justice by one state to another. Com. of Ky. v. Dennison, 65 U. S. (24 How.) 66, 99; Morton v. Skinner, 48 Ind. 123.

Peters, J., in State v. Doud, 7 Conn. 385, Mikell's Cas. 32, uses the word "crime" to indicate a serious degree of misdemeanor nearly allied and equal in guilt to a felony.

[25] 4 Bl. Comm. 73 et seq., 203, Mikell's Cas. 592.

[26] Const. U. S. art. 3, § 3. "Treason," as thus defined, is punished by act of congress. See Rev. St. U. S. 1878, § 5331.

[27] For example, see Const. Mo. art. 2, § 13; Const. Mich. art. 6, § 30; Comp. Laws Mich. 1897, p. 3379; Pen. Code N. Y. § 37; Crim. Code Ill. c. 38, par. 435; Pub. St. Mass. c. 201, § 1; Code Va. 1887, § 3658.

[28] To show the importance of the distinction: In felonies there may

At common law, felonies were those offenses which occasioned forfeiture of the lands and goods of the offender, and to which might be added death or other punishment, according to the degree of guilt.[29] Generally the punishment was death, in addition to such forfeiture, subject, however, to the benefit of clergy.[30] The common-law felonies were murder, manslaughter, rape, sodomy, robbery, larceny, arson, burglary, and perhaps mayhem.[31]

In this country there is no forfeiture of property on conviction of crime, but the distinction between felonies and misdemeanors is still recognized, and, as was stated above, it is very important. According to the weight of authority, in the ab-

be principals and accessaries. In misdemeanors all are principals. Post, § 164. Unintentionally causing death in committing some felony is murder, while to unintentionally cause death in committing a misdemeanor is manslaughter only. Post, §§ 248, 263. To constitute burglary at common law, the house must be broken and entered with intent to commit a felony. Intent to commit a misdemeanor is not enough. Post, § 407. In making an arrest for a felony, a warrant is not necessary, while it is generally necessary to authorize arrest for a misdemeanor. In making an arrest for a felony, but not in making an arrest for a misdemeanor, the accused may be killed, if he cannot otherwise be taken. Post, § 271.

The distinction is also important as regards questions of procedure. Thus, in some jurisdictions, in the case of felonies, but not in the case of misdemeanors, the prosecution must be by indictment, and not by information or complaint, the accused must be present during the trial, and the indictment must expressly allege that the act was done "feloniously."

[29] 4 Bl. Comm. 94, 95; Fassett v. Smith, 23 N. Y. 257; State v. Murphy, 17 R. I. 698, 24 Atl. 473; Com. v. Schall, 12 Pa. Co. Ct. R. 554; People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; Bannon v. U. S., 156 U. S. 464. See the reference to Blackstone as to the derivation of the term "felony."

[30] As to the benefit of clergy, see 4 Bl. Comm. 365 et seq.; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 555.

[31] Whether mayhem was a felony at common law see 2 Bish. New Crim. Law, § 1008; Com. v. Newell, 7 Mass. 245; Com. v. Lester, 2 Va. Cas. 198; 1 Hawk. P. C. c. 44, § 3. Suicide was a felony. Post, § 250. Likewise, excusable homicide, being punished by forfeiture of goods and chattels. Post, § 273.

sence of any statute on the subject, we recognize as felonies all those crimes, enumerated above, that were felonies at common law, and only those crimes, whatever may be the punishment imposed.[32]

By Statute.—Many new felonies have, from time to time, been created by statute, and what were merely misdemeanors at common law have in some cases been raised to the grade of felony. Often felonies are created by declaring in express terms that the offense shall be deemed or taken to be a felony, but they may be created by implication. Thus, if a statute creating an offense provides for the punishment of accessaries as such, the offense must be deemed a felony, for, as we shall see, it is only in the case of felonies that there can be accessaries.[33] An offense cannot be considered as impliedly made a felony by statute, unless such an intention on the part of the legislature is clear, and the implication is a necessary one.[34]

Offenses Punishable by Death or Confinement in State Prison.—By statute in some states it is expressly declared that all offenses that *are punishable,* or that *may be punished,* by

[32] Com. v. Newell, 7 Mass. 245; Com. v. Barlow, 4 Mass. 439; State v. Murphy, 17 R. I. 698, 24 Atl. 473; Com. v. Schall, 12 Pa. Co. Ct. R. 554; Bannon v. U. S., 156 U. S. 464; State v. Dewer, 65 N. C. 572.

There is a decision to the contrary in New Hampshire. It was there held that the English test of a felony does not apply in this country, but that, even in the absence of a statute, the term applies to all crimes punishable by death or imprisonment in the state prison, and only to such crimes. State v. Felch, 58 N. H. 1.

[33] Com. v. Macomber, 3 Mass. 254; Com. v. Barlow, 4 Mass. 439; post, § 164.

[34] Thus, where a statute declared that one convicted of a certain offense which was not a felony at common law (assault with intent to murder) should be deemed a "felonious" assaulter, and the same term was used in another statute, by which it was clear that the legislature did not intend to create a felony, it was held that the term might be applied to the disposition of the mind of the assaulter, and not as descriptive of the offense, and that the statute, therefore, did not make the offense a felony. Com. v. Barlow, 4 Mass. 439. And see Com. v. Newell, 7 Mass. 245; Com. v. Macomber, 3 Mass. 254.

death, or by confinement in the state prison, are felonies.[35] In a few states the confinement must be at hard labor. Some of the statutes apply only to the term "felony," when used in a statute.[36]

Under such a statute, it is the *possible* punishment—the punishment that may be imposed—that determines whether an offense is a felony, and not the punishment that is actually imposed in a particular case.[37]

[35] See People v. Lyon, 99 N. Y. 210, 1 N. E. 673; Cook v. State, 60 Ala. 39, 31 Am. Rep. 31; Randall v. Com., 24 Grat. (Va.) 644; State v. Mallett, 125 N. C. 718, 34 S. E. 651; State v. Smith, 32 Me. 369, 33 Me. 48; State v. Smith, 8 Blackf. (Ind.) 489.

Under such a statute, an offense not punishable by death or by imprisonment in the state prison is not a felony, though it may have been a felony at common law. Shay v. People, 22 N. Y. 317; Nathan v. State, 8 Mo. 631.

A statute which merely changes the punishment for offenses that were felonies at common law from death to imprisonment in the state prison does not have the effect of reducing the grade of such offenses from felony to misdemeanor. The grade remains the same as at common law. State v. Dewer, 65 N. C. 572.

[36] Thus, a statute declaring that the term "felony," when "used in any statute," shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in the state prison, does not make an offense a felony which was only a misdemeanor at common law, though it may be punished by imprisonment in the state prison, but it merely furnishes a definition of the term "felony," when it is used in some statute. Wilson v. State, 1 Wis. 184; Nichols v. State, 35 Wis. 308.

In Michigan the statute declares that "the term 'felony,' when used in this title, or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in the state prison." It is held that this is only a legislative definition of the term, as used in those provisions of the statute where neither the particular offense, nor its grade, is otherwise indicated than by the use of this term; and that those acts which were felonies at common law remain such, notwithstanding the statute, though by statute they may be subjected to a less punishment than that mentioned. Drennan v. People, 10 Mich. 169.

[37] People v. Lyon, 99 N. Y. 210, 1 N. E. 673; People v. Hughes, 137 N. Y. 29, 32 N. E. 1105; People v. War, 20 Cal. 117; Johnston v. State, 7 Mo. 183; Ingram v. State, 7 Mo. 293; State v. Melton, 117 Mo. 618, 23

No offense against the United States—that is, no violation of the federal laws—is a felony, unless it is expressly declared to be so by an act of congress.[38]

Misdemeanors.—All crimes that are not treason or felony are misdemeanors.

4. Infamous Crimes.

The term "infamous" was applied at common law to crimes disqualifying convicts as witnesses. They included treason and felonies, and also forgery and other misdemeanors affecting, by falsehood and fraud, the administration of justice, such as perjury, conspiracy to falsely accuse one of crime, etc., but did not include cases of cheating, assault and battery, and other mere breaches of the peace, etc.[39] It was the nature of the offense, and not the punishment, that rendered it infamous.[39a]

S. W. 889; State v. Smith, 32 Me. 369, 33 Me. 48; State v. Waller, 43 Ark. 381; State v. Mayberry, 48 Me. 218; Rafferty v. State, 91 Tenn. 655, 16 S. W. 728; Benton v. Com., 89 Va. 570, 16 S. E. 725; State v. Harr, 38 W. Va. 58, 17 S. E. 794. And see People v. Brigham, 2 Mich. 550; Firestone v. Rice, 71 Mich. 377, 381, 38 N. W. 885; State v. Rouch, 47 Ohio St. 478, 481, 25 N. E. 59.

"The maximum punishment to which he is liable to be subjected is the test by which the degree of the crime must be determined." People v. Lyon, supra.

This statutory definition of felony must be construed as relating to the punishment prescribed for the crime, without regard to any personal exemption of the criminal. Therefore one who is convicted and sentenced for an offense punishable by imprisonment in the state prison is convicted and sentenced for a felony, though by statute, because of his youth, he is sent, not to state prison, but to the house of refuge. People v. Park, 41 N. Y. 21.

In Illinois the decisions are not in accord with this view. The statute in that state declares to be felonies all offenses "punishable" by death or imprisonment in the state prison, and it is held that this means that the offense "must" be so punished, and that an offense which may be punished either by imprisonment in the penitentiary or by a fine only, in the discretion of the jury, is a misdemeanor only. Lamkin v. People, 94 Ill. 501; Baits v. People, 123 Ill. 428, 16 N. E. 483.

[38] In re Acker, 66 Fed. 290; U. S. v. Belvin, 46 Fed. 381.

[39] 1 Greenl. Ev. § 373; Ex parte Wilson, 114 U. S. 417; People v.

The term, however, is not always used in this sense. It is declared in the federal constitution that no person shall be held to answer for a capital or "otherwise infamous offense," unless on a presentment or indictment by a grand jury, but the term "infamous" is not defined.[40] There are similar provisions in some of the state constitutions and statutes.[41] Some of the lower federal courts have held that this provision only requires an indictment for such offenses as disqualified a witness at common law,[42] but the supreme court has overruled them in a late case, and has decided that any offense is infamous, within the meaning of the provision, that may be punished by death or by imprisonment in a state prison, with or without hard labor.[43]

5. Crimes Mala in Se and Mala Prohibita.

Crimes are divided into those that are *mala in se,* or wrong in themselves, and those that are *mala prohibita,* or wrong

Sponsler, 1 Dak. 289, 46 N. W. 459; King v. State, 17 Fla. 183; Com. v. Shaver, 3 Watts & S. (Pa.) 338; Smith v. State, 129 Ala. 89, 29 So. 699, 87 Am. St. Rep. 47.

[39a] Smith v. State, 129 Ala. 89, 29 So. 699, 87 Am. St. Rep. 47.

[40] Const. U. S. Amend. art. 5.

[41] See Const. N. Y. art. 1, § 6.

[42] U. S. v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15,750. There are state court decisions to the same effect. People v. Sponsler, 1 Dak. 289, 46 N. W. 459.

[43] Ex parte Wilson, 114 U. S. 417; Mackin v. U. S., 117 U. S. 348; U. S. v. DeWalt, 128 U. S. 393; Ex parte McClusky, 40 Fed. 71; Jamison v. Wimbish, 130 Fed. 351.

The term "infamous" has been construed in the same way by some of the state courts. Jones v. Robbins, 8 Gray (Mass.) 329, 349; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124.

The test is the possible punishment,—the punishment that may be imposed, and not the punishment actually awarded in the particular case. Ex parte Wilson, supra.

In Illinois, "infamous" crimes are enumerated in the statute, and are murder, rape, kidnapping, perjury and subornation of perjury, arson, burglary, robbery, sodomy, or other crime against nature, incest, larceny, forgery, counterfeiting, and bigamy. Crim. Code Ill. c. 38, par. 458.

merely because they are prohibited and punished by statute. Crimes *mala in se* include all common-law offenses, for the common law punishes no act that is not wrong in itself. They include, in addition to felonies, all breaches of the public peace or order, injuries to person or property, outrages upon public decency or good morals, and willful and corrupt breaches of official duty. Acts *mala prohibita* include any act forbidden by statute, but not otherwise wrong.[44] This distinction has been criticised, but it is clear, and is often of the utmost importance.[45]

6. The Merger of Offenses.

The same act often involves several offenses, felonies, or misdemeanors, or both. Thus, every murder or rape, and every robbery by actual violence, includes an assault and battery. Every robbery includes larceny. And when arson is committed, and a person is thereby burned to death, there is both arson and murder. So, if a person breaks and enters a house with intent to steal or rape, and accomplishes his purpose, there is burglary, and also larceny or rape. The question arises in such cases, whether there may be a prosecution for any one of these offenses, at the election of the state, or whether one of

[44] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204, Mikell's Cas. 160.

[45] Thus, as we shall see in dealing with assault and battery and homicide, and with criminal intent, a person who, in doing an act, causes results not intended by him, may be punished for such results if his act was malum in se, whereas he may not be punishable if it was merely malum prohibitum. A man who intentionally assaults and beats another is guilty of manslaughter if he unintentionally kills him, because the assault and battery is malum in se. Post, § 263. But it has been held that a person who accidentally drives over and injures another while driving at a speed prohibited by a statute or city ordinance, but not recklessly, is not guilty of a criminal assault and battery (and, if this is true, he would not be guilty of manslaughter if death should result), as the excessive speed is only wrong because prohibited by the statute or ordinance. Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204, Mikell's Cas. 160.

them merges and extinguishes the others, so that it alone can be prosecuted. This is what is meant by the merger of offenses.

The common-law rule was that, if the offenses were of different degrees, there was a merger, but not if they were of the same degree. Misdemeanors merged in felonies, as assault and battery in murder, rape, or robbery, and conspiracy to commit a felony in the felony, if committed, etc.[46] But there was no merger of a felony in a felony, as in the case of burglary

[46] Graff v. People, 208 Ill. 312, 70 N. E. 299; Harmwood's Case, 1 East, P. C. 411; Com. v. Kingsbury, 5 Mass. 106; State v. Cooper, 13 N. J. Law, 361, 25 Am. Dec. 490; People v. Bruno, 6 Park. Cr. R. (N. Y.) 657; Lambert v. People, 9 Cow. (N. Y.) 578; People v. McKane, 7 Misc. 478, 28 N. Y. Supp. 397; People v. Thorn, 21 Misc. 130, 47 N. Y. Supp. 46; People v. Fish, 4 Park. Cr. R. (N. Y.) 206; People v. Richards, 1 Mich. 217; Com. v. Blackburn, 1 Duv. (Ky.) 4; Johnson v. State, 26 N. J. Law, 313; Elsey v. State, 47 Ark. 572, 2 S. W. 337; State v. Hattabough, 66 Ind. 223; Wright v. State, 5 Ind. 527; People v. Wicks, 11 App. Div. 539, 42 N. Y. Supp. 630; U. S. v. Gardner, 42 Fed. 829.

The common law rule was founded on the difference as to procedure between felony and misdemeanor cases, misdemeanants being allowed many privileges in making their defense, such as full privilege of counsel, a copy of the indictment and a special jury, not accorded to felons. Rex v. Westbeer, 1 Leach, C. C. 12, 2 Strange, 1133. It was considered therefore that no conviction of a constituent misdemeanor could be had on indictment for felony, because of the denial of privileges, and no conviction of misdemeanor where the evidence showed a felony, because the king had a right to the conviction of felony with its attendant forfeiture. Whence arose the rule that where a misdemeanor was a constituent part of a felony, as where an assault culminated in murder or rape, or where a conspiracy culminated in the felony which was its object, the misdemeanor was sunk or merged in the felony which alone was punishable. Another result of the rule was that a prior conviction or acquittal of misdemeanor could not be pleaded in bar of an indictment for felony, and it is frequently urged as a ground for discharge on indictment for misdemeanor that the record of conviction would be no bar to a prosecution for the felony. On the principle of cessat ratione cessat lex it would seem that the rule of merger might well be abolished as it has been practically in England and many states by statutes abrogating rules of procedure founded upon it. For a lucid explanation of the rule and its present status see Graff v. People, 208 Ill. 312, 320, 70 N. E. 299.

and rape or larceny, robbery, and the included larceny, rape and murder, arson and murder, etc.[47] Nor was there any merger of a misdemeanor in a misdemeanor, as of an attempt or conspiracy to commit a misdemeanor in the misdemeanor when committed.[48] Neither is there a merger when the misdemeanor and felony are distinct and the one not a necessary constituent of the other.[48a]

[47] People v. Bristol, 23 Mich. 118; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; State v. Mayberry, 48 Me. 218, 238; Graff v. People, 208 Ill. 312, 70 N. E. 299; People v. Smith, 57 Barb. (N. Y.) 46.

Statutory felonies, as well as felonies at common law, are within this rule. At common law, an assault with intent to rob is a misdemeanor only, and robbery is a felony. At common law, therefore, an assault with intent to rob merges in the robbery if it is committed. There is no merger, however, if an assault with intent to rob is made a felony by statute, as by a statute making it punishable by imprisonment in the state prison. Hamilton v. State, supra.

[48] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; State v. Mayberry, 48 Me. 219; State v. Murray, 15 Me. 100; People v. Mather, 4 Wend. (N. Y.) 229, 265, 21 Am. Dec. 122, Mikell's Cas. 385; People v. Richards, 1 Mich. 216; State v. Setter, 57 Conn. 461, 18 Atl. 782; Com. v. Blackburn, 1 Duv. (Ky.) 4; Orr v. People, 63 Ill. App. 305; Graff v. People, 208 Ill. 312, 70 N. E. 299; U. S. v. McDonald, 3 Dill. 543, Fed. Cas. No. 15,670; U. S. v. Rindskopf, 6 Biss. 259, Fed. Cas. No. 16,165; State v. Noyes, 25 Vt. 415; Berkowitz v. U. S., 93 Fed. 452, 35 C. C. A. 379.

If, in the particular jurisdiction, petit larceny is a misdemeanor only, and not a felony, as at common law, a conspiracy to commit petit larceny does not merge in the larceny. State v. Setter, supra.

In a Massachusetts case (Com. v. Kingsbury, 5 Mass. 106), Chief Justice Parsons said that a conspiracy to commit a misdemeanor merges in the misdemeanor, but this was mere obiter dictum, and is not sustained by the authorities. See People v. McKane, 7 Misc. 478, 28 N. Y. Supp. 397; and Graff v. People, supra.

The misdemeanor merges in the felony only when both are committed in the same state. Regent v. People, 96 Ill. App. 189. Compare Noyes v. State, 41 N. J. Law (12 Vroom) 418; Thompson v. State, 106 Ala. 67, 17 So. 512.

[48a] People v. Rathbun, 44 Misc. 88, 89 N. Y. Supp. 746; People v. Petersen, 60 App. Div. 118, 69 N. Y. Supp. 941; Johnson v. State, 26 N. J. Law (2 Dutch.) 313; State v. Pomeroy, 30 Or. 16, 46 Pac. 797; State v. Noyes, 25 Vt. 415.

The doctrine of merger of offenses seems to have been repudiated in England.[49] It has also been repudiated in some of our states, and in others the courts have shown a strong tendency to reject it.[50] In some states it has been abolished by statute.[51]

The less is merged in the greater offense only when they result from the same act or continuing transaction. State v. Coppenburg, 2 Strob. (S. C.) 273. As where one unlawfully carries a dangerous weapon and commits a murderous assault with it. The carrying is not merged in the assault. State v. Livesay, 30 Mo. App. 633.

Contempt of court is not merged in subornation of perjury. Ricketts v. State (Tenn.) 77 S. W. 1076.

[49] In Reg. v. Button, 3 Cox, C. C. 229, 11 Q. B. (Adol. & E. N. S.) 929, the defendants were charged with conspiracy to commit a felony, and the evidence tended to show that the felony was in fact committed. Lord Denman sustained the prosecution for the conspiracy. "A misdemeanor," he said, "which is a part of a felony, may be prosecuted as a misdemeanor, though the felony has been completed." And again, in Reg. v. Neale, 1 Den. C. C. 37, a conviction for carnal knowledge of a young girl, which was a mere misdemeanor, was sustained, though the evidence showed a rape.

[50] See State v. Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121; State v. Shepard, 7 Conn. 54; State v. Vadnais, 21 Minn. 382; Mitchell v. State, 42 Ohio St. 383; Hunter v. Com., 79 Pa. 503.

Where an indictment for conspiracy also charges an overt act, but defendant is placed on trial only for the conspiracy, there is no merger. State v. Grant, 86 Iowa, 216, 53 N. W. 120; Graff v. People, 208 Ill. 312, 70 N. E. 299; U. S. v. Rindskopf, 6 Biss. 259, Fed. Cas. No. 16,165.

Where the offense consists of a series of acts, and a part of them constitute a complete misdemeanor, there is no merger. Elkin v. People, 24 How. Pr. (N. Y.) 272.

[51] In Michigan, and some of the other states, there is a statute expressly providing that if, upon the trial of any person for a misdemeanor, the facts given in evidence amount in law to a felony, he shall not, by reason thereof, be entitled to an acquittal of the misdemeanor. Under such a statute, a misdemeanor does not merge in a felony. People v. Arnold, 46 Mich. 268, 9 N. W. 406.

In Massachusetts, and some of the other states, it is provided that whenever a person indicted for a felony shall be acquitted of part of the offense charged, and convicted of the residue, he shall be adjudged guilty of the offense, if any, which shall be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly. Under this statute, misdemeanors do not merge in felonies. Herman v. People, 131 Ill. 594, 22 N. E. 471; Hill v. State, 53 Ga. 125;

State v. Dowd, 19 Conn. 388; Com. v. Goodhue, 2 Metc. (43 Mass.) 193; Glover v. Com., 86 Va. 382, 10 S. E. 420. Thus, one may be convicted of conspiracy to commit a felony, notwithstanding actual commission of the felony. Com. v. Walker, 108 Mass. 309. And there may be a conviction of assault and battery on an indictment for rape. Com. v. Drum, 19 Pick. (Mass.) 479; Com. v. Dean, 109 Mass. 349; State v. Kyne, 86 Iowa, 616, 53 N. W. 420; People v. Abbott, 97 Mich. 484, 56 N. W. 862; Com. v. Cooper, 15 Mass. 187; State v. Johnson, 30 N. J. Law (1 Vroom) 185. See, also, Glover v. Com., 86 Va. 382, 10 S. E. 420, Beale's Cas. 133.

An indictment for a constituent offense is supported by proof of the including offense. Com. v. Creadon, 162 Mass. 466, 38 N. E. 1119; Com. v. Burke, 14 Gray (80 Mass.) 100; State v. Kneeland, 90 Mo. 337, 2 S. W. 442; State v. Vadnais, 21 Minn. 382; Com. v. McPike, 3 Cush. (57 Mass.) 181.

CHAPTER II.

SOURCES OF THE CRIMINAL LAW.

I. Necessity for Prohibition by Law, §§ 7-9.
II. The Common Law, §§ 10-31.
III. The Statute Law, §§ 32-48.
IV. Expiration and Repeal of Laws, §§ 49-53.

I. Necessity for Prohibition by Law.

7. In General.—To be a crime, an act must be prohibited and made punishable by law, and it must be so, both at the time it is committed, and at the time it is punished.[1] This prohibition is either by (a) the common or unwritten law, or (b) by statute.

8. Abolition of the Common Law.

As we shall presently see at some length, many acts are prohibited and punished by the common or unwritten law, which is that portion of the municipal law which does not rest for its authority upon any express legislative enactment, but upon usage or custom.[2] Or it may be punished by the statute law, or express legislative enactments.[3] Unless prohibition can be found in one or the other, no act whatever, however atrocious, is a crime.[4]

Murder, rape, and robbery are most grievous crimes by the common law, and were punished by death, but they would not

[1] Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377, Beale's Cas. 5.

[2] Post, § 10 et seq.

[3] Post, § 32 et seq.

[4] Com. v. Marshall, supra; Rust v. State, 4 Ind. 528; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; Com. v. Grover, 16 Gray (Mass.) 602; Ware v. Branch Circ. Judge, 75 Mich. 488, 42 N. W. 997.

be crimes at all if the legislature should abolish the common law, as has been done in several states,[5] and inadvertently fail to enact a statute covering such acts, or enact a statute unconstitutionally. In Ohio, the common law was abolished, in so far as it determines what acts are crimes, and the legislature undertook to cover the whole field by statute. It neglected, however, to provide for the punishment of a man who should have carnal knowledge of a girl under 10 years of age with her consent, and when such an act was committed in that state some years ago, the court had to hold that it was not a crime, and could not be punished.[6]

9. Repeal of Law after Commission of Act.

As will be shown in a subsequent section, an act committed while a law is in force prohibiting and punishing it cannot be made the subject of a criminal prosecution after the law has been repealed without a saving clause as to acts previously committed. The law must be in force when proceedings are taken to punish for the act, as well as when the act is committed.[7]

II. The Common Law.

10. Definition.—By the "common law" is meant that portion of the municipal law which does not rest for its authority upon any express act of the legislature, but is founded upon usage and custom. It is called the unwritten law, in contradistinction to the written or statute law.[8]

[5] Post, § 14.

[6] Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355. And see Mitchell v. State, 42 Ohio St. 383; Estes v. Carter, 10 Iowa, 400. See, also, post, § 14.

[7] Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377, Beale's Cas. 5; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; post, § 52.

[8] 2 Cent. Dict. & Cyc. p. 1133; 2 Johns. Univ. Cyc. 427. "By the common law is meant those maxims, principles, and forms of judicial proceeding which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws, and,

The common law in the United States consists of the common law of England as it existed at the time the colonists emigrated and settled in America, in so far as that law was applicable to their new conditions and surroundings, and except in so far as it has been abolished by statute. It also includes some English statutes enacted before that time, a few of such statutes enacted afterwards, but before the Revolution, and some usages adopted by the colonists.

11. The English Common Law.

The common law of England, otherwise called the "unwritten law,"—the *lex non scripta,*—is based upon the immemorial usage and general consent of the people, and not upon legislative enactment. From the earliest times, certain rules and principles have been recognized there, and applied by the courts from time to time to particular cases, as they have arisen. These rules and principles constitute the common law of England. "The authority of the maxims and rules of the common law," said Blackstone, "rests entirely upon general reception and usage, and the only method of proving that this or that maxim is a rule of the common law is by showing that it hath always been the custom to observe it."[9]

12. The Common Law in the United States.

(*a*) *Offenses against the States.*—The common law in the United States consists, for the most part, of the common law of England, except in so far as it has been abolished by statute; but it also includes other laws. When our ancestors emigrated from England, they brought with them the common law as it then existed, except such parts as were inapplicable to their new state and condition. This became the common or unwritten

by such incorporation, form a part of the municipal code of each state or nation which has emerged from the loose and erratic habits of savage government." State v. Lafferty, Tappan (Ohio) 113.

[9] 1 Bl. Comm. 68. See 6 Am. & Eng. Enc. Law (2d Ed.) 270, 271.

law of the colonies settled by the English, and continued to be a part of their common law when they became states. It is still the common law in the various states, except in so far as it has been abolished or superseded by statute.[10] In Massachusetts

[10] Com. v. Knowlton, 2 Mass. 530, Beale's Cas. 1; Com. v. Chapman, 13 Metc. (Mass.) 68. And see Com. v. York, 9 Metc. (Mass.) 93, 110; Com. v. Callaghan, 2 Va. Cas. 460, Beale's Cas. 116; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776, Mikell's Cas. 64; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, Beale's Cas. 113; State v. Rollins, 8 N. H. 550, 559; State v. Carver, 69 N. H. 216, 39 Atl. 973; State v. Danforth, 3 Conn. 112, 114; State v. Lafferty, Tappan (Ohio) 113; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; State v. Cawood, 2 Stew. (Ala.) 360; Pierson v. State, 12 Ala. 149; Stout v. Keyes, 2 Doug. (Mich.) 184; Porter v. State, Mart. & Yerg. (Tenn.) 226; Fields v. State, 1 Yerg. (Tenn.) 156; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Twogood, 7 Iowa, 252; State v. Buchanan, 5 Har. & J. (Md.) 317, 333, 9 Am. Dec. 534, Mikell's Cas. 358; U. S. v. Worrall, 2 Dall. (Pa.) 384, Mikell's Cas. 1; Guardians of Poor v. Greene, 5 Binn. (Pa.) 554, Mikell's Cas. 5; State v. Pulle, 12 Minn. 164 (Gil. 99), Mikell's Cas. 16; Com. v. Cramer, 2 Pears. (Pa.) 441, Mikell's Cas. 47; Bloom v. Richards, 2 Ohio St. 387.

In Com. v. Chapman, 13 Metc. (Mass.) 68, 69, Chief Justice Shaw said: "To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common-law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument, that without the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law."

and some of the other states it was expressly recognized and adopted by the constitution or by statute.[11]

Our English ancestors also brought with them such of the English statutes as had been enacted and were in force at the time of their emigration, and were applicable to their new condition, and these also became a part of their common law, without being re-enacted.[12] Other English statutes, enacted after their emigration, and before the Revolution, in amendment or modification of the common law, were adopted in the colonies by general consent, and thus became a part of their common law.[13]

In addition to these sources of our common law, some usages growing out of the peculiar situation and exigencies of the colonists were adopted by general consent.[14]

No part of the common law of England was adopted or is in force in this country that is inapplicable to our state and condition; and as the condition of the people may vary in the different states, what is recognized as common law in one state may not be so recognized in another.[15]

[11] See Com. v. Chapman, 13 Metc. (Mass.) 68; Com. v. Churchill, 2 Metc. (Mass.) 118, Beale's Cas. 6; Com. v. York, 9 Metc. (Mass.) 93, 110; Stuart v. People, 4 Ill. 395, 404; Sans v. People, 8 Ill. (3 Gilm.) 327; State v. Cawood, 2 Stew. (Ala.) 360; Dawson v. Coffman, 28 Ind. 220; State v. La Forrest, 71 Vt. 311, 45 Atl. 225.

[12] Com. v. Chapman, supra; Com. v. Knowlton, 2 Mass. 530, Beale's Cas. 1; Com. v. Leach, 1 Mass. 59; State v. Moore, 26 N. H. 448, 455, 59 Am. Dec. 354; State v. Rollins, 8 N. H. 550, 559; Sans v. People, supra; Dawson v. Coffman, supra. See Republica v. Mesca, 1 Dall. (Pa.) 73, Mikell's Cas. 10, where the statute 28 Edw. III, c. 13, allowing foreigners a trial *per medietatem linguae* was held to be of force in Pennsylvania.

[13] Com. v. Chapman, supra; Com. v. Knowlton, supra.

Generally, however, statutes passed in England after emigration did not become a part of our common law. Com. v. Lodge, 2 Grat. (Va.) 580.

[14] Com. v. Chapman, supra; Com. v. Knowlton, supra; Guardians of the Poor v. Greene, supra; Com. v. Leach, supra.

[15] People v. Randolph, 2 Park. Cr. R. (N. Y.) 174; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Stuart v. People, 4 Ill. 395, 404; Simpson v. State, 5 Yerg. (Tenn.) 356; U. S. v. Worrall, 2 Dall. (Pa.)

Louisiana and Texas, having been settled respectively by the French and Spanish, were originally subject to the civil law, but the common law as to crimes and criminal prosecutions has been adopted by statute in both states to some extent.[16]

(*b*) *Offenses against the United States.*—The federal courts cannot exercise common-law jurisdiction in criminal cases. Under the constitution of the United States, they can exercise such power only as is conferred upon them by congress. Therefore, before any act can be punished as a crime against the United States, congress must make it a crime, affix a punishment, and declare the court which shall have jurisdiction of the offense.[17] Congress has passed statutes making many acts

384, Mikell's Cas. 1; Guardians of Poor v. Greene, 5 Binn. (Pa.) 554, Mikell's Cas. 5.

As to misdemeanors the common law punishments were not brought over by the first settlers of Pennsylvania, though the law as to felonies was. See James v. Com., 12 Serg. & R. (Pa.) 220, Mikell's Cas. 7, where a sentence to the ducking stool was held unauthorized.

[16] See State v. McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301; Grinder v. State, 2 Tex. 339.

In Louisiana, the act of 1805, for the punishment of crimes, defined many offenses, but, in the case of a number of the more familiar crimes, such as murder, rape, robbery, etc., simply described them by name, without further definition; and section 33 of the act provided that the crimes "hereinbefore named" should be "taken, intended, and construed according to the common law of England." The present statute leaves out the words first quoted, and declares: "All crimes, offenses, and misdemeanors shall be taken, intended, and construed according to and in conformity with the common law of England," etc. It has been held that this does not adopt the common law, so as to punish in Louisiana all the crimes known to the common law, but merely adopted the common-law definitions of those offenses declared to be crimes by the act of 1805. State v. Smith, 30 La. Ann. 846; State v. Depass, 31 La. Ann. 487; State v. Gaster, 45 La. Ann. 636, 12 So. 739. Except to this extent, there can be no crime in Louisiana which is not defined and denounced by statute. Except as to the crimes denounced by name in the act of 1805, and which are to be taken according to the common-law definitions, the legislature must define crimes. State v. Gaster, 45 La. Ann. 636, 12 So. 739.

[17] This was settled in 1812 in U. S. v. Hudson, 7 Cranch (U. S.) 32, Beale's Cas. 3; and it was held in that case that for this reason the

crimes, and conferring jurisdiction of them upon the federal courts. In many instances it has merely designated the offenses by their common-law name, as "murder," "manslaughter," "robbery," etc. In such cases we must look to the common law for the definition of the offense.[18] The offense, however, is purely a statutory one.

(c) *Offenses in the District of Columbia.*—The common law of Maryland, as it existed at the time the territory embraced in the District of Columbia was ceded by that state to the United States, and the statutes in force at that time, continued in force in the District when it was created by congress, and are now in force there except in so far as they have been changed by act of congress.[19]

13. How the Common Law is Evidenced and Determined.

For the most part, the common law is in fact unwritten law, —usage and tradition,—but there is abundant evidence of it in the reports of decisions, and in the writings of recognized authorities, like Coke, Hale, Hawkins, Foster, East, and others. The judges determine from such sources what the law is. What this law is, said Blackstone, is to be determined "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. The knowledge of that law is derived from experience and study, * * * and from being long personally accustomed to the judicial decisions of their predecessors."[20]

circuit court of the United States for the district of Connecticut could not take jurisdiction of an indictment for a libel on the president and congress. See, also, U. S. v. Eaton, 144 U. S. 677; U. S. v. Worrall, 2 Dall. (Pa.) 384, Mikell's Cas. 1; U. S. v. Coolidge, 1 Wheat. (U. S.) 415; Barclay v. U. S., 11 Okl. 503, 69 Pac. 798.

[18] In re Greene, 52 Fed. 104; U. S. v. Coppersmith, 4 Fed. 198.

[19] Pollard v. Lyon, 91 U. S. 225, 238; U. S. v. Simms, 1 Cranch (U. S.) 252; Kendall v. U. S., 12 Pet. (U. S.) 613; State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208.

[20] 1 Bl. Comm. 69.

"In coming to such decision," said Chief Justice Shaw, "judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well-authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness."[21]

In other words, it is the duty of the courts to determine what the established rules and customs of the common law are, and then to apply them to the facts of the particular case that may be before them for decision. It is not necessary that they shall be able to point to a decided case exactly similar in its facts. It is sufficient if the facts bring the case within established principles. "Acts deemed to be injurious to the public have, in some instances, been held to be misdemeanors, because it appeared to the court, before which they were tried, that there was an analogy between such acts and others which had been held to be misdemeanors, although such first-mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them."[22]

[21] Com. v. Chapman, 13 Metc. (Mass.) 68. And see Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776, Mikell's Cas. 64.

[22] Steph. Dig. Crim. Law, art. 160. And see Com. v. York, 9 Metc. (Mass.) 93, 110; Com. v. Callaghan, 2 Va. Cas. 460, 462, Beale's Cas. 116; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, Beale's Cas. 113; State v. Buchanan, 5 Har. & J. (Md.) 317, 333, Mikell's Cas. 358.

"It is impossible to find precedents for all offenses. The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbors. To this invention must be opposed general principles, calculated to meet and punish them." Com. v. Taylor, 5 Binn. (Pa.) 277.

In the introduction to Stephen's Digest of the Criminal Law (page VIII.) it is said: "It is not till a very late stage in its history that law is regarded as a series of commands issued by the sovereign power of the state. Indeed, even in our own time and country, that conception of it is gaining ground very slowly. An earlier, and, to some extent, a still prevailing, view of it is that it is more like an art or

14. Abolition of the Common Law.

In some states, the common law, in so far as it punishes offenses, has been altogether abolished, while in all states it has been to some extent abrogated or superseded by statute.[22a] The question, what constitutes an implied repeal of the common law, will be considered in another section.[23]

In Ohio, no act, however atrocious,—even sodomy,—can be punished criminally except in pursuance of a statute.[24]

In Iowa, Kansas, Michigan, Nebraska, and Oregon, the principles of the common law are recognized for the purpose of construing a statute punishing a crime, and merely describing it by a name known to the common law, as murder, robbery, assault and battery, etc.,[25] but no act is punishable as a crime unless it is made so by statute.[26]

science, the principles of which are at first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances. Somehow, no one can say precisely how, * * * certain principles came to be accepted as the law of the land. The judges held themselves bound to decide the cases which came before them according to those principles, and, as new combinations of circumstances threw light on the way in which they operated, the principles were, in some cases, more and more fully developed and qualified, and, in others, evaded or practically set at naught and repealed. Thus, in order to ascertain what the principle is at any given moment, it is necessary to compare together a number of decided cases, and to deduce from them the principles which they establish."

[22a] In Minnesota the code itself abolishes all common law crimes. State v. Shaw, 39 Minn. 153, 39 N. W. 305.

[23] Post, § 51.

[24] Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; Allen v. State, 10 Ohio St. 287; Mitchell v. State, 42 Ohio St. 383; Johnson v. State, 66 Ohio St. 59, 63 N. E. 607, 90 Am. St. Rep. 564; State v. Lafferty, Tappan (Ohio) 113, to the contrary, is overruled. See Mitchell v. State, supra.

[25] State v. Twogood, 7 Iowa, 252; State v. Young, 55 Kan. 349, 40 Pac. 659; In re Lamphere, 61 Mich. 105, 27 N. W. 882; In re Lambrecht (Mich.) 100 N. W. 606; State v. De Wolfe (Neb.) 93 N. W. 746; State v. Gaunt, 13 Or. 115, 9 Pac. 55.

[26] Estes v. Carter, 10 Iowa, 400; State v. Young, supra; In re Lamphere, supra; In re Lambrecht, supra; State v. De Wolfe, supra; State v. Gaunt, supra.

In Indiana, it is expressly declared by statute that crimes and misdemeanors "shall be defined," and "the punishment therefor fixed," by statute, and not otherwise. No act is a crime unless it is made so by statute.[27] But it has been held that this provision does not prevent the legislature, in punishing an act which was an offense at common law, from describing it by merely giving its common-law name. The common law may then be looked to in order to ascertain what acts are necessary to constitute the crime.[28]

In Texas it was formerly provided that no person should be punished for any act or omission, as a penal offense, unless the same should be "expressly defined" by statute,[29] and it was held necessary, not only to declare an act punishable by statute, but also to expressly define the offense. To prescribe a punishment for an offense without defining it further than by giving it a common-law name was not enough.[30] The present statute is different. It provides that no person shall be punished for any act or omission unless the same "is made a penal offense," and a penalty is affixed by statute.[31] Under this provision it is no longer necessary that offenses shall be defined further than by using a name known to the common law.[32]

In Louisiana, with some exceptions, no act is a crime unless defined by statute.[33]

In most states, the common law, in so far as it punishes crimes, has not been altogether abolished. It has been to some extent repealed or superseded by statute,[34] but where there has

[27] Stephens v. State, 107 Ind. 185, 8 N. E. 94; Jones v. State, 59 Ind. 229.

[28] Ledgerwood v. State, 134 Ind. 81, 33 N. E. 631; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117.

[29] Pasch. Dig. art. 1605.

[30] State v. Foster, 31 Tex. 578; Wolff v. State, 6 Tex. App. 195.

[31] Pen. Code, art. 3.

[32] Ex parte Bergen, 14 Tex. App. 52; Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833.

[33] Ante, § 12, note 16.

[34] Ante, § 12; post, § 51.

been no express repeal, an act which was an offense at common law, and which is not covered by any statute, may still be punished as a common-law crime.[35]

15. Acts and Omissions Prohibited and Punished at Common Law—In General.

It may be laid down, as a general rule of the common law, that any act, or any omission of a legal duty, that injures or tends to injure the community at large to such an extent that public policy requires the state to interfere and punish the wrongdoer is a crime, and renders the wrongdoer liable to indictment.[36] But an act which injures a single individual only, or a few individuals, and does not injure or threaten the other members of the community to such an extent as to require interference and punishment by the state, is a mere private wrong, and must be left to be redressed in a civil action by the party or

[35] See State v. Pulle, 12 Minn. 164, Mikell's Cas. 16 (overruling the dictum to the contrary in Benson v. State, 5 Minn. 19); Smith v. People, 25 Ill. 17, 76 Am. Dec. 780, Beale's Cas. 811; Johnson v. People, 22 Ill. 314; People v. Crowley, 23 Hun (N. Y.) 412; Com. v. McHale, 97 Pa. 397, 39 Am. Rep. 808, Mikell's Cas. 27; post, § 51.

[36] In the case of Com. v. McHale, 97 Pa. 397, 39 Am. Rep. 808, Mikell's Cas. 27, where fraud in an election of public officers was held a misdemeanor at common law, it was said: "We are of opinion that all such crimes (acts) as especially affect the public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public policy and economy." See, also, Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128.

"Whatever acts are wicked and immoral in themselves, and directly tend to injure the community, are crimes against the community, which not only may, but must, be repressed and punished, or government and social order cannot be preserved. It is this salutary principle of the common law which spreads its shield over society, to protect it from the incessant activity and novel inventions of the profligate and unprincipled,—inventions which the most perfect legislation could not always see and guard against." State v. Lafferty, Tappan (Ohio) 113.

By the common law, all immoral acts, which tend to the prejudice of the community, are offenses, and punishable by courts of justice. State v. Doud, 7 Conn. 385, Mikell's Cas. 32.

parties injured.[37] This principle has been applied by the courts again and again to the facts of particular cases, and in this way narrower and more definite rules have become established. These rules are sufficient to cover almost any fact or combination of facts, and therefore it is seldom necessary to apply the broader principle. Illustrations of its application, and the narrower principles that have sprung from it, will appear in the following sections.

16. Frauds in General.

If a man fraudulently takes and carries away another's goods without his consent, with intent to steal them, he is guilty of larceny at common law,—a felony;[38] and if a man defrauds another of his money or property by the use of false weights, measures, or tokens of a public nature, against which common prudence cannot guard, he is guilty of a cheat and misdemeanor at common law;[39] and if he joins another in a conspiracy to defraud, he is guilty of a misdemeanor.[40] It was considered by the common law that ordinary care and prudence could not guard against these acts, and that the whole community was threatened to such an extent that the state should interfere for its protection, and therefore these frauds were held to be crimes. They have been so regarded from the earliest times.

On the other hand, the common law considered that common prudence could sufficiently guard against cheating by mere false representations or lies, without the use of false measures, weights, or tokens, and without conspiracy, and such cheats were held not to be crimes, but mere private wrongs. Such is the case at common law when a man sells an unsound horse on a false and fraudulent representation that it is sound, or sells

[37] Rex v. Wheatly, 2 Burrow, 1125, 1 W. Bl. 273, Beale's Cas. 97; Kilpatrick v. People, 5 Denio (N. Y.) 277; Com. v. Webb, 6 Rand. (Va.) 726.

[38] Post, § 303 et seq.

[39] Reg. v. Mackarty, 2 Ld. Raym. 1179; post, § 350 et seq.

[40] Reg. v. Mackarty, supra; Com. v. Warren, 6 Mass. 74; post, § 144.

and agrees to deliver a certain quantity of liquor, and fraudulently delivers a less quantity as and for the quantity agreed upon, using no false measures.[41] The same is true of fraudulent breach of trust and confidence, as in cases of embezzlement. This is not a crime at common law.[42]

Fraud in an election of public officers directly affects the public at large, and is a misdemeanor at common law.[43]

17. Trespasses in General.

If a trespass does not injure or threaten to injure the public to such an extent that public policy requires the state to interfere, it is a mere private wrong, and not a crime. For this reason it has been held that it is not a crime to break the windows of a house, though it be done willfully and maliciously, if it be not done at night, nor in a secret manner, nor in such a way as to disturb the public peace.[44] The same is true of a bare trespass upon land or goods, not accompanied by actual force or threatened violence, so as to amount to a breach of the peace.[45]

[41] Rex v. Wheatly, 2 Burrow, 1125, 1 W. Bl. 273, Beale's Cas. 97; Com. v. Warren, 6 Mass. 74; People v. Garnett, 35 Cal. 470, 95 Am. Dec. 125; People v. Miller, 14 Johns. (N. Y.) 371; People v. Babcock, 7 Johns. (N. Y.) 201; Middleton v. State, Dudley (S. C.) 275, Mikell's Cas. 57; post, § 351.

In a case involving the facts last mentioned in the text, Lord Mansfield said: "That the fact here charged should not be considered as an indictable offense, but left to a civil remedy by an action, is reasonable and right, in the nature of the thing, because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness is not measuring the liquor, upon receiving it, to see whether it held out the just measure or not. The offense that is indictable must be such a one as affects the public." Rex v. Wheatly, supra. See post, § 351.

[42] Post, § 341 et seq.

[43] Com. v. McHale, 97 Pa. 397, 39 Am. Rep. 808, Mikell's Cas. 27; post, § 444.

[44] Kilpatrick v. People, 5 Denio (N. Y.) 277; post, § 418.

[45] Rex v. Storr, 3 Burrow, 1698; Rex v. Blake, 3 Burrow, 1731; Com. v. Edwards, 1 Ashm. (Pa.) 46; post, § 418.

It is otherwise, however, when a trespass is committed under such circumstances as to threaten or injure the whole community. Murder, manslaughter, rape, robbery, burglary, and arson are all trespasses against the person or property, and they are all felonies at common law.[46] It is clear that, if such acts are not punished by the state, the security of the whole community is affected; and so it is of many less grievous trespasses. Any trespass that constitutes a breach of the public peace and order, or that threatens a breach of the public peace and order, is a crime at common law. Thus it is a misdemeanor at common law to commit a trespass on real property, if it is committed under such circumstances as to constitute or cause a breach of the peace.[47] And it has been held a misdemeanor, and not merely a private wrong, to destroy another's property maliciously, and in a secret manner,[48] or to maliciously and wantonly kill or maim a domestic animal,[49] for these acts have a direct tendency to provoke violent retaliation, and therefore to cause breaches of the peace.[50]

18. Nuisances in General.

The same distinction exists as to nuisances. A nuisance which affects the health or comfort of a particular individual only, or of a few individuals, is a mere private nuisance, to be redressed or abated by a civil action;[51] but if it affects the health or comfort of the entire neighborhood, or the passers-by on a public highway, it is a common or public nuisance, and a crime.[52] Thus, it is a misdemeanor at common law to sell un-

[46] See these specific crimes, post §§ 197 et seq., 303 et seq., 400 et seq.

[47] Com. v. Taylor, 5 Binn. (Pa.) 277, Mikell's Cas. 44; Rex v. Hood, Sayer, 161; post, § 418.

[48] Loomis v. Edgerton, 19 Wend. (N. Y.) 419; post, § 418.

[49] Respublica v. Teischer, 1 Dall. (Pa.) 335; People v. Smith, 5 Cow. (N. Y.) 258; State v. Briggs, 1 Aik. (Vt.) 226; Com. v. Cramer, 2 Pears. (Pa.) 441, Mikell's Cas. 47; post, § 388.

[50] As to breaches of the peace, see post, § 417 et seq.

[51] Com. v. Webb, 6 Rand. (Va.) 726; post, § 445 et seq.

[52] Rex v. Burnett, 4 Maule & S. 272; post, § 445 et seq.

wholesome provisions,[53] or to obstruct a public street or highway by collecting a crowd, or otherwise.[54] Many other illustrations of the distinction will be found in a subsequent chapter.[55]

19. Particular Crimes and Their Classification—In General.

The particular crimes prohibited and punished at common law, as well as the more important statutory crimes, will be treated and explained in subsequent chapters. It is proposed to show here only in a general way what crimes were punished by the common law. Following in a general way, though with some change, Blackstone's arrangement, common-law crimes, including both felonies and misdemeanors, may be classified as follows:

1. Offenses especially affecting individuals, among which are included (1) offenses against the persons of individuals, (2) offenses against their property, and (3) offenses against their habitations.

2. Offenses especially affecting the commonwealth, among which are included (1) offenses against public justice, (2) offenses against the public peace, (3) offenses against the public trade, (4) offenses against the public health and comfort, and (5) offenses against the public morals and sense of decency.

3. Offenses especially affecting the king, or the state, and the government, the most important of which is treason.

4. Offenses more immediately offending God and religion, among which Blackstone included (1) apostacy, (2) heresy, (3) offenses against the established church, (4) blasphemy, (5) profane swearing and cursing, (6) witchcraft, (7) religious impostures, (8) simony, (9) Sabbath breaking, (10) drunkenness, and (11) lewdness.

5. Offenses against the law of nations, among which are (1)

[53] State v. Lafferty, Tappan (Ohio) 113.
[54] Barker v. Com., 19 Pa. 412.
[55] Post, §§ 445-456.

violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy.

20. Offenses against the Persons of Individuals.

The following offenses, called offenses against the person, because they especially affect the persons of particular individuals, are either felonies or misdemeanors at common law:

1. *Murder,* or the killing of a human being with malice aforethought,[56] is a felony.

2. *Manslaughter,* or the killing of a human being without malice aforethought, but without justification or excuse,[57] is also a felony.

3. *Mayhem,* or the depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself, or to annoy his adversary,[58] is either a felony or a misdemeanor. As to which, there is some doubt.

4. *Abortion,* or unlawfully causing the premature delivery of a child after it has quickened, so that it is born dead,[59] is a misdemeanor.

5. *Rape,* or unlawful carnal knowledge of a woman by force, and against her will,[60] is a felony.

6. *Sodomy,* or buggery, the crime against nature,[61] is also a felony.

7. *Assault and battery.*—An assault is a mere offer or attempt to inflict corporal injury upon another, accompanied by circumstances which indicate an intent, coupled with apparent present ability, to do actual violence. If injury is actually inflicted, there is a battery,—both assault and battery.[62] Assault with intent to kill, or to rape, or to rob, etc., are called ag-

[56] 4 Bl. Comm. 195; post, § 238 et seq.
[57] 4 Bl. Comm. 191; post, § 255 et seq.
[58] 4 Bl. Comm. 205; post, § 221 et seq.
[59] Post, § 289 et seq.
[60] 4 Bl. Comm. 210; post, § 293 et seq.
[61] 4 Bl. Comm. 215; post, § 461.
[62] See 4 Bl. Comm. 216; post, § 197.

gravated assaults, and are punished more severely than simple assault.[63] Assaults and assault and battery are misdemeanors at common law.

8. *False imprisonment,* or unlawfully depriving another of his personal liberty,[64] is a common-law misdemeanor.

9. *Kidnapping,* or the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another,[65] is a misdemeanor.

The above are the offenses against the persons of individuals which were known to the common law. They are still offenses, except in so far as the common law has been abrogated or superseded by statute. There are other offenses against the person which have been created by statute, both in England and in this country, and to which attention will be called in another chapter.

21. Offenses against the Property of Individuals.

The following offenses against the property of individuals are punished by the common law. Some are felonies, while others are merely misdemeanors. They are classed as offenses against property, because they immediately affect the property of particular individuals.

1. *Larceny.*—This offense may be defined generally as the taking and carrying away of the mere personal goods of another, *animo furandi,* or with intent to steal.[66] It was a felony at common law, and is still punished as a felony in all jurisdictions.

2. *Cheats.*—It is a misdemeanor at common law, known as "cheating," for a person to fraudulently obtain the property of another by a deceitful practice, not amounting to a felony (larceny), which directly affects, or may affect, the public at large.

[63] Post, § 207.
[64] 4 Bl. Comm. 218; post, § 224.
[65] 4 Bl. Comm. 219; post, § 228.
[66] 4 Bl. Comm. 229; post, § 303 et seq.

But it is not cheating at common law to deceive any person in any contract or private dealing by lies, unaccompanied by such practices.[67]

3. *Malicious mischief.*—At common law, it is a misdemeanor, known as "malicious mischief," to willfully and maliciously destroy or injure the property of another, under certain circumstances. This offense is now covered by various statutes in England and in this country. It is included here, as by Blackstone, among offenses against property. At common law, however, it was punished, not merely because of the injury to the property, but because of the tendency to provoke violent retaliation, and cause a breach of the public peace, and was therefore more properly an offense against the public peace.[68]

4. *Robbery* is a felony at common law. It is a compound larceny,—the taking of the property of another from his person, *animo furandi,* by violence, or by putting him in fear.[69]

5. *Receiving stolen goods* with knowledge that they have been stolen, and with intent to defraud, is a misdemeanor at common law.[70]

6. *Forgery* is a misdemeanor at common law. It is the false making, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.[71]

As we shall see in a subsequent chapter, statutes have been enacted in all jurisdictions creating many new offenses against property.

22. Offenses against the Habitations of Individuals.

The only common-law offenses which more immediately af-

[67] Steph. Dig. Crim. Law, art. 338; post, §§ 350-369. Cheating was classed by Blackstone as an offense against public trade.

[68] See 4 Bl. Comm. 243; post, § 388.

[69] 4 Bl. Comm. 241; post, § 370.

[70] 4 Bl. Comm. 132; post, § 380. This is included by Blackstone among offenses against public justice.

[71] Post, § 392; 4 Bl. Comm. 247.

fect the habitations of individuals, and which are therefore classed as offenses against the habitation, rather than as offenses against property, are burglary and arson. These are both felonies at common law.

1. *Burglary* is the breaking and entering of the dwelling house of another in the nighttime, with intent to commit a felony.[72]

2. *Arson* is the willful and malicious burning of the dwelling house of another.[73]

These offenses, as we shall see when we come to treat of them, have been very much enlarged by statute in all jurisdictions.

23. Offenses Especially Affecting the Commonwealth and the Government—In General.

In one sense, all offenses affect the commonwealth or government. It is only upon this theory that any act is punished by the state. There are some offenses, however, which especially affect the commonwealth,—that is, the whole community,—rather than any one individual, as (1) offenses affecting the administration of public justice, (2) offenses affecting the public peace, (3) offenses affecting the public trade, (4) offenses affecting the public health and comfort, (5) offenses affecting the public morals or sense of decency, and (6) offenses directly affecting the administration of government.[74]

24. Offenses Affecting the Administration of Justice.

The public is clearly injured by acts corrupting or obstructing the administration of public justice, and therefore the common law punishes as a misdemeanor any willful and corrupt act having this effect or tendency. For this reason, it punishes the compounding of felonies, or agreements not to prosecute therefor, bribery of judicial officers, bribery of jurors.

[72] 4 Bl. Comm. 223; post, § 400.
[73] 4 Bl. Comm. 221; post, § 410.
[74] See 4 Bl. Comm. 127 et seq.; Steph. Dig. Crim. Law, 36 et seq.

or otherwise tampering with them, champerty and maintenance, perjury, obstruction of officers in the service of process, escape, prison breach, rescue, etc.[75]

25. Offenses Affecting the Public Peace.

At common law, any act which in itself amounts to a disturbance of the public peace, or which has a direct tendency to cause a breach of the public peace, is a misdemeanor.[76] For this reason, among others, the common law punishes unlawful assemblies, routs, riots, affrays, disturbance of public assemblies, prize fighting, etc.;[77] and because of the tendency to cause breaches of the peace, it punishes various acts of malicious mischief,[78] libel,[79] certain kinds of disorderly houses,[80] etc. The principle is not limited to these specific offenses, but covers any other case in which the public peace is disturbed.[81]

[75] 4 Bl. Comm. 127 et seq.; Reg. v. Burgess, 16 Q. B. Div. 141; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; State v. McNally, 34 Me. 210, 56 Am. Dec. 650; State v. De Witt, 2 Hill (S. C.) 282, 27 Am. Dec. 371; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; State v. Doud, 7 Conn. 385, Mikell's Cas. 32; post, §§ 430-444.

[76] 4 Bl. Comm. 142 et seq.; Henderson v. Com., 8 Grat. (Va.) 708, 56 Am. Dec. 160; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; State v. Jasper, 4 Dev. (N. C.) 323; State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416. Writing a scandalous letter concerning a young lady to one whom she was about to marry. Rex v. Summers, 3 Salk. 194, Mikell's Cas. 41.

[77] Com. v. Hoxey, 16 Mass. 385; State v. Perry, 5 Jones (N. C.) 9, 69 Am. Dec. 768; Com. v. Haines, 4 Clark (Pa.) 17, Mikell's Cas. 41. And see these specific crimes, post, §§ 417-429.

[78] Respublica v. Teischer, 1 Dall. (Pa.) 335; People v. Smith, 5 Cow. (N. Y.) 258; State v. Briggs, 1 Aik. (Vt.) 226; post, § 388.

[79] Com. v. Chapman, 13 Metc. (Mass.) 68; Rex v. Summers, 3 Salk. 194, Mikell's Cas. 41; post, § 428.

[80] State v. Buckley, 5 Harr. (Del.) 508; State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; post, § 427.

[81] Thus it has been held a misdemeanor at common law to agree to fight. State v. Hitchens, 2 Harr. (Del.) 527. Or to exhibit an effigy calculated to provoke anger and resentment among the populace. Com. v. Haines, 4 Clark (Pa.) 17, Mikell's Cas. 41. For other illustrations,

26. Offenses Affecting the Public Trade.

Among the common-law offenses affecting the public trade, the first mentioned by Blackstone is owling,[82] or the transporting of wool or sheep out of the kingdom, to the detriment of its staple manufacture.[83] Smuggling, or the importing of goods without paying the duties imposed by law, was punished by various early English statutes.[84] Fraudulent bankruptcy and usury were punished by early English statutes, and are classed by Blackstone as offenses affecting the public trade.[85] In this country they are punished by statute in some jurisdictions. Cheating was also classed as an offense against public trade.[86] Forestalling the market, regrating, engrossing, monopolies, exercising a trade without having served an apprenticeship, were all offenses against the public trade, either at common law, or by virtue of early English statutes.[87]

27. Offenses Affecting the Public Health and Comfort.

Any act injuriously affecting or endangering the health or comfort of the community at large was and still is a common nuisance, and a misdemeanor at common law. Thus, it is a misdemeanor to expose a person having a contagious disease in such a way that other members of the community may be

see State v. Huntly, 3 Ired. (N. C.) 418; U. S. v. Hart, Pet. C. C. 390, Fed. Cas. No. 15,316, and the cases cited post, §§ 417-429.

[82] So called because it was usually carried on at night. 4 Bl. Comm. 154.

[83] 4 Bl. Comm. 154. It was also punished particularly by the statute of 2 Edw. III. c. 1; but it has been since abolished.

[84] 4 Bl. Comm. 154, 155.

[85] 4 Bl. Comm. 156.

[86] Respublica v. Powell, 1 Dall. (Pa.) 47, Mikell's Cas. 56. See ante, § 21; post, § 350.

[87] 4 Bl. Comm. 158; post, §§ 474-481.

[88] 4 Bl. Comm. 161 et seq.; Anon., 12 Mod. 342, Beale's Cas. 843; Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104; Rex v. Vantandillo, 4 Maule & S. 73, Mikell's Cas. 53; Rex v. Taylor, 2 Strange, 1167, Mikell's Cas. 52; Com. v. Cassidy, 6 Phila. (Pa.) 82, Mikell's Cas. 54; Rex v. Dixon, 3 Maule & S. 11; post, § 445 et seq.

infected, to sell unwholesome provisions, to improperly excite public alarm, to conduct a dangerous or noxious business in such a way, or at such a place, as to endanger the life or health of the other members of the community, or, subject to limitations, so as to interfere with the comfort of the other members of the community.[88]

28. Offenses Affecting the Public Morals or Sense of Decency.

"Immorality" and "crime" are by no means convertible terms. The law does not undertake to punish a man merely because he is immoral. There must be something more. There must be injury to the community at large. A man may be grossly immoral in his private life, without being responsible to the criminal law, unless his conduct is covered by some statute.[89] Public immorality, however, because of the tendency to corrupt the public morals, and shock the public sense of decency, is a public nuisance, and a misdemeanor at common law. It may therefore be laid down as a general principle, that, at common law, any act that has a direct tendency to corrupt the morals of the community, or shock its sense of decency, is a misdemeanor. For this reason, the common law punishes the keeping of a common bawdy house, or house that is a common resort for the purpose of prostitution, a common gaming house, indecent exposure of the person in a public place, obscene publications and exhibitions, open and notorious lewdness, etc.[90]

[88] Anderson v. Com., 5 Rand (Va.) 627, 16 Am. Dec. 776, Mikell's Cas. 64, where it was held in effect that fornication, adultery, and seduction are not common-law crimes.

[90] Rex v. Delaval, 3 Burrow, 1434, Beale's Cas. 101; Rex v. Curl, 2 Strange, 788; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632 Beale's Cas. 113; Kanavan's Case, 1 Me. 226, Beale's Cas. 115; Bell v. State, 1 Swan (Tenn.) 42, Mikell's Cas. 59; Britain v. State, 3 Humph. (Tenn.) 203; State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; Barker v. Com., 19 Pa. 412. And see post, § 458 et seq.

In Barker v. Com., supra, it was held that foul language charged to have been uttered in the public streets with intent "to debauch, debase,

29. Offenses Affecting the Administration of the Government.

A number of offenses which cannot strictly be classed as offenses against the administration of justice, but which are very similar, and are governed by the same principles, may be designated as offenses against the administration of the government. Misconduct on the part of a public officer, if accompanied by fraud or corruption, is clearly a misdemeanor at common law.[91] He may be guilty of a misdemeanor, even without fraud or corruption.[92] Private citizens may also be punished at common law for acts preventing or obstructing the administration of the government, as for illegally voting at an election.[93]

30. Offenses against God and Religion.

Blackstone mentions a number of offenses which he classes as offenses against God and His holy religion, and which were punishable in England. These have been mentioned in another place.[94] In this country, we have no offenses which can be called offenses against God and religion. Neither the United States nor the states undertake to interfere with a citizen's religious belief or religious practices, so long as his acts do not affect the other members of the community, so as to become common nuisances, or otherwise criminal.[95]

31. Offenses against the Law of Nations.

The law of nations "is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the

and corrupt the morals of youth, as well as others," and to their "manifest corruption and subversion," was indictable at common law.

[91] Trial of Jones, 31 How. St. Tr. 251; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; post, § 434.

[92] Com. v. Callaghan, 2 Va. Cas. 460, Beale's Cas. 116; Com. v. Alexander, 4 Hen. & M. (Va.) 522; post, § 434.

[93] Com. v. Silsbee, 9 Mass. 417, Beale's Cas. 111; post, § 444.

observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each."[96] The law of nations is a part of the common law.[97] The offenses against the law of nations noticed by the common law were (1) violation of safe conducts, (2) infringements of the rights of ambassadors, and (3) piracy, or robbery and depredation upon the high seas.[98]

III. The Statute Law.

32. In General.—The statute law, as distinguished from the common or unwritten law, is the law expressly promulgated by the law-making power,—in England, by parliament; in the United States, by congress for the federal government and for the District of Columbia, by the legislatures or general assemblies for the states, and by congress and the territorial legislatures for the territories.

The power of the English parliament to punish acts as crimes is absolute.

The power of congress is such only as is conferred upon it, expressly or impliedly, by the constitution of the United States.

The power of the state legislatures or general assemblies is absolute, except in so far as it is limited by the constitution of the United States, or of the state.

The power of a territorial legislature is such only as is conferred upon it by the organic act of the territory,—the act of congress by which the territory is created,—and acts supplemental thereto.

The Reason and Object of Statutes.—Both in England and in the United States, notwithstanding the common law, statutes

[94] 4 Bl. Comm. 42; ante, § 19.
[95] Post, § 457.
[96] 4 Bl. Comm. 66.
[97] 4 Bl. Comm. 67; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, Mikell's Cas. 33.
[98] 4 Bl. Comm. 68-73; post, §§ 482-485.

have been enacted from time to time punishing particular acts as crimes. There are various reasons for their enactment. Some statutes have been enacted to remedy or supply what was considered to be a defect in the common law, by punishing an act which was not regarded as a crime at common law, but which experience has shown to be so hurtful to the public as to require interference and punishment by the state. It was for this reason that statutes were enacted to punish embezzlement, and the obtaining of money or property by false pretenses, neither of which were regarded as crimes at common law.[99] For the same reason, statutes have been enacted to punish as burglary or arson the breaking and entering, or the burning, of other houses and things than dwelling houses and outhouses within the curtilage or common inclosure, which were the only subjects of burglary and arson at common law.[100]

Other statutes have been enacted to remove doubt and uncertainty as to what was the common law, where the judges differed in opinion. Thus, eminent judges differed in opinion as to whether it was burglary at common law to enter a house with felonious intent, but without any breaking, and to break out, in order to escape. A statute was enacted in England at an early day, and has been followed in some of our states, declaring it to be burglary.[101]

Other statutes have been enacted merely to change the punishment imposed by the common law. Felonies, at common law, were almost invariably punished by death, but this has been very generally changed by statute as to all felonies except murder and rape, and in some states as to these. This was the reason for the statutes dividing murder into different degrees. All murder was punished by death at common law, but, under

[99] See Rex v. Wheatly, 2 Burrow, 1125, 1 W. Bl. 273, Beale's Cas. 5. See ante, § 16; post, §§ 341, 350.

[100] See post, § 400 et seq.

[101] See post, § 404(e).

these statutes, only murder in the first degree—that is, murder with actual malice, or express malice—is so punished.[102]

Construction of Statutes.—It is often important to ascertain the reason for the enactment of a penal statute, because the reason and object of a statute is taken into consideration in construing it.[103]

33. Power of the State Legislatures.

In England there is no written constitution to impose restrictions upon the power of parliament. Its power to punish an act as a crime is absolute, and all the courts have to do is to construe its enactments and enforce them. It is different, however, in this country. The state legislatures, like the English parliament, have inherent power to declare acts criminal, and to punish the wrongdoer, but their power is not unlimited. It is restricted by the constitution of the United States, and by the state constitution, and no penal statute is valid if it is in violation of the provisions of either.[104] Except for these limitations, the power of a state legislature is absolute. It may punish any act which, in its judgment, requires punishment, provided it violates no constitutional restriction, and its enactments must be enforced by the courts.[105] The courts cannot re-

[102] See post, § 251.

[103] See post, § 47(c).

[104] Post, § 36 et seq.

[105] Powell v. Com., 114 Pa. 265, 7 Atl. 913, 127 U. S. 678; State v. Stephenson, 2 Bailey (S. C.) 334; Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322, 326; Com. v. Evans, 132 Mass. 11; Com. v. Bearse, 132 Mass. 542, 42 Am. Rep. 450; State v. Addington, 77 Mo. 110; Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344; Morgan v. Nolte, 37 Ohio St. 23, 41 Am. Rep. 485. And see post, §§ 36-44.

It is competent for the legislative power to create new offenses, and it may extend common-law definitions of particular offenses, so as to punish acts not embraced in the common-law definitions. See People v. Most, 128 N. Y. 108, 27 N. E. 970; Rachels v. State, 51 Ga. 374, 276; State v. Sattley, 131 Mo. 464, 33 S. W. 41.

In a late New York case it was said: "The legislative power of the

view the discretion of the legislature, or pass upon the expediency, wisdom, or propriety of legislative action in matters within its powers.[106]

state, which, by the constitution, is vested in the senate and assembly, covers every subject which, in the distribution of the powers of government between the legislative, executive, and judicial departments, belongs, by practice or usage, in England or in this country, to the legislative department, except in so far as such power has been withheld or limited by the constitution itself, and subject, also, to such restrictions upon its exercise as may be found in the constitution of the United States. From this grant of legislative power springs the right of the legislature to enact a criminal code, to define what acts shall constitute a criminal offense, what penalty shall be inflicted upon offenders, and generally to enact all laws which the legislature shall deem expedient for the protection of public and private rights, and the prevention and punishment of public wrongs. The legislature may not declare that to be a crime which in its nature is and must be, under all circumstances, innocent, nor can it, in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the constitution. But it may, acting within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This, in its nature, is a legislative power, which, by the constitution of the state, is committed to the discretion of the legislative body." Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rep. 813.

[106] Per Allen, J., in People v. Albertson, 55 N. Y. 50, 54. And see State v. Addington, 77 Mo. 110; People v. Worden Grocer Co., 118 Mich. 604, 77 N. W. 315. See, also, post, § 36.

In People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452, it was said: "It is not a good objection to a statute prohibiting a particular act, and making its commission a public offense, that the prohibited act was, before the statute, lawful or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine, in the interest of the public, what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality. The unnecessary multiplication of mere statutory offenses is undoubtedly an evil, and the general interests are best promoted by allowing the largest practicable liberty of individual action, but nevertheless the justice and wisdom of penal legislation, and its extent within constitutional limits, is a matter resting in the judgment of the legislative branch of the government, with which courts cannot interfere."

34. Power of Congress.

The power of congress is very much more restricted than the power of the state legislatures. It has no inherent power, but has such powers only as have been expressly or impliedly conferred upon it by the instrument to which it owes its existence, —the constitution of the United States.[107] The constitution also contains some express limitations upon its powers.[108] Congress has the power to legislate for the territories and for the District of Columbia.[109]

35. Power of Territorial Legislatures.

The territorial legislatures are created by congress, and have such powers only as are conferred upon them by congress in the act by which they are created,—the organic act,—and by acts of congress supplemental thereto. By act of congress, the legislative power in the territories is vested in a governor and legislative assembly, and "extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."[110]

36. Constitutional Limitations—In General.

The legislature cannot legally enact any law in violation of constitutional limitations. Such a statute is absolutely void.[111]

[107] Const. U. S. art. 1, §§ 8, 9, and the amendments; U. S. v. Arjona, 120 U. S. 479; U. S. v. Coombs, 12 Pet. (U. S.) 72.

[108] Const. U. S. art. 1, § 9.

[109] Const. U. S. art. 1, § 8; Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Reynolds v. People, 1 Colo. 179.

[110] Rev. St. U. S. § 1851. And see Reynolds v. People, 1 Colo. 179; Territory v. Yarberry, 2 N. M. 391.

[111] A statute declaring it a crime to exercise any fundamental right guarantied by the constitution, as the right of suffrage, or the free exercise of religious worship, or which, without any reason, deprives a person of life, liberty, or property, is absolutely void. See Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322, 326; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; Northwestern Mfg. Co. v. Wayne Circ. Judge, 58 Mich.

In the following sections we shall consider particular provisions of the various constitutions. Before doing so, it is well to understand the leading principles by which the courts are governed in determining whether they are violated.

1. If a statute is clearly unconstitutional, the courts must declare it void, and refuse to enforce it. They have no discretion in such a case.[112]

2. They should pay great respect, however, to the deliberate judgment of the legislature as to the constitutionality of a statute, and no statute should be declared unconstitutional unless its unconstitutionality is clear beyond any reasonable doubt.[113]

3. The courts do not sit in review of the discretion of the legislature in matters which are within its power, nor determine upon the expediency, wisdom, or propriety of its action in such matters.[114]

Form of Statutes and Requirements as to Enactment.—There are a number of provisions in the various constitutions with respect to the form of acts and mode of enacting them, as, for example, the provisions that an act shall be passed by both houses of the legislature, that it shall be signed by the speaker of the house and the president of the senate, and that it shall be presented to the governor for his approval, etc., and the provision

381, 25 N. W. 372, 55 Am. Rep. 693. And see the cases hereafter more specifically cited.

[112] In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Frorer v. People, 141 Ill. 172, 31 N. E. 395; Ex parte Kuback, 85 Cal. 274, 24 Pac. 737; People v. Gillson, 109 N. Y. 389, 17 N. E. 343; State v. Scougal, 3 S. D. 55, 51 N. W. 858.

[113] Per Allen, J., in People v. Albertson, 55 N. Y. 50, 54. And see Powell v. Com., 114 Pa. 265, 7 Atl. 913, affirmed in 127 U. S. 678.

A doubt as to the constitutionality of a law stamps it as constitutional. State v. Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; State v. Ide, 35 Wash. 576, 77 Pac. 961.

[114] People v. Albertson, supra; State v. Addington, 77 Mo. 110; Com. v. Colton, 8 Gray (Mass.) 488; Powell v. Com., 114 Pa. 265, 7 Atl. 913, affirmed in 127 U. S. 678; People v. Worden Grocer Co., 118 Mich. 604, 77 N. W. 315; State v. Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; McCray v. U. S., 195 U. S. 27, ante, note 106.

that no act shall embrace more than one subject, and that this subject-matter shall be expressed in its title. Statutes which violate such a provision are void.[115] This question is not at all peculiar to penal statutes, and need not be further considered.[116]

Local and Special Laws.—In the absence of constitutional restrictions, the legislature has the power to declare that certain acts committed in a particular locality shall constitute a criminal offense, and be punished, although such acts would not be criminal if committed in another locality or section of the state.[117] But it has no such power if the constitution declares that laws shall be uniform and equal throughout the state.[118]

37. Due Process of Law in General.

It is provided in the constitution of the United States that no state shall "deprive any person of life, liberty, or property without due process of law," and there are similar provisions in the various state constitutions. This provision is most frequently invoked against laws relating to procedure. It has also been invoked, however, to defeat statutes making acts criminal, and in this connection it may be shortly considered here.

38. Right to Follow Lawful Business or Occupation.

It has been held repeatedly that the right to liberty guarantied by the constitution embraces the right of a man "to exercise his faculties and to follow a lawful avocation for the support of life."[119] It embraces "the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or

[115] See Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; People v. Starne, 35 Ill. 142, 85 Am. Dec. 348; People v. Campbell, 8 Ill. 466; Miller v. State, 3 Ohio St. 475; State v. Platt, 2 S. C. 150, 16 Am. Rep. 647.

[116] See Am. & Eng. Enc. Law, tit. "Statutes."

[117] People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124.

[118] See Am. & Eng. Enc. Law, tit. "Statutes."

[119] Bertholf v. O'Reilly, 74 N. Y. 515, 30 Am. Rep. 323; State v. Dodge, 76 Vt. 197, 56 Atl. 983.

avocation."[120] It follows that a penal statute which, by making an act a crime, arbitrarily prohibits a man from following a lawful trade or business, and which is not sustainable as a reasonable exercise of the police power of the state, is unconstitutional and void.[121]

In a New York case, a statute making it a misdemeanor to manufacture cigars, in cities of more than five hundred thousand inhabitants, in any tenement house occupied by more than three families, except on the first floor of houses on which there might be a store for the sale of cigars and tobacco, was held unconstitutional, as an unreasonable interference with a man's right to follow a lawful avocation.[122] For the same reason it has been held that the legislature cannot constitutionally deprive a person of the right to carry on the business of banking, other than that of issuing paper to circulate as money,[123] or prohibit the sale of any article of food, or offer to sell, upon any representation or inducement that anything else will be delivered as a gift, prize, premium, or reward to the purchaser.[124]

Such statutes are not within the police power of the state. While it is for the legislature generally to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and the exercise of its discretion in this respect is not subject to review by the courts, a statute, to be upheld as an exercise of the police power, must have some relation to these ends. The rights of property cannot be invaded

[120] In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

[121] In re Jacobs, supra; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; Frorer v. People, 141 Ill. 171, 31 N. E. 395; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62; State v. Ramseyer (N. H.) 58 Atl. 958; In re Aubrey, 36 Wash. 308, 78 Pac. 900; Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; State v. Dodge, 76 Vt. 197, 56 Atl. 983.

[122] In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

[123] State v. Scougal, 3 S. D. 55, 51 N. W. 858.

[124] People v. Gillson, 109 N. Y. 389, 17 N. E. 343; Young v. Com., 101 Va. 853, 45 S. E. 327; State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818; State v. Dodge, 76 Vt. 197, 56 Atl. 983.

under the guise of a police regulation for the protection of health, etc., when it is manifest that such is not the object of the regulation.[125]

39. Right to Make Contracts.

Under the police power of the state, laws may be enacted restricting personal rights of enjoyment of property, when necessary for the comfort, safety, and welfare of society, but the legislature cannot, under the guise of the police power, unnecessarily and unreasonably interfere with the right of persons to make contracts and acquire property. The privilege of contracting is both a liberty and a property right, within the meaning of the constitution, and cannot be abridged by penal laws, unless they can be supported as a valid exercise of the police power.[126]

For this reason it has been held that the legislature cannot make it an offense for employers of weavers to impose a fine or withhold wages of their employes for imperfections in their work,[127] or for contractors doing work for a city to employ any person to work more than eight hours a day, or to employ Chinese laborers,[128] or require persons to pay wages weekly,[129] or deprive coal miners and those employing them of the right to fix upon the weight of coal mined, or the amount due for mining the same, in any manner mutually satisfactory.[130]

[125] People v. Gillson, 109 N. Y. 389, 17 N. E. 343; Lochner v. New York, 198 U. S. —, Adv. Sheets U. S. 539, 25 Sup. Ct. 539; State v. Ramseyer (N. H.) 58 Atl. 958.

[126] Frorer v. People, 141 Ill. 172, 31 N. E. 395; Millett v. People, 117 Ill. 294, 7 N. E. 631; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285.

[127] Com. v. Perry, 139 Mass. 198, 29 N. E. 656.

[128] Such a statute, said the court, is an attempt to prevent persons from employing others in a lawful business, and paying them for their services, and is a direct interference with their right to make and enforce contracts, not sustainable as an exercise of the police power. Ex parte Kuback, 85 Cal. 274, 24 Pac. 737.

[129] Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62.

[130] Harding v. People, 160 Ill. 459, 43 N. E. 624.

40. Class Legislation.

The words "due process of law" in the constitutional provision above mentioned is synonymous with "law of the land," and this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of particular individuals only, or particular classes of individuals.[131] The constitution, therefore, forbids the legislature to single out particular individuals or classes of individuals, and make it a crime for them to engage in a business which it is lawful for others to engage in, or to make contracts which it is lawful for others to make.[132]

Thus, it is not competent for the legislature to single out operators of mines and manufacturers of iron and other minerals, and prohibit them from making contracts which it is lawful for other owners of property and employers of labor to make.[133] For this reason, a statute is unconstitutional and void which attempts to prohibit persons engaged in mining and manufacturing from keeping a "truck store," or being interested in or controlling any store, for the purpose of furnishing supplies, tools, clothing, provisions, or groceries to their employes.[134]

The same is true of a statute prohibiting such persons from issuing, for the payment of labor, any order or other paper whatsoever, unless the same purports to be redeemable for its face value in lawful money, etc.,[135] or depriving them and their em-

[131] Millett v. People, 117 Ill. 294, 7 N. E. 631; Frorer v. People, 141 Ill. 171, 31 N. E. 395; Harding v. People, 160 Ill. 459, 43 N. E. 624; Eden v. People, 161 Ill. 296, 43 N. E. 1108; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285.

[132] Frorer v. People, 141 Ill. 171, 31 N. E. 395; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285.

[133] A statute making that an offense, if committed by a person engaged in one branch of mining, which, if done by persons in another branch of the same business, is lawful, without any reason for the distinction between the two, is unconstitutional. Harding v. People, 160 Ill. 459, 43 N. E. 624.

[134] Frorer v. People, 141 Ill. 171, 31 N. E. 395.

[135] State v. Goodwill, 33 W. Va. 179, 10 S. E. 285; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354.

ployes of the right to fix upon the weight of coal mined, and the amount due for mining the same, in any manner mutually satisfactory.[136] A barber is deprived of his liberty and property without due process of law by a statute making it unlawful for him to do business on Sunday, where the statute does not apply to any other class of business.[137]

The police power does not justify class legislation.[138]

41. The Police Power in General.

The prohibition in the constitution against depriving any person of life, liberty, or property without due process of law does not prevent the legislature from imposing burdens upon persons or property, so long as it acts within the police power of the state. Under the police power, the legislature may constitutionally enact laws for the protection of the lives, limbs, health, comfort, and quiet of all persons within the state, and the protection of all property within the state.[139] And, subject to what has been said in sections preceding this, it is generally for the legislature, and not for the courts, to determine what laws and regulations are needed for this purpose.[140] Among the laws sustainable as an exercise of the police power are license laws, quarantine laws, laws creating liability for causing death or injury to servants, laws requiring dangerous machinery to be properly guarded and used, so as to avoid injury, laws to pre-

[136] Harding v. People, 160 Ill. 459, 43 N. E. 624.

[137] Eden v. People, 161 Ill. 296, 43 N. E. 1108.

[138] Eden v. People, 161 Ill. 296, 43 N. E. 1108, and other cases above cited.

[139] Frorer v. People, 141 Ill. 171, 31 N. E. 395; State v. Hyman, 98 Md. 596, 57 Atl. 6; Bland v. People, 32 Colo. 319, 76 Pac. 359; State v. Cantwell, 179 Mo. 245, 78 S. W. 569; Anderson v. State (Neb.) 96 N. W. 149.

[140] Powell v. Com., 114 Pa. 265, 7 Atl. 913, affirmed in 127 U. S. 678; People v. Gillson, 109 N. Y. 389, 17 N. E. 343; State v. Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; In re Boyce (Nev.) 75 Pac. 1, and cases cited in notes following.

vent monopolies, extortion, and fraudulent imposition, and also usury laws.[141]

42. Regulations as to Food Products.

The legislature cannot arbitrarily prohibit absolutely the manufacture and sale of harmless articles of food. For this reason it has been held that a statute absolutely prohibiting and punishing the manufacture or sale for food of any substitute for butter or cheese produced from pure unadulterated cream or milk,—as oleomargarine,—and not merely requiring such substitute to be marked so as to prevent fraud upon the public, is unconstitutional.[142]

Prevention of Fraud.—The legislature, however, has the power to enact laws for the protection of the public against fraud and deception in the sale of articles of food in common and general use. This is clearly a legitimate exercise of the police power of the state. Statutes, therefore, merely regulating the sale of articles of food, and punishing adulteration, deception, and fraud, are unquestionably valid; and whether a particular regulation of this character is necessary, reasonable, or expedient is a question for the legislature, and not for the courts.[143]

[141] Frorer v. People, 141 Ill. 171, 31 N. E. 395.

[142] People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34. And see Northwestern Mfg. Co. v. Wayne Cir. Judge, 58 Mich. 381, 25 N. W. 372, 55 Am. Rep. 693.

[143] The following statutes of this character have been sustained by the courts:

Statutes prohibiting and punishing the sale or keeping for sale of oleomargarine or other substances in imitation of butter, without marking them so as to show what they are, and statutes regulating generally the sale of dairy products, and punishing their adulteration. Powell v. Com., 114 Pa. 265, 7 Atl. 913, affirmed in 127 U. S. 678; State v. Addington, 77 Mo. 110; State v. Marshall, 64 N. H. 549, 15 Atl. 210; People v. Arensberg, 103 N. Y. 388, 8 N. E. 736, 57 Am. Rep. 741; Palmer v. State, 39 Ohio St. 236; State v. Horgan, 55 Minn. 183, 56 N. W. 688; Pierce v. State, 63 Md. 592.

Statutes prohibiting the sale of adulterated or watered milk. See the cases above cited, and see Butler v. Chambers, 36 Minn. 69, 30 N.

Protection of Public Morals, Health, and Comfort.—It is also a legitimate exercise of police power of the state to enact laws regulating the manufacture and sale of food products, and other articles, to such an extent as may be necessary to properly protect the morals, health, and comfort of the public. Thus, the legislature may regulate or prohibit the sale of intoxicating liquors,[144] and it may prevent the keeping of cows in an unhealthy or crowded condition, and the adulteration of dairy products,[145] or of confectionery or other articles of food.[146]

43. Regulation of Places of Amusement.

It is also within the power of the state legislatures to regulate theatres, billiard rooms, and other places of amusement and sport, so as to prevent annoyance or disturbance of the community, corruption of the public morals, etc.[147]

W. 308; Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Com. v. Evans, 132 Mass. 11; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344.

Statutes prohibiting the sale of vinegar below a certain standard. People v. Worden Grocer Co., 118 Mich. 604, 77 N. W. 315.

Statutes requiring that baking powder containing alum shall be so marked as to show that fact. Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410.

Statutes regulating the manufacture and sale of lard and lard compounds and substitutes, and of foods prepared therefrom. State v. Aslesen, 50 Minn. 5, 52 N. W. 220.

Statutes prohibiting the sale of adulterated confectionery. Com. v. Chase, 125 Mass. 202.

[144] Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Thurlow v. Com., 5 How. (U. S.) 504; Mugler v. Kansas, 123 U. S. 623; Woods v. State, 36 Ark. 38; Keller v. State, 11 Md. 525, 69 Am. Dec. 226; Danville v. Hatcher, 101 Va. 523, 44 S. E. 723.

[145] Powell v. Com., 114 Pa. 265, 7 Atl. 913, affirmed in 127 U. S. 678; Butler v. Chambers, 36 Minn. 69, 30 N. W. 308; note 143, supra.

[146] Com. v. Chase, 125 Mass. 202; Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410. And see the other cases cited in notes preceding.

[147] Thus, the legislature may prohibit the keeper of a billiard room or bowling alley from allowing playing therein after a certain time in the evening or night. Com. v. Colton, 8 Gray (Mass.) 488.

44. Ex Post Facto Laws.

It is provided by the constitution of the United States that no "*ex post facto* law" shall be passed by congress,[148] or by any state,[149] and in the state constitutions there is a similar limitation on the power of the legislature. An "*ex post facto* law," within the meaning of this prohibition, is "one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party, to his disadvantage."[150] In a sense, all acts passed after an offense is committed are *ex post facto* in relation to that offense, but the words are not used in so broad a sense in the constitution.

Laws Creating or Aggravating Offenses.—This prohibition in the constitution clearly prevents the legislatures from punishing as a crime an act previously committed, and which was innocent or not punishable when committed, and from aggravating an offense previously committed.[151]

[148] Const. U. S. art. 1, § 9.

[149] Id. § 10.

[150] Per Mr. Justice Washington in U. S. v. Hall, 2 Wash. C. C. 366, Fed. Cas. No. 15,285. And see Kring v. Missouri, 107 U. S. 221; Ex parte Garland, 4 Wall. (U. S.) 333; Cummings v. Missouri, 4 Wall. (U. S.) 277; Marion v. State, 16 Neb. 349, 20 N. W. 289, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; In re Medley, 134 U. S. 160; Duncan v. Missouri, 152 U. S. 377; Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531.

In Fletcher v. Peck, 6 Cranch, 87, Chief Justice Marshall said that an ex post facto law was a law which rendered "an act punishable in a manner in which it was not punishable when it was committed."

And in Calder v. Bull, 3 Dall. (U. S.) 386, Mr. Justice Chase defined such a law as (1) "any law which makes an act done before the passing of the law, and which was innocent when done, criminal;" (2) "any law which aggravates a crime, and makes it greater than it was when committed;" (3) "any law which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed;" (4) "any law which alters the legal rules of evidence."

[151] Calder v. Bull, 3 Dall. (U. S.) 386; Com. v. Edwards, 9 Dana (Ky.) 447; Marion v. State, 16 Neb. 349, 20 N. W. 289.

It has been held that a statute which purports to authorize the pros-

Laws Affecting Punishment.—It is also a violation of this provision for the legislature to increase the punishment for an act previously committed,[152] or to change the punishment, and substitute a different punishment, where the change does not amount merely to a remission of a separable portion of the punishment prescribed at the time the offense was committed, or a clear mitigation of the punishment.[153] It is otherwise if a

ecution, trial, and punishment of a person for an offense previously committed, and as to which prosecution and punishment is, at its passage, barred by the pre-existing statute of limitations, or by an act of amnesty, is unconstitutional. Moore v. State, 43 N. J. Law, 203, 39 Am. Rep. 558 (six judges voting "yes," and five voting "no"); State v. Sneed, 25 Tex. Supp. 66; State v. Keith, 63 N. C. 140; Thompson v. State, 54 Miss. 740.

[152] In re Medley, 134 U. S. 160; Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; Shepherd v. People, 25 N. Y. 406; Johnson v. People, 173 Ill. 131, 50 N. E. 321; Com. v. Mott, 21 Pick. (Mass.) 492; Flaherty v. Thomas, 12 Allen (Mass.) 728; Murphy v. Com., 172 Mass. 264, 52 N. E. 505; Marion v. State, 16 Neb. 349, 20 N. W. 289; Ex parte Hunt, 28 Tex. App. 361, 13 S. W. 145; Lindzey v. State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674; People v. McNulty (Cal.) 28 Pac. 816.

[153] Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; Shepherd v. People, 25 N. Y. 406; In re Petty, 22 Kan. 477; Murphy v. Com., 172 Mass. 264, 52 N. E. 505; Lindzey v. State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674; State v. Rooney, 12 N. D. 144, 95 N. W. 513.

When, at the time a murder is committed, it is punishable by death or imprisonment for life, the penalty to be fixed by the jury, a statute dividing murder into degrees, and punishing murder in the first degree by death, and divesting the jury of authority to fix the penalty at imprisonment for life, is unconstitutional as to this murder. Marion v. State, 16 Neb. 349, 20 N. W. 289.

A law changing the punishment from death to one year's imprisonment at hard labor, and then death, if the governor shall issue his warrant therefor, or from death, merely, to death and imprisonment by solitary confinement until execution, is unconstitutional, as applied to offenses previously committed. Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; In re Petty, 22 Kan. 477; In re Medley, 134 U. S. 160. Cf. State v. Rooney, 12 N. D. 144, 95 N. W. 513.

Where an act is punishable by fine or imprisonment, a statute diminishing the extreme limit of imprisonment, but increasing the extreme limit of the fine, is unconstitutional. Flaherty v. Thomas, 12 Allen (Mass.) 428.

The same is true of a change from fine "or" imprisonment to fine

law merely remits a portion of the punishment, or otherwise merely mitigates it,[154] and mere changes in the details of the execution, affecting no substantial right of the prisoner, are unobjectionable.[154a] Laws which provide for an increased punishment for a second or third offense are not within the prohibition, though the prior offense may have been committed before its enactment.[155]

"and" imprisonment. Flaherty v. Thomas, supra; Com. v. McDonough, 13 Allen (Mass.) 581.

The legislature cannot take away from one who has committed a crime the right to a deduction from his term of imprisonment for good behavior, which was allowed at the time the act was committed (Murphy v. Com., 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266; In re Canfield, 98 Mich. 645, 57 N. W. 807) hence an indeterminate sentence law so providing is invalid as to prior crimes. State v. Tyree (Kan.) 78 Pac. 525.

Nor can it reduce the amount per day allowed to a convict as a credit on his fine and costs, when working out the same. Ex parte Hunt, 28 Tex. App. 361, 13 S. W. 145.

[154] Com. v. Wyman, 12 Cush. (Mass.) 237; Com. v. Gardner, 11 Gray (Mass.) 438; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572; Hartung v. People, 22 N. Y. 95, 105; In re Petty, 22 Kan. 477. And see State v. Williams, 2 Rich. (S. C.) 418, 45 Am. Dec. 741.

In Hartung v. People, supra, Judge Denio said that "anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection," as a change from punishment by fine and imprisonment to fine or imprisonment.

The Massachusetts court held that a change of the punishment from death to imprisonment for life at hard labor was not unconstitutional, on the ground that this was a mitigation of the punishment. Com. v. Wyman, 12 Cush. (Mass.) 237; Com. v. Gardner, 11 Gray (Mass.) 438. See, also, McInturf v. State, 20 Tex. App. 335.

The contrary was held in New York. Shepherd v. People, 25 N. Y. 406.

[154a] Holden v. Minnesota, 137 U. S. 483; In re Tyson, 13 Colo. 482, 22 Pac. 810; State v. Rooney, 12 N. D. 144, 95 N. W. 513. Removal of limitation of minimum, People v. Hayes, 70 Hun, 111, 24 N. Y. Supp. 194.

[155] Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18; Com. v. Marchand, 155 Mass. 8, 29 N. E. 578; Com. v. Graves, 155 Mass. 163, 29 N. E. 579; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; People v. Butler, 3 Cow. (N. Y.) 347; McDonald v. Massachusetts, 180 U. S. 311;

Prison Discipline.—Any change in the law which is fairly referable to prison discipline, or penal administration, as its primary object, may be made to take effect upon past as well as future offenses, as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, and the like. Changes of this sort may operate to increase or mitigate the severity of the punishment of the convict, but they are not within the constitutional prohibition.[156]

Laws Regulating Mode of Procedure.—Laws regulating the mode of procedure in criminal cases are not within the constitutional prohibition if they do not dispense with any of the substantial protections with which the existing law surrounds the accused.[157] It is competent, therefore, for the legislature, as to offenses previously committed, to change the place of trial, or the tribunal before which the accused shall be tried;[158a] to substitute proceedings by information for indictments;[158b] to limit

Rand v. Com., 9 Grat. (Va.) 738; People v. Stanley, 47 Cal. 113; In re Kline, 6 Ohio Cir. Ct. R. 215. And see In re Miller, 110 Mich. 676, 68 N. W. 990; Davis v. State, 152 Ind. 34, 51 N. E. 928.

[156] Hartung v. People, 22 N. Y. 95; Murphy v. Com., 172 Mass. 264, 52 N. E. 505.

[157] Cooley, Const. Lim. 272; Kring v. Missouri, 107 U. S. 221; Duncan v. Missouri, 152 U. S. 377; Gibson v. Mississippi, 162 U. S. 565; Marion v. State, 16 Neb. 349, 20 N. W. 289, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; Gut v. State, 9 Wall. (U. S.) 35; Hopt v. People of Utah, 110 U. S. 574; People v. Mortimer, 46 Cal. 116.

[158a] Cook v. U. S., 138 U. S. 157; Duncan v. Missouri, 152 U. S. 377; State v. Jackson, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829; Com. v. Phillips, 11 Pick. (Mass.) 28; State v. Welch, 65 Vt. 50, 25 Atl. 900; State v. Cooler, 30 S. C. 105, 8 S. E. 692; Marion v. State, 16 Neb. 349, 20 N. W. 289, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

[158b] Lybarger v. State, 2 Wash. St. 552, 27 Pac. 449, 1029; State v. Hoyt, 4 Wash. St. 818, 30 Pac. 1060; In re Wright, 3 Wyo. 478, 27 Pac. 565.

Contra, as to crimes committed while state was a territory and the federal constitution applied. State v. Kingsly, 10 Mont. 537, 26 Pac. 1066; McCarty v. State, 1 Wash. St. 377, 25 Pac. 299.

the number composing a grand jury;[158c] to change the mode of summoning or impaneling the jury;[158d] to limit the time for challenging jurors;[158e] to give the state additional,[158f] or the accused fewer, peremptory challenges,[158g] and change the grounds of challenge;[158h] to limit the jury to a consideration of the facts only;[158i] to change the requirements as to pleadings;[158j] to regulate the procedure on appeal,[158k] and the like.

Rules of procedure, however, cannot be changed as to existing offenses, if the change injuriously affects any substantial right to which the accused is entitled under the law in force when the offense was committed.[159] Thus, if the law in force at the time of a homicide makes a conviction and sentence for murder in the second degree an acquittal of the crime of murder in the first degree, though such conviction be reversed, the legislature cannot change the law, and allow another prosecution for murder in the first degree.[160] Nor can it reduce the number of jurors.[161] Nor remove the bar of the statute of limitations after it has once run.[161a]

[158c] State v. Ah Jim, 9 Mont. 167, 23 Pac. 76.

[158d] Gibson v. Mississippi, 162 U. S. 565; Stokes v. People, 53 N. Y. 164.

[158e] State v. Taylor, 134 Mo. 109, 35 S. W. 92.

[158f] State v. Ryan, 13 Minn. 370; Walston v. Com., 16 B. Mon. (55 Ky.) 15.

[158g] South v. State, 86 Ala. 617, 6 So. 52; Mathis v. State, 31 Fla. 291, 12 So. 681.

[158h] Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492.

[158i] Marion v. State, 16 Neb. 349, 20 N. W. 289, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

[158j] State v. Manning, 14 Tex. 402; Perry v. State, 87 Ala. 30, 6 So. 425.

[158k] Jacquins v. Com., 9 Cush. (Mass.) 279.

[159] Kring v. Missouri, 107 U. S. 221.

[160] Kring v. Missouri, 107 U. S. 221.

[161] Thus, in Thompson v. Utah, 170 U. S. 343, the provision in the constitution of the state of Utah for the trial of criminal cases, not capital, in courts of general jurisdiction by a jury composed of eight persons only, was held unconstitutional as to offenses committed before the territory became a state.

[161a] Moore v. State, 43 N. J. Law, 203, 39 Am. Rep. 558.

Changing Rules of Evidence.—A law is unconstitutional, as applied to offenses previously committed, if it changes the rules of evidence to such an extent as to allow a conviction on less evidence or proof than was previously required.[162] But a law may be enacted which makes certain matters admissible in evidence,[162a] or enlarges the class of persons who may be competent to testify, for this does not alter the degree or measure of proof required.[163]

45. Indefiniteness of Statutes.

Except as to common-law offenses, it is for the legislature, not the courts, to determine what acts are to be punished as crimes. A penal statute, therefore, to be valid, must be sufficiently definite to show what acts the legislature intended to punish. It must define the offense with certainty, either by specifying the acts which shall constitute it, or by describing it by some name known to the common law.[164] The description, though general, is sufficiently definite if the court, by giving the words their ordinary meaning, can say what acts were intended to be punished.[165] A statute punishing a crime, and

[162] Calder v. Bull, 3 Dall. (U. S.) 386; Duncan v. Missouri, 152 U. S. 377; Hart v. State, 40 Ala. 32, 88 Am. Dec. 752; State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241; Cummings v. Missouri, 4 Wall. (U. S.) 277, 325.

Thus, the necessity for corroboration of witnesses cannot be dispensed with. Hart v. State, supra.

[162a] Thompson v. Missouri, 171 U. S. 380.

[163] Hopt v. People of Utah, 110 U. S. 574. And see Mrous v. State, 31 Tex. Cr. R. 597, 21 S. W. 764, 37 Am. St. Rep. 834.

[164] State v. Partlow, 91 N. C. 550, 49 Am. Rep. 652; Foster v. Territory, 1 Wash. St. 411, 25 Pac. 459. See State v. Mann, 2 Or. 238, where this principle is recognized, but wrongly applied.

[165] An act punishing any person who "shall disturb any religious society, when meeting together in religious worship," is not void as failing to sufficiently define the offense. State v. Stuth, 11 Wash. 423, 39 Pac. 665.

Nor are statutes to suppress gaming houses and gambling too indefinite because they use general words, without defining them,—as

merely describing it by a general name known to the common law, as "rape," "robbery," "arson," "assault and battery," etc., is not too indefinite.[166]

46. Construction of Statutes—In General.

Unfortunately, in the enactment of penal statutes, the legislature does not always express itself in clear and unambiguous language. In such a case it is for the courts to construe the statute, and ascertain, if possible, what the legislature intended. In the construction of statutes in cases of doubt, the courts are governed by certain well-established rules. These rules, or the most important of them, will be given in the following sections.

The Intention of the Legislature Governs.—The principal rule is that the intention of the legislature governs. Whenever the intention of the legislature is manifest, it must be given effect, provided the statute is not unconstitutional. This is the *paramount* rule of construction.[167] "All the rules of construction must give way to the fundamental principle that the intention of the legislature is to govern. * * * The design of all rules is to furnish guides to assist in arriving at the intention of the legislature."[168]

"gaming house," "gaming table," "gaming device," "faro," "banking game," etc. U. S. v. Speeden, 1 Cranch, C. C. 535, Fed. Cas. No. 16,366; Miller v. State, 48 Ala. 122; People v. Carroll, 80 Cal. 153, 22 Pac. 129; State v. Thomas, 50 Ind. 292.

[166] See State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Ledgerwood v. State, 134 Ind. 81, 33 N. E. 631; Ex parte Bergen, 14 Tex. App. 52; Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Houston v. Com., 87 Va. 257, 12 S. E. 385.

[167] Cain v. State, 20 Tex. 355; Walker v. State, 7 Tex. App. 245; Albrecht v. State, 8 Tex. App. 313; Smith v. People, 47 N. Y. 330; People v. Potter, 47 N. Y. 375, 379; Noble v. State, 1 G. Greene (Iowa) 325; Parkinson v. State, 14 Md. 184, 194; State v. Stephenson, 2 Bailey (S. C.) 334; Com. v. Kimball, 24 Pick. (Mass.) 366, 35 Am. Dec. 326; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269.

[168] Cain v. State, 20 Tex. 355.

Reasonable Construction.—Another rule, applicable in all cases, is that statutes must have a reasonable construction.[169]

47. Rules to Aid in Construction.

(*a*) *Ordinary Meaning of Language.*—Except as to technical terms, statutes are to be construed according to the ordinary and literal meaning of their language, if that meaning can be clearly ascertained.[170] But words will be construed contrary to their literal meaning, when necessary in order to give effect to the manifest intention of the legislature.[171]

(*b*) *Strict Construction.*—It is a well-settled rule that, in the absence of express statutory provision to the contrary, penal statutes are to be strictly construed in favor of the accused.[172]

[169] Walker v. State, 7 Tex. App. 245; Adams v. New York, 192 U. S. 585.

[170] Coolidge v. Choate, 11 Metc. (Mass.) 79, 82; Remmington v. State, 1 Or. 281; People v. Todd, 51 Hun, 446, 451, 4 N. Y. Supp. 25; People v. Plumstedl, 2 Mich. 465.

The courts are not at liberty to construe a statute contrary to its ordinary and grammatical meaning, merely because such a construction is necessary to render the statute effective. If the legislature has failed to accomplish its object by the enactment of a penal statute, "it is to that authority, and not to the courts, that the public must look for a correction of the mistake." Remmington v. State, 1 Or. 281.

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest." Per Chief Justice Marshall, in U. S. v. Wiltberger, 5 Wheat. (U. S.) 76.

[171] Cain v. State, 20 Tex. 355; Walker v. State, 7 Tex. App. 245; Albrecht v. State, 8 Tex. App. 313; Smith v. People, 47 N. Y. 330; People v. Potter, 47 N. Y. 375, 379; Noble v. State, 1 G. Greene (Iowa) 325.

[172] U. S. v. Lacher, 134 U. S. 624; U. S. v. Wiltberger, 5 Wheat. (U. S.) 76; In re McDonough, 49 Fed. 360; Lescallett v. Com., 89 Va. 878, 17 S. E. 546; Warner v. Com., 1 Pa. 154, 44 Am. Dec. 114; State v. Bryant, 90 Mo. 534, 2 S. W. 836; Com. v. Hickey, 2 Pars. Sel. Cas. (Pa.) 317; Steel v. State, 26 Ind. 82; People v. Reynolds, 71 Mich. 343, 38 N. W. 923.

"There can be no constructive offenses, and, before a man can be

By this it is meant that they are to be construed strictly in those parts which are against the accused, but liberally in those parts which are in his favor.[173] No person is to be made subject to such statutes by implication, and when doubts arise concerning their interpretation, they are to weigh only in favor of the accused.[174] This does not mean, however, that a penal statute is to be construed so strictly as to defeat the obvious intention of the legislature. The courts are bound to give effect to the plain and obvious meaning of a statute, and not narrow it by construction.[175]

punished, his case must be plainly and unmistakably within the statute." U. S. v. Lacher, supra.

"The rule that penal statutes are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the main principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." Per Chief Justice Marshall, in U. S. v. Wiltberger, 5 Wheat. (U. S.) 76.

Criminal statutes are inelastic, and cannot by construction be made to embrace cases plainly without the letter, though within the reason and policy, of the law. State v. Lovell, 23 Iowa, 304.

[173] State v. Bryant, 90 Mo. 534, 2 S. W. 836.

[174] State v. Bryant, 90 Mo. 534, 2 S. W. 836; People v. Reilly, 50 Mich. 384, 15 N. W. 520.

[175] Parkinson v. State, 14 Md. 184, 194; U. S. v. Wiltberger, 5 Wheat. (U. S.) 76; U. S. v. Hartwell, 6 Wall. (U. S.) 385; U. S. v. Morris, 14 Pet. (U. S.) 464; In re Coy, 31 Fed. 794; Keller v. State, 11 Md. 525, 69 Am. Dec. 226; Wedge v. State, 12 Md. 235; Gibbons v. People, 33 Ill. 443; People v. Plumsted, 2 Mich. 465; Com. v. Schmunk, 22 Pa. Super. Ct. 348.

In State v. Thatcher, 35 N. J. Law, 445, 452, it was said: "The rule of strict interpretation for criminal statutes does not hinder the court from searching for the legislative will; nor is the rule violated by giving words, in some cases, their full, or the more extended of two meanings, as the wider popular, instead of the narrow technical, one. Cases are not wanting where some elasticity has been given to criminal statutes in order to extend them to the mischief obviously aimed at."

This is well illustrated by the case of People v. Cotteral, 18 Johns. (N. Y.) 115, where a jail was held to be an "inhabited dwelling house," within the meaning of the statute against arson.

(*c*) *Reason and Purpose of Statute.*—When the meaning of a statute is doubtful, the reason and purpose of its enactment are to be taken into consideration in construing it, and determining the intention of the legislature. In other words, though a penal statute cannot be extended by construction, it should, if possible, receive such a construction as, when practically applied, will tend to suppress the evil which the legislature intended to prohibit.[176] "The pre-existing law, the evils which arose out of it, and the remedy intended to be applied, are useful guides in the interpretation of a doubtful statute. A knowledge of the old law and the remedy applied by the new frequently points out the evil, and enables us to correct it."[177] It is not permissible, however, to vary or add to the provisions of a statute on any consideration of its reason and purpose, if the meaning of the legislature is clear.[178] All effects which are unnatural, absurd, or unjust must be held as implied exceptions, the same as if they had been expressed in words.

(*d*) *Preamble and Title of Act.*—It is a well-settled principle, applicable to penal statutes, as well as to others, that the preamble and the title though they are no part of an act may be resorted to as an aid in ascertaining the intention of the legislature.[178a] Thus, in a South Carolina case, where an act made it larceny for any person to fraudulently take from any field, not belonging to him, "any cotton, corn, rice, or other grain," etc., without saying anything as to its being severed before the taking, but the act was entitled, "An act to make the fraudulent and secret taking of cotton, corn, and other grain, *before severance*

[176] Smith v. State, 52 Ala. 384, 388; Gibbons v. People, 33 Ill. 443; People v. Forbes, 52 Hun, 30, 4 N. Y. Supp. 757; People v. Plumsted, 2 Mich. 465; People v. McKinney, 10 Mich. 54; State v. Sherman, 46 Iowa, 415.

[177] State v. Stephenson, 2 Bailey (S. C.) 334.

[178] State v. Stephenson, 2 Bailey (S. C.) 334; Warner v. Com., 1 Pa. 154, 44 Am. Dec. 114; People v. Plumsted, 2 Mich. 465; Ball v. State, 50 Ind. 595; Atkinson v. State (Tex. Cr. App.) 79 S. W. 31.

[178a] U. S. v. Fisher, 2 Cranch (U. S.) 358.

from the soil, larceny," the court took the title into consideration, and held that the act made a severance and taking of growing grain larceny, though it was not larceny at common law.[179] The title, however, can never be used to set at naught the obvious meaning of the statute itself.[179a]

(*e*) *Construction with Reference to the Common Law.*—Statutes frequently prescribe a punishment for an offense without defining it further than by giving it a name known to the common law,—as "murder," "manslaughter," "rape," "robbery," "perjury," etc. In such a case the common law must be resorted to in order to determine the nature and elements of the offense.[180] And when a statute uses other terms, which have a settled meaning in the common law, this meaning is to be given them, unless there is something to show that the legislature intended otherwise. Thus, the words "dwelling house," "breaking," and "entry," in statutes defining and punishing burglary, "burning," in statutes defining and punishing arson, "from the person," "or by violence or putting in fear," in statutes defining and punishing robbery, etc., are, unless a contrary intention appears, to be given a construction in accordance with their meaning at common law.[181]

[179] State v. Stephenson, 2 Bailey (S. C.) 334.

[179a] Patterson v. Bark Eudora, 190 U. S. 169.

[180] State v. Camley, 67 Vt. 322, 31 Atl. 840; State v. Twogood, 7 Iowa, 252; U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494; In re Greene, 52 Fed. 104; U. S. v. Wilson, Baldw. 78, Fed. Cas. No. 16,730; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; U. S. v. Palmer, 3 Wheat. (U. S.) 610, 630; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, 716; Benson v. State, 5 Minn. 19.

If a statute punishes an offense without defining it further than by calling it by a name known to the common law, the common-law definition applies. Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833; State v. Twogood, 7 Iowa, 252; Com. v. York, 9 Metc. (Mass.) 93, 109; Houston v. Com., 87 Va. 257, 12 S. E. 385; Respublica v. Roberts, 1 Yeates (Pa.) 6, Mikell's Cas. 13; Smith v. State, 58 Neb. 531, 78 N. W. 1059; U. S. v. Carll, 105 U. S. 611, and other cases cited above.

[181] Com. v. Humphries, 7 Mass. 242; Pitcher v. People, 16 Mich. 142;

Statutes defining and punishing offenses are also to be construed in accordance with the common law in relation to principals and accessaries, responsibility of children, insane persons, etc., and the necessity generally for a criminal intent.[182]

Further, if the statute enjoin an act to be done, or prohibit it, without pointing out any mode of punishment, an indictment as at common law will lie.[182a]

(*f*) *Change of the Common Law.*—It must be remembered, however, that it is competent for the legislature to create new offenses, and to extend the common-law definitions of particular offenses, so as to punish, under common-law names, acts not em-

State v. Calhoun, 72 Iowa, 432, 34 N. W. 194, 2 Am. St. Rep. 252; Long v. State, 12 Ga. 293, 320; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; Finch v. Com., 14 Grat. (Va.) 643; Nicholls v. State, 68 Wis. 416, 32 N. W. 543; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789; Schwabacher v. People, 165 Ill. 618, 46 N. E. 809; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; People v. Gates, 15 Wend. (N. Y.) 159. See post, §§ 379, 409, 416.

In an Alabama case it was said: "When words are used by the legislature in relation to a matter or subject, which, when used in reference to the same subject at common law, have obtained a fixed and definite meaning, the inference is irresistible that they were intended to be used in the common-law sense." Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714.

[182] Duncan v. State, 7 Humph. (Tenn.) 148; Rex v. Groombridge, 7 Car. & P. 582; Com. v. Knox, 6 Mass. 76; State v. Martindale, 1 Bailey (S. C.) 163; Stamper v. Com., 7 Bush (Ky.) 612; Com. v. Carter, 94 Ky. 527, 23 S. W. 344; post, §§ 56, 70.

Statutes punishing any person who should dispose of crops or other property after giving a mortgage thereon have been construed in the light of the common-law principle that the contract of an infant is voidable at his option, and it has been held that an infant's sale of property on which he has given a mortgage, being a disaffirmance and avoidance of the mortgage, does not render him liable under such a statute. State v. Howard, 88 N. C. 650; State v. Plaisted, 43 N. H. 413.

Unless the plain intent of the statute creating an offense is to inflict punishment only on the person actually committing it, principals in the second degree and accessaries will be considered as within its terms. Com. v. Carter, 94 Ky. 527, 23 S. W. 344.

[182a] 4 Bl. Comm. 122; Keller v. State, 11 Md. 525, 69 Am. Dec. 226; State v. Fletcher, 5 N. H. 257.

braced in the common-law definitions.[183] And it follows that identity in the name of offenses at common law and under a statute does not necessarily imply that the same elements, and no others, enter into both.[184] Whether a statutory offense is the same as an offense known to the common law must depend upon the language of the particular statute, and the intention of the legislature.

(*g*) *Prior Judicial Construction.*—When the legislature enacts a statute which is substantially the same as one which has already received a judicial construction, it will be presumed to have known that construction, and to have intended to adopt it.[185]

(*h*) *Construction as a Whole—Giving Effect to All Parts.*—In construing a statute, the intention of the legislature is not to be ascertained from any particular expression or section, but from the whole act. It is a cardinal principle that a statute is to be construed as a whole, and effect is to be given, if possible, to every section and clause.[186]

(*i*) *Construction of Statutes Together.*—In ascertaining the meaning of a particular statute, all statutes *in pari materia* are to be taken into consideration. In other words, all statutes on the same subject, whether enacted on the same day, or on different days of the same session, or at different sessions, are to be taken together as one law.[187]

[183] Ante, § 14.

[184] People v. Most, 128 N. Y. 108, 27 N. E. 970.

[185] O'Byrnes v. State, 51 Ala. 25; State v. Brewer, 22 La. Ann. 273.

[186] People v. Ah Ho, 1 Idaho, 691; People v. Potter, 47 N. Y. 375, 379; People v. Todd, 51 Hun, 446, 451, 4 N. Y. Supp. 25; Parkinson v. State, 14 Md. 184, 195, 74 Am. Dec. 522; State v. Babcock, 21 Neb. 599, 33 N. W. 247; State v. Sherman, 46 Iowa, 415.

[187] Cain v. State, 20 Tex. 355, 362; State v. Hope, 15 Ind. 474; State v. Rackley, 2 Blackf. (Ind.) 249; Keller v. State, 11 Md. 525, 69 Am. Dec. 226; Myers v. State, 3 Sneed (Tenn.) 98; Howlett v. State, 5 Yerg. (Tenn.) 144, 151; Smith v. People, 47 N. Y. 330; State v. Babcock, 21 Neb. 599, 33 N. W. 247; People v. McKinney, 10 Mich. 54; State v. Sherman, 46 Iowa, 415.

Statutes in relation to the same offense must be taken together, and

(*j*) *Construction in Connection with the Constitution.*—Unless a contrary intention clearly appears, it is to be presumed that the legislature intended a statute to be in accordance with constitutional provisions, and statutes, therefore, are to be construed in connection with the constitution, and, if possible, so as to be in accordance therewith. "It is a well-recognized principle that courts will not so construe a statute as to render it unconstitutional, if any other reasonable construction can be placed upon it, which will render it effective and legal."[188]

(*k*) *Expression of One Thing an Exclusion of Others.*—The maxim, *expressio unius est exclusio alterius,* applies in the construction of penal statutes. Thus, where a statute provided that certain games of chance might be kept on being licensed, and declared that certain others should be unlawful, it was held that all games not mentioned in the statute were legalized.[189]

(*l*) *Special Enumeration Followed by General Words.*—In the construction of penal statutes, the courts are also governed by the general rule that, "where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as

construed as if the matters to which they relate were embraced in a single statute. State v. Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

In Indiana, a statute approved June 10, 1852, provided that any person who should be the keeper of "any gaming apparatus," for the purpose of winning or gaining any article of value, should be deemed a professional gambler, and subject to punishment in the penitentiary. Another statute, approved on June 14th, declared that any person who should be the keeper or exhibitor of "any gaming table, roulette, * * * or billiard table," for the purpose of winning any article of value thereon, should be liable to a fine. In State v. Hope, 15 Ind. 474, it was held that these two statutes must be construed together, and that, as the last-mentioned statute specially prohibited the keeping of a billiard table for gaming, and made it a misdemeanor only, the keeping of such a table was not a felony, within the first-mentioned statute, though it might have been so regarded except for the second statute.

[188] People v. Peacock, 98 Ill. 172, 177; Adams v. New York, 192 U. S. 585. And see Eskridge v. State, 25 Ala. 30.

[189] People v. Goldman, 1 Idaho, 714.

referring to matters *ejusdem generis* with such class."[190] Thus, where a statute provided that "no tradesman, artificer, workman, laborer, or other person whatsoever," should exercise his ordinary calling on Sunday, it was held that the words "other person whatsoever" were intended to refer to persons of like denomination with those specially mentioned, and not to all persons, without regard to their occupation, and that the statute, therefore, did not apply to farmers.[191]

This rule of construction has also been applied to statutes enumerating things of a particular class, and concluding with general words,—as statutes against gaming, enumerating particular games or devices, as faro, roulette, etc., and concluding with the words, "or any other device." These words have generally been construed as referring to such devices only as are of like kind with those enumerated.[192]

(*m*) *Punctuation.*—The punctuation of a statute is not necessarily to be considered in ascertaining its meaning. It may always be disregarded in order to make the statute conform to the evident intention of the legislature.[193]

[190] Broom, Leg. Max. 625; Rex v. Inhabitants of Whitnash, 7 Barn. & C. 596; State v. Bryant, 90 Mo. 534, 2 S. W. 836.

[191] Rex v. Inhabitants of Whitnash, 7 Barn. & C. 596. In this case, Bayley, J., remarked that if all persons were meant, there was no need of the specific enumeration.

[192] State v. Bryant, 90 Mo. 534, 2 S. W. 836; State v. Hardin, 1 Kan. 474; Stith v. State, 13 Ark. 680; Marquis v. City of Chicago, 27 Ill. App. 253; State v. Shaw, 39 Minn. 153, 39 N. W. 305; Nuckolls v. Com., 32 Grat. (Va.) 884; People v. Todd, 51 Hun, 446, 4 N. Y. Supp. 25. Compare State v. Lewis, 12 Wis. 434.

There are many other statutes in the construction of which this rule has been applied. See Shirk v. People, 121 Ill. 61, 11 N. E. 888.

[193] "In giving construction to a statute, the punctuation is entitled to small consideration, for that is more likely to be the work of the engrossing clerk, or the printer, than of the legislature." Morrill v. State, 38 Wis. 428, 434. See, also, Schriedley v. State, 23 Ohio St. 130, 139; State v. Pilgrim, 17 Mont. 311, 42 Pac. 856.

Thus, in Schriedley v. State, supra, a statute punishing the receiving of goods "that have been stolen or taken by robbers" was construed as covering the receiving of goods stolen in any way, as well as of goods

48. Intention to Make Prohibited Act a Crime.

It is not always clear whether the legislature, in prohibiting an act and imposing a penalty for its commission, intended to make the act a crime, and to require the penalty to be imposed in a criminal prosecution, instead of merely subjecting the person doing the act to liability in a civil action.[194] Of course the intention of the legislature must govern, and its intention is to be gathered from the whole act, the terms used in it, and the purpose of the prohibition. It may be laid down, as a general rule, that if the purpose is to protect the public generally, and the terms used in the statute are such as are generally employed in a penal statute, like the words "offense," "fine," "prosecution," "conviction," "punishment," etc., the statute should be construed as making the act a crime, and rendering the doer liable to a criminal prosecution.[195] If the stat-

taken by robbery, though to construe it according to the punctuation, there being no comma after word "stolen," it would apply only to goods stolen by robbers or taken by robbers.

[194] In Wisconsin it was held that a statute subjecting to a pecuniary penalty only any person who should willfully obstruct a public highway, to be recovered in an action brought in the name of the state, did not create a criminal offense, and that an action by the state to recover the penalty was a civil action. State v. Hayden, 32 Wis. 663; State v. Smith, 52 Wis. 134, 8 N. W. 870.

As to the act of congress excluding Chinese from the United States, see U. S. v. Hing Quong Chow, 53 Fed. 233, Beale's Cas. 123.

[195] In State v. Horgan, 55 Minn. 183, 56 N. W. 688, a statute provided that whoever should sell or keep for sale an article in imitation of butter, etc., should be subject to the payment of a "penalty" of $50, and, for a second "offense," a penalty of $100, "to be recovered, with costs, in any court of competent jurisdiction." In another section, possession of the article "prohibited" by the act was made prima facie evidence that the same was kept in "violation" thereof. In another section, the word "fine" was used instead of "penalty," and in another, proceedings to enforce the law were spoken of as "prosecutions." It was held that the act prohibited was a misdemeanor, and that the penalty was to be imposed as a fine in a criminal prosecution. See, also, State v. Marshall, 64 N. H. 549, 15 Atl. 210.

In Oregon, a statute provided that county warrants indorsed, "Not paid for want of funds," should bear interest from the date of such

ute imposes a "fine," and, in default thereof, imprisonment, the act is clearly made a crime, unless a contrary intention is very plainly shown.[196] The statute need not expressly and in terms declare the act to be a crime, or a felony, or a misdemeanor,[197] nor, in those states in which the common law of crimes is effective, need it provide a punishment, or means of procedure, for its enforcement.[197a]

Bastardy Proceedings.—Where a statute subjects the father of a bastard child to proceedings, either in the name of the mother or in the name of the state, merely to charge him with the child's maintenance, and not to punish him by a fine or otherwise, the object is not to punish him as for a crime, but to give redress to the mother, or else to indemnify the county against

indorsement until the treasurer should give notice that there were funds to redeem them, that such notice should be given when he should have as much as $1,500 belonging to the county, and that, for failure to comply with the statute, he should, on "conviction" thereof, be "punished" by a "fine" of not less than $500, nor more than $1,000. Laws 1893, p. 60. It was held that this statute created a criminal offense. Ex parte Howe, 26 Or. 181, 37 Pac. 536.

[196] See State v. Burton, 113 N. C. 655, 18 S. E. 657. Compare City of Oshkosh v. Schwartz, 55 Wis. 483, 13 N. W. 552.

"A fine," said Lord Coke, "signifieth a pecuniary punishment for an offense or contempt against the king." 1 Co. Litt. 126 b.

[197] Ex parte Howe, 26 Or. 181, 37 Pac. 536; Portland v. Yick, 44 Or. 439, 75 Pac. 706, and the other cases above cited.

A statute providing merely that every person convicted of the willful burning of a gin house shall be imprisoned for not less than five, nor more than ten, years, creates an offense, notwithstanding it does not expressly state that such person shall be guilty of a felony. State v. Pierce, 123 N. C. 745, 31 S. E. 847.

[197a] That a statute prohibiting a matter of public grievance, or compelling a matter of public convenience, fails to provide a proceeding for its enforcement, or a punishment for its violation, does not render it unenforceable, since all violations of the statute are misdemeanors and punishable by indictment, if the statute specify no other mode of proceeding. State v. Parker, 91 N. C. 650, Mikell's Cas. 15.

In Oregon, where there are no common law offenses, where an act is prohibited by law but no penalty is provided, the doing of the act cannot be punished as a misdemeanor. State v. Gaunt, 13 Or. 115, 9 Pac. 55.

liability for the support of the child as a pauper, and such a statute does not make the begetting of a bastard child a misdemeanor. The proceeding, even though it may be in the name of the state, is civil, not criminal.[198] If a statute, however, provides for the imposition of a fine in bastardy proceedings, upon a finding of the issue of paternity against the defendant, in addition to the allowance to be made for the use of the mother, and declares that he shall be imprisoned in default of payment, the begetting of a bastard child is thereby made a misdemeanor, and the proceeding is criminal.[199]

IV. Expiration and Repeal of Laws.

49. In General.—Laws may be repealed expressly or impliedly. Repeals by implication are not favored, and, as a rule, a law is not to be taken as repealed by a later law unless there is an irreconcilable conflict between them. There is generally an implied repeal, however,

1. **When there is an irreconcilable repugnancy between the earlier and the later law.**
2. **When the later law undertakes to cover the whole subject matter covered by the earlier law.**

An act cannot be punished after the law making it punishable has been repealed without a saving clause, though it may have been committed, and even though there may have been a conviction therefor, before the repeal.

Unless otherwise provided, the repeal of a repealing law revives the pre-existing law.

50. Implied Repeal of Statutes.

When the legislature intends to repeal a statute, it generally does so in express terms, but this is not always the case. Some-

[198] State v. Pate, Busb. (N. C.) 244; State v. Burton, 113 N. C. 655, 18 S. E. 657; State v. Johnson, 89 Iowa, 1, 56 N. W. 404; Hodge v. Sawyer, 85 Me. 285, 27 Atl. 153; Chandler v. Com., 4 Metc. (61 Ky.) 66.

[199] State v. Burton, 113 N. C. 655, 18 S. E. 657; Myers v. Stafford, 114 N. C. 234, 689, 19 S. E. 764; State v. Cagle, 114 N. C. 835, 19 S. E. 766.

times, when a statute is enacted on a particular subject, nothing at all is said about existing laws on the same subject, and the question may then arise whether an existing law is impliedly repealed. Repeals by implication are not favored, and the general rule is that an intention to repeal a prior law will never be implied if it can be avoided by any reasonable construction of the statutes. If both acts can be given full force without conflict, or if the later act is merely affirmative, or cumulative, or auxiliary, and not inconsistent, the earlier act is not repealed, and both must stand.[200] On the other hand, if the two acts are

[200] Per Champlin, J., in People v. Hanrahan, 75 Mich. 611, 612, 42 N. W. 1124. And see, to the same effect: Com. v. Wyman, 12 Cush. (Mass.) 237; Flaherty v. Thomas, 12 Allen (Mass.) 428; Chamberlain v. State, 50 Ark. 132, 6 S. W. 524; State v. Rieger, 59 Minn. 151, 60 N. W. 1087; Walker v. State, 7 Tex. App. 245; Cain v. State, 20 Tex. 355; People v. Platt, 67 Cal. 22, 7 Pac. 1; State v. Babcock, 21 Neb. 599, 33 N. W. 247.

The rule as to the repeal of a prior by a subsequent statute is well stated in Chamberlain v. State, 50 Ark. 132, 6 S. W. 524, by Judge Smith, as follows: "Subsequent laws do not abrogate prior ones unless they are irreconcilably in conflict. The courts have always leaned against implied repeals. A general affirmative statute does not repeal a prior particular statute, or particular provisions of a prior statute, unless negative words are used, or unless there be an invincible repugnancy between the two. The more specific provision controls the general, without regard to their order and dates. The two acts are interpreted as operating together, the specific provisions furnishing exceptions and qualifications to the general rule."

An amendatory statute providing only for the distribution of the penalty for a public offense in a manner different from that directed by the original act does not affect the offense defined by the previous act, or work a repeal of the penalty. State v. Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

In People v. Gustin, 57 Mich. 407, 24 N. W. 156, the court recognized the rule that repeals by implication are not favored, and held that a statute punishing the keeping of a house of ill fame was not impliedly repealed by a statute relating to "disorderly persons," and providing a different punishment for offenders of that class, among whom were enumerated "keepers of bawdy houses, or houses for the resort of prostitutes."

In Thompson v. State, 60 Ark. 59, 28 S. W. 794, it was held that a statute providing that the conversion of unmarked or unbranded cattle,

so inconsistent that they cannot stand together, the earlier act is impliedly repealed.[201] And the same is true whether a later act undertakes to cover the whole subject-matter of an earlier act.[202]

The reason for holding that a statute is impliedly repealed by a later inconsistent statute is because it is inferred that the legislature intended a repeal. Apparent or real inconsistency between acts is not sufficient ground for holding that the first is impliedly repealed by the second, if it clearly appears that there was no such intention on the part of the legislature.[203]

hogs, or sheep over 12 months old, and running at large, should not be larceny, was not impliedly repealed by a subsequent statute providing that every person who should steal any kind of cattle, pigs, hogs, sheep, or goats should be guilty of a felony. The latter, said the court, is a general affirmative statute, without negative words, and its effect was to abolish the distinction as to the subjects enumerated in the act that had existed between grand and petit larceny. There does not seem to be an invincible repugnancy between it and the former act, and therefore both should stand.

[201] Shannon v. People, 5 Mich. 71, 84; Flaherty v. Thomas, 12 Allen, 428; Sullivan v. People, 15 Ill. 233. And see Miller v. State, 33 Miss. 361, 69 Am. Dec. 351; State v. Dolan, 93 Mo. 467, 6 S. W. 366; Homer v. Com., 106 Pa. 221, 51 Am. Rep. 521; Johns v. State, 78 Ind. 332, 41 Am. Rep. 577.

Thus, there are any number of cases holding that a statute imposing a different punishment for the same offense as is punished by a former statute impliedly repeals it, at least in so far as the punishment is concerned. See Com. v. McDonough, 13 Allen (Mass.) 581; People v. Sponsler, 1 Dak. 289, 46 N. W. 459; People v. Tisdale, 57 Cal. 104.

[202] "Where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals, by implication, the former statute, though there may be no repugnance." Com. v. Cooley, 10 Pick. (Mass.) 37. And see U. S. v. Tynen, 11 Wall. (U. S.) 88; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377, Beale's Cas. 5; Shannon v. People, 5 Mich. 71, 85; People v. Sponsler, 1 Dak. 289, 46 N. W. 459; Andrews v. People, 75 Ill. 605.

In U. S. v. Tynen, 11 Wall. (U. S.) 88, it was held that a statute which embraced all the provisions of a former statute on the same subject, and also contained new provisions, and which imposed different and additional penalties, operated as a repeal of the earlier statute, without any repealing clause.

[203] Cain v. State, 20 Tex. 355.

51. Implied Repeal of the Common Law.

The same principles apply for the purpose of determining whether a statute impliedly repeals a rule or principle of the common law. As a general rule, there is no repeal if there is no repugnancy between the common law and the statute.[204] But the common law is repealed if there is an irreconcilable repugnancy, or if the legislature has undertaken to revise and cover the whole subject-matter, and, in the latter case, inconsistency between the statute and the common law is not necessary.[205]

[204] State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707; State v. Pulle, 12 Minn. 164, Mikell's Cas. 16.

A statute defining and punishing bribery of judicial officers only does not abrogate or repeal the common law as to bribery of other officers. State v. Ellis, supra.

"A statute which is clearly repugnant to the common law must be held as repealing it, for the last expression of the legislative will must prevail. Or we may admit * * * that when a new statute covers the whole ground occupied by a previous one, or by the common law, it repeals, by implication, the prior law, though there is no repugnancy. Beyond this, the authorities do not go in sustaining a repeal of the common law by implication. On the contrary, it is well settled that where a statute does not especially repeal or cover the whole ground occupied by the common law, it repeals it only when and so far as directly and irreconcilably opposed in terms." State v. Pulle, 12 Minn. 164, Mikell's Cas. 16.

[205] Com. v. Cooley, 10 Pick. (Mass.) 37; Com. v. Dennis, 105 Mass. 162; Estes v. Carter, 10 Iowa, 400; State v. Boogher, 71 Mo. 631.

In Com. v. Dennis, supra, the prosecution was for attempt to commit suicide, which was a misdemeanor at common law. It appeared that the Massachusetts legislature had undertaken to cover the subject of attempts by statute, the degree of punishment being measured by the character of the offense attempted, and the punishment attached to it. All offenses punishable by death, imprisonment, and fine were included, and no others. It was held that the common law as to attempts to commit suicide was repealed, and that such attempts were no longer indictable, since sucide could never be punished in either of the ways specified.

And in Com. v. Cooley, supra, it was held that a statute containing a series of provisions in relation to the whole subject of the disinterment of dead bodies had superseded, and by necessary implication repealed, the rules of the common law on the same subject.

When a statute creates a new offense, and prescribes a particular penalty and mode of enforcing it, the statute, of course, must be followed; but if the offense was before punishable at common law, the common-law remedy still remains, though the statute may prescribe a new remedy, unless there are negative words in the statute excluding all other remedies. "That affirmative statutes do not take away the common law is a maxim of the law itself."[206]

52. Effect of Expiration or Repeal.

When a law has expired or been repealed absolutely, it no longer has any operation, and it is well settled, therefore, that a person cannot be prosecuted for an offense after the law under which it was punishable has expired or been repealed without a saving clause, although the offense may have been committed when the law was in full force.[207] Even when there has been a conviction during the existence of the law, no judgment can be rendered after its expiration or repeal.[208] For this reason,

In Michigan the whole common law of crimes is regarded as repealed because of an evident purpose of the statutes to cover the entire field of the criminal law. In re Lamphere, 61 Mich. 105, 27 N. W. 882.

[206] Wetmore v. Tracy, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525; People v. Crowley, 23 Hun (N. Y.) 412.

[207] 1 Hale, P. C. 291; Rex v. McKenzie, Russ. & R. 429; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377, Beale's Cas. 5; Com. v. McDonough, 13 Allen (Mass.) 581; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Teague v. State, 39 Miss. 516; Wheeler v. State, 64 Miss. 462, 1 So. 632; Roberts v. State, 2 Overt. (Tenn.) 423; State v. Ingersoll, 17 Wis. 631; Com. v. Duane, 1 Binn. (Pa.) 601, 2 Am. Dec. 497; Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; State v. Long, 78 N. C. 571; State v. Williams, 97 N. C. 455, 2 S. E. 55; Sheppard v. State, 1 Tex. App. 522, 28 Am. Rep. 422; State v. Mansel, 52 S. C. 468, 30 S. E. 481; State v. Lewis (S. C.) 33 S. E. 351.

[208] Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 379, Beale's Cas. 5; Com. v. Kimball, 21 Pick. (Mass.) 373; Com. v. Duane, 1 Binn. (Pa.) 601, 2 Am. Dec. 497; Mahoney v. State, 5 Wyo. 520, 42 Pac. 13; Wall v. State, 18 Tex. 682, 70 Am. Dec. 302.

This principle also applies when a law is repealed or expires pending a writ of error or appeal, for the decision must be in accordance

it is usual, in repealing laws, to insert a saving clause ing them in force as to pending prosecutions, and often violations of the law before the repeal.[209] In some stat is a general provision that the repeal of a penal statu not abate a pending prosecution, or prevent a prosecut acts previously committed.[210]

53. Repeal of Repealing Law.

As a general rule, in the absence of a statutory pro the contrary, the repeal of a repealing law revives the ing law. Thus, if a statute should repeal the common murder by defining and punishing it, the simple repe statute would revive the common law. And the sam of the repeal of a statute which repealed a prior statu prior statute is revived.[211] The intention of the le however, must govern; and the repeal of a repealing not have this effect if a contrary intention is manifes course, the pre-existing law is not revived so as to acts committed when it was not in force.[213]

with the law at the time of final judgment. Keller v. Sta Mahoney v. State, supra.

[209] See Sanders v. State, 77 Ind. 227; Com. v. Bennett, 10 A clause in a statute that nothing contained in the statute "any penalty or forfeiture already incurred under the provisi law in force prior to the passage of this act" saves from the of the statute any penalty incurred before it took effect, th its approval by the governor. Com. v. Bennett, supra.

[210] See Com. v. Duff, 87 Ky. 586, 9 S. W. 816; Acree v. Com (Ky.) 353; McCuen v. State, 19 Ark. 634; State v. Mathews,

[211] Com. v. Mott, 21 Pick. (Mass.) 492; Com. v. Getchel (Mass.) 452; State v. Kent, 65 N. C. 311.

In some jurisdictions it is expressly declared by statute or part of an act repealed by another act shall be deemed to by the repeal of the repealing act. See U. S. v. Philbrick, 12 Heinssen v. State, 14 Colo. 228, 23 Pac. 995; State v. Slaugh 484; Sullivan v. People, 15 Ill. 233.

[212] Com. v. Churchill, 2 Metc. (Mass.) 123; Com. v. M Pick. (Mass.) 350, 22 Am. Dec. 379, Beale's Cas. 5.

[213] Com. v. Marshall, supra.

CHAPTER III.

THE CRIMINAL INTENT AND CAPACITY TO COMMIT CRIME.

I. In General, §§ 54-67.
II. Ignorance or Mistake of Fact, §§ 68-72.
III. Ignorance or Mistake of Law, §§ 73-75.
IV. Justification, §§ 76-84.
V. Responsibility of Married Women, §§ 85-87.
VI. Responsibility of Infants, §§ 88-92.
VII. Responsibility of Insane Persons, §§ 93-99.
VIII. Responsibility of Drunken Persons, §§ 100-108.
IX. Responsibility of Corporations, §§ 109-113.
X. Concurrence of Act and Intent, §§ 114-115.

I. Criminal Intent in General.

54. Necessity for a Criminal Intent.—It is a general rule, applicable both to common-law and to statutory crimes, that there is no crime unless there is a criminal intent. The legislature, however, if it sees fit, may punish acts when the mind is entirely innocent, and on grounds of public policy it has dispensed with the necessity for a criminal intent in some cases.

55. Necessity for Criminal Intent at Common Law.

No principle of the common law is better settled or more generally applicable than the principle that an act is not a crime if the mind of the person doing the act is innocent. The maxim is, *"Actus non facit reum, nisi mens sit rea."* A wrongful act and a wrongful intent must concur.[1] "It is a sacred prin-

[1] Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 134, 178; Levet's Case, Cro. Car. 538, 1 Hale, P. C. 474, Beale's Cas. 286; Chisholm v. Doulton, 22 Q. B. Div. 736; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Birney v. State, 8 Ohio, 230, Beale's Cas. 303; Duncan v. State, 7 Humph. (Tenn.) 148; People v. Welch, 71 Mich. 548, 39 N. W. 747; Com. v. Weiss, 139 Pa. 247, 21 Atl. 10, 23 Am. St. Rep. 182, Mikell's

ciple of criminal jurisprudence," said the Tennessee court, that the intention to commit the crime is of the essence of the crime, and to hold that a man shall be held criminally responsible for an offense, of the commission of which he was ignorant at the time, would be intolerable tyranny."[2] It is because of this principle, as we shall presently see at some length, that the law does not punish children of tender age and insane persons, who, by reason of their mental incapacity, are incapable of understanding the nature of their acts, or of distinguishing between right and wrong, persons acting in good faith and without negligence under a mistake of fact, and persons acting under necessity or compulsion.

56. Necessity for Criminal Intent in Statutory Offenses.

(*a*) *In General.*—Ordinarily the principle that a criminal intent is a necessary element of crime applies to statutory offenses as well as to offenses at common law,[3] for, as was explained in another chapter, penal statutes are to be construed in accordance with common-law principles, unless the legislature has clearly excluded such construction.[4] The principle, however, is not inflexible in the case of statutory offenses. It is within the power of the legislature, if it sees fit, to dispense with the necessity for a criminal intent, and to punish particular acts without regard to the mental attitude of the doer.[4a] Be-

Cas. 205; State v. Snyder, 44 Mo. App. 429; and numerous cases hereafter more specifically cited.

[2] Duncan v. State, 7 Humph. (Tenn.) 148.

[3] Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 134, 178; Rider v. Wood, 2 El. & El. 338; Reg. v. Tinkler, 1 Fost. & F. 513, Beale's Cas. 285; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Myers v. State, 1 Conn. 502, Beale's Cas. 302; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266, Mikell's Cas. 202; Duncan v. State, 7 Humph. (Tenn.) 148; State v. Eastman, 60 Kan. 557, 57 Pac. 109; Birney v. State, 8 Ohio, 230, Beale's Cas. 303; People v. Welch, 71 Mich. 548, 39 N. W. 747; People v. White, 34 Cal. 183.

[4] Ante, § 47 (e).

[4a] State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743.

cause of the difficulty of proving a criminal intent in some cases, or for other reasons, public policy may require the legislature, in prohibiting and punishing certain acts, to provide that any person who shall do the act shall do it at his peril, and shall not be allowed to show in defense that he did not know of the existence of the circumstances rendering the act unlawful. If such an intention on the part of the legislature clearly appears, the courts must give it effect, however harshly the statute may operate in the particular case.[5]

(*b*) *Construction of the Statutes.*—The legislature may dispense with the necessity for a criminal intent either in express terms or impliedly. In the former case there can be no difficulty; but, when the intention of the legislature is to be implied, it is often very difficult to say whether a criminal intent is necessary, as at common law, or not. The question, it has been said, "depends upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable."[6] It is not surprising that

[5] Reg. v. Woodrow, 15 Mees. & W. 404; Halstead v. State, 41 N. J. Law, 552, 32 Am. Rep. 247, Mikell's Cas. 192; Com. v. Farren, 9 Allen (Mass.) 489; Com. v. Mash, 7 Metc. (Mass.) 472, Beale's Cas. 304; Com. v. Boynton, 2 Allen (Mass.) 160, Beale's Cas. 306; Com. v. Wentworth, 118 Mass. 441; Com. v. Connelly, 163 Mass. 539, 40 N. E. 862; State v. Kelly, 54 Ohio St. 166, 43 N. E. 163; State v. Smith, 10 R. I. 258; State v. Huff, 89 Me. 525, 36 Atl. 1000; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784, overruling State v. Gardner, 5 Nev. 377; People v. Waldvogel, 49 Mich. 337, 13 N. W. 620; People v. Roby, 52 Mich, 577, 18 N. W. 365; State v. Baltimore & S. Steam Co., 13 Md. 181.

[6] Per Wills, J., in Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 178. See, also, State v. Kelly, 54 Ohio St. 166, 167, 43 N. E. 163; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496.

In Halstead v. State, 41 N. J. Law, 552, 32 Am. Rep. 247, Mikell's Cas. 192, it was said: "These two classes of cases, diverging as they do, and seemingly standing apart from each other, may at first view appear to be irreconcilable in point of principle; but, nevertheless, such is not the case. They all rest upon one common ground, and that ground is the legal rules of statutory construction. None of them can

the courts have differed widely in construing the statutes, even when they have been substantially the same, and that in many cases the judges of the same court have differed. In construing a statute the court should not hold that it dispenses with the necessity for a criminal intent unless such an intent on the part of the legislature is clear beyond any reasonable doubt.[7]

legitimately have any other basis. They are not the products of any of the general maxims of civil or natural law. On the contrary, each of this set of cases is, or should have been, the result of the judicial ascertainment of the mind of the legislature in the given instance. In such investigations, the dictates of natural justice, such as that a guilty mind is an essential element of crime, cannot be the ground of decision, but are merely circumstances of weight, to have their effect in the effort to discover the legislative purpose. As there is an undoubted competency in the lawmaker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances, the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention, and in looking over the decided cases on the subject it will be found that in the considered adjudications this inquiry has been the judicial guide. And naturally, in such an inquiry, the decisions have fallen into two classes, because there have been two cardinal considerations of directly opposite tendency, influencing the minds of judges; the one being the injustice of punishing unconscious violations of law, and the other the necessity, in view of public utility, of punishing, at times, some of that very class of offenses."

[7] See Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 280; Mikell's Cas. 134, 178; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Duncan v. State, 7 Humph. (Tenn.) 148.

In Reg. v. Tinkler, 1 Fost. & F. 513, Beale's Cas. 285, where a man was indicted under a statute for the abduction of a girl under sixteen years of age, and it did not appear that he had any improper motive, Chief Justice Cockburn directed the jury that, if they thought he merely wished to have the child live with him, and honestly believed that he had a right to the custody of the child, because of a promise made by him to her father on his death bed, they should acquit him, although he in fact had no such right.

In Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 134, 178, decided in England in 1889, in the court of appeal, queen's bench division, the statute under which the defendant, a woman, was indicted, provided that any person who, being married, should marry

(*c*) *Particular Cases.*—Among the various statutes which some of the courts, but not all, have construed as not requiring a criminal intent, are statutes punishing bigamy,[8] statutes for the protection of game and fish,[9] statutes punishing public officers for the expenditure of public moneys in excess of appropriations, etc.,[10] statutes punishing the sale of chattel mortgaged

any other person during the life of his or her wife or husband, should be guilty of a felony. There was a proviso that the act should not extend to any person marrying a second time, after the absence of his or her wife or husband for the space of seven years, without being known to such person to have been living within that time. The defendant had married a second time while her husband was living, and before he had been absent for seven years, but it appeared that she believed, and had good reason to believe, that he was dead. She was convicted, notwithstanding the absence of a criminal intent. On appeal, the case was considered by all of the judges, and most of them delivered opinions. The majority held that the statute was not to be construed as dispensing with the necessity for a criminal intent, and the conviction was quashed. The minority were of opinion that the legislature intended to absolutely prohibit any person from marrying a second time before the expiration of the seven years, without knowing of the death of his or her former spouse, and that any person so marrying should do so at his or her peril.

[8] Com. v. Mash, 7 Metc. (Mass.) 472, Beale's Cas. 304; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784, overruling State v. Gardner, 5 Nev. 377. Contra, Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 134, 178; ante, note 7; Squire v. State, 46 Ind. 459. And see post, § 70 (c).

[9] State v. Huff, 89 Me. 521, 36 Atl. 1000 (seining for smelts, in violation of a statute). State v. Ward, 75 Vt. 438, 56 Atl. 85 (shooting deer without horns).

[10] In New Jersey, a statute punished any member of certain public boards who should disburse or vote for the disbursement of public moneys in excess of appropriations, or incur obligations in excess of appropriations, or the limit of expenditures provided by law, and said nothing at all about the intent. On a prosecution for violation of this statute, it was held that a criminal intent was not necessary, and that the accused was guilty, though he acted in good faith, under advice of counsel, and with due care and caution. Halstead v. State, 41 N. J. Law, 552, 32 Am. Rep. 247, Mikell's Cas. 192.

property,[10a] statutes punishing the sale of adulterated food products,[10b] statutes punishing the sale of intoxicating liquors to slaves,[11] or to minors or drunkards,[12] etc. Generally, the cases in which this question arises are cases in which ignorance or mistake of fact is set up as a defense, and these are treated more fully in another place.[13]

57. Ignorance of Law.

There is one real exception, even at common law, to the rule that a criminal intent is an essential element of every crime. This exception is in the case of acts done in unavoidable ignorance of the law prohibiting and punishing them. Every man is conclusively presumed to know the law, and, except as to those crimes requiring a specific intent, if he violates the law, he cannot set up his ignorance as a defense, though as a matter of fact it might negative the existence of an actual criminal intent. And it can make no difference how reasonable, or even unavoidable, his ignorance may have been.[14]

58. Criminal Intention Presumed from Act.

It is a general rule that every man of sufficient mental capacity to know what he is doing is presumed to have intended the natural or probable consequences of his voluntary acts. This rule has repeatedly been applied in the criminal law, and to a great variety of cases. If a man voluntarily, and without any mistake as to the facts, does an act which, according to the nat-

[10a] State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743.

[10b] State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 84 Am. St. Rep. 360; State v. Ryan, 70 N. H. 196, 46 Atl. 49, 85 Am. St. Rep. 629; State v. Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395; Fox v. State, 94 Md. 143, 50 Atl. 700, 89 Am. St. Rep. 419.

[11] State v. Presnell, 12 Ired. (N. C.) 103, Beale's Cas. 177.

[12] Post, § 70 (b).

[13] Post, § 70 et seq.

[14] Post, § 73 et seq.

ural course of events, will probably injure another in a particular way, it will be presumed, in the absence of evidence to the contrary, that he intended such consequences.[15]

Conclusive Presumption.—In many cases a criminal intention will be conclusively presumed from voluntary acts.[16]

Common Law.—Thus, where a man uses language towards another which is calculated to bring on an affray, and engages in a fight when the other assaults him, he cannot, on a prosecution for an affray, be heard to say that he did not intend to bring about a breach of the peace.[17] So, if a person deliberately, and without ignorance of fact, shoots in the direction of another, it will be presumed that he intended to kill him, and he may be convicted of murder, or assault with intent to murder, according to the circumstances.[18]

Violation of Statutes.—If a statute prohibits an act under certain circumstances, and a person does the act, not under any mistake of fact, a criminal intention is conclusively presumed.[19]

[15] Com. v. Hersey, 2 Allen (Mass.) 173, Beale's Cas. 183; Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Com. v. York, 9 Metc. (50 Mass.) 93, 43 Am. Dec. 373; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; State v. Gilman, 69 Me. 163, 31 Am. Rep. 260; State v. King, 86 N. C. 603; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. White Oak River Corp., 111 N. C. 661, 16 S. E. 331.

[16] "Where an act, in itself indifferent, if done with a particular intent becomes criminal, the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and, in failure thereof, the law implies a criminal intent." Per Lord Mansfield in Rex v. Woodfall, 5 Burrow, 2667. See, also, State v. Welch, 21 Minn. 22.

[17] State v. King, 86 N. C. 603.

[18] Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; Walker v. State, 8 Ind. 290; State v. Gilman, 69 Me. 163, 31 Am. Rep. 260; post, §§ 208, 244.

[19] Com. v. Connelly, 163 Mass. 539, 40 N. E. 862; State v. McLean, 121 N. C. 589, 28 S. E. 140; State v. White Oak River Corp., 111 N. C. 661, 16 S. E. 331.

Thus, if a person, in violation of a statute, intentionally opens a grave for the purpose of removing anything interred therein, a criminal intent is conclusively presumed. State v. McLean, supra.

And so it is where a carrier discriminates in the transportation of

59. Responsibility for Unintended Results.

(*a*) *In General.*—To constitute a criminal intent, so as to render a person responsible for the results of his acts, it is not always necessary that he shall have intended the particular results for which he is punished. If his intention was not innocent, he may in many cases be held criminally responsible for results that were clearly not contemplated.[19a]

(*b*) *Intention to Commit a Crime.*—If a person intends to commit one offense, and by reason of mistake of fact, or for any other reason, commits another, he may in many cases be punished for the latter.[20] There is no injustice in this. Thus, a homicidal act, taking effect on a person other than the one whom the slayer intended, makes him guilty of the same degree of homicide of which he would have been guilty had the person intended been slain.[21] So, it is murder to unintentionally kill another, while engaged in the commission of some felony.[22] And it is manslaughter to unintentionally kill a person in com-

passengers or goods, in direct violation of a statute. State v. Southern Ry. Co., 122 N. C. 1052, 30 S. E. 133.

[19a] All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which, though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature. Bacon's Maxims, Reg. 15, Mikell's Cas. 134.

[20] See State v. Ruhl, 8 Iowa, 447; Reg. v. Latimer, 16 Cox, C. C. 70, Mikell's Cas. 163. And see post, § 71. A slave, who kills a white man, intending to kill a negro, is guilty of a criminal homicide in the degree in which he would have been guilty if the person slain had been a negro; and he is subject to the punishment prescribed for the commission of the offense upon a white person. Isham v. State, 38 Ala. 213, Mikell's Cas. 148.

[21] Reg. v. Smith, 7 Cox, C. C. 51, 33 Eng. Law & Eq. 567; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; Isham v. State, 38 Ala. 213, Mikell's Cas. 148; Com. v. Eisenhower, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670; Wheatley v. Com., 26 Ky. L. R. 436, 81 S. W. 687; People v. Suesser, 142 Cal. 354, 75 Pac. 1093; post, § 241 (b).

[22] Reg. v. Greenwood, 7 Cox, C. C. 404, Beale's Cas. 424; Reddick v. Com., 17 Ky. L. R. 1020, 33 S. W. 416; post, § 248.

mitting an assault and battery.[23] Many other illustrations might be given.[24]

(*c*) *Immoral Acts.*—A criminal intent may also be imputed to a man because of an intention to do an immoral act. Thus, if a person has unlawful intercourse with a woman who is married, he is none the less guilty of adultery because he does not know that she is married.[25] And there are many other cases.[26]

(*d*) *Consequences not Natural or Probable.*—A person is not liable criminally for all possible consequences which may immediately follow his wrongful act, but only for such as are natural and probable. For this reason, where a man struck another with his fist and knocked him down, and a horse then jumped upon him and killed him, it was held that the assailant was not responsible for the death, and could not be convicted of manslaughter.[27]

(*e*) *Acts Merely Mala Prohibita and Mere Civil Wrongs.*—As will be shown in another place, the principle that a man is criminally responsible for results not intended by him, if engaged in an unlawful act, does not apply where the act is merely

[23] Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425; post, § 263.

[24] See Rex. v. Conner, 7 Car. & P. 438; Rex v. Brown, 1 Leach, C. C. 148; Reg. v. Latimer, 16 Cox, C. C. 70, 17 Q. B. Div. 359, Mikell's Cas. 163; Reg. v. Lynch, 1 Cox, C. C. 361; Rex v. Pedley, Cald. 218; Barcus v. State, 49 Miss. 17, 19 Am. Rep. 3; McGehee v. State, 62 Miss. 772, 52 Am. Rep. 210; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; Callahan v. State, 21 Ohio St. 306; Isham v. State, 38 Ala. 213, Mikell's Cas. 148; State v. Wagner, 78 Mo. 644.

See Reg. v. Packard, Car. & M. 236, Mikell's Cas. 154, where the owner of a shop on which the sheriff had levied an execution made the caretaker drunk and drove him about in a cab until he died.

[25] Post, § 71 (b).

[26] Post, § 71 (b).

[27] People v. Rockwell, 39 Mich. 503. And see post, § 236.

A rioter cannot be held guilty of murder or manslaughter for the accidental killing of an innocent bystander by the officers engaged in suppressing the riot. Com. v. Campbell, 7 Allen (89 Mass.) 541, 83 Am. Dec. 705; Butler v. People, 125 Ill. 641, 18 N. E. 338, 8 Am. St. Rep. 423, 1 L. R. A. 211. Compare Taylor v. State, 41 Tex. Cr. R. 564, 55 S. W. 961, Mikell's Cas. 575.

malum prohibitum, and not otherwise wrong.[28] Nor does it apply where the act is a mere civil wrong, and neither a crime nor immoral, as where it is a mere civil trespass upon land or goods.[29]

60. Willfulness.

The common meaning of the term "willful" is "voluntary; due to one's own will; intentional."[30] An act, to be willful, must be voluntary. In penal statutes, and in the criminal law generally, the term does not always mean an evil or corrupt intent. Thus, where a statute punished any person who should "willfully" obstruct a highway, it was held that the term applied where a highway was intentionally obstructed without reasonable grounds to believe the obstruction to be lawful, and that it was no defense that the accused was acting under the orders of a superior officer of a railroad company, and without any evil intent.[31]

Generally, however, the term "willful" does mean something more than voluntary or intentional. It implies a guilty mind. It implies, at least, that the act is done without justification or excuse, and it generally implies, to some extent, an evil mind or intent.[32] Thus, when used in a penal statute in

[28] Post, § 71 (c).

[29] Post, § 71 (d).

[30] Cent. Dict. & Enc. "Willful."

[31] Sanders v. State, 31 Tex. Cr. R. 525, 21 S. W. 258; Sneed v. State, 28 Tex. App. 56, 11 S. W. 834.

In State v. Clark, 102 Iowa, 685, 72 N. W. 296, it was held that whether the refusal of a vote by election officers was with or without just grounds for believing the refusal to be lawful was altogether immaterial in determining whether the refusal was "willful," within a statute making officers of election guilty of a misdemeanor in "willfully" refusing the vote of a person who should comply with the requisites prescribed by law to prove his qualifications.

[32] Felton v. U. S., 96 U. S. 699; State v. Preston, 34 Wis. 675; City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246, 39 N. E. 943; U. S. v. Three Railroad Cars, 1 Abb. U. S. 196, Fed. Cas. No. 16,513; Com. v. Kneeland, 20 Pick. (Mass.) 206, 220; Thomas v. State,

reference to a person who shall neglect or fail to discharge a duty or perform an act enjoined, the term implies that the party shall have the ability to discharge the duty or perform the act. A person who is unable to comply with a statute because of physical or financial inability to do so is not guilty of "willfully" violating it.[33] Among other statutes in which the term "willful" has been construed as meaning something more than voluntary or intentional are statutes punishing the willful killing of another's animals,[34] the willful mutilation of a person,[35] or the willful obstruction of a highway,[36] and statutes punishing willful homi-

14 Tex. App. 200; State v. Abram, 10 Ala. 928; McManus v. State, 36 Ala. 285.

[33] City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246, 39 N. E. 943.

[34] In a Texas case, where the defendant was charged under a statute with willfully and wantonly killing another's sheep, and it was claimed in defense that he killed them to prevent them from injuring his own property, it was held that this might be a good defense. The court said: "Of course he killed them intentionally, but it is not every intentional act that is a willful or wanton act. When used in a penal statute, the word 'willful' means more than it does in common parlance. It means with evil intent, or legal malice, or without reasonable ground for believing the act the sense of 'intentional,' as distinguished from 'accidental' or 'involuntary.' To make the killing of the sheep, therefore, a willful act, it must have been committed with an evil intent, with legal malice, and without legal justification. To make the killing a wanton act, it must have been committed regardless of the rights of the owner of the sheep, in reckless sport, or under such circumstances as evinced a wicked or mischievous intent, and without excuse." Thomas v. State, 14 Tex. App. 200.

[35] State v. Abram, 10 Ala. 928.

[36] Thus, in State v. Preston, 34 Wis. 675, it was held that the willful obstruction of a highway, for which a penalty was provided by statute, did not include the case of an obstruction created in good faith by a landowner, believing that no highway existed at the place, and acting under the advice and direction of the town supervisors, who were charged by law with the general direction and control of highways in the town. The court said in this case: "It is contended that the term 'willfully,' as here used, signifies no more than 'voluntarily' or 'purposely,' thus distinguishing the act of obstructing made penal from one which may be said to have been accidental,

cide,[37] willful blasphemy,[38] willful voting by a person not qualified to vote,[39] etc.

61. Wantonness.

A wanton act is something more than a willful act. It has been defined to be an act committed in disregard of the rights of others, in a reckless spirit, or under circumstances which evince a lawless, wicked, or mischievous intent.[40]

62. Malice.

(*a*) *In General.*—In its popular sense, the term "malice" means hatred, ill-will or hostility to another, but this is not necessarily its meaning in law. In its broadest legal sense it is almost, if not quite, synonymous with "criminal intent," and means the state of mind of a person, irrespective of his motive, whenever he consciously violates the law. In this broad sense, every person who is *sui juris,* and who, without justification or excuse, willfully does an act which is prohibited and made punishable by law as a crime, does the act maliciously.[41] Malice, in its legal sense, said Chief Justice Shaw, "characterizes all

which last alone it was the design of the statute not to punish. The word 'willfully,' as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning or degrees of intensity, according to the context and evident purpose of the writer. It is sometimes so modified and reduced as to mean little more than plain 'intentionally' or 'designedly.' Such is not, however, its ordinary signification when used in criminal law and penal statutes. It is there most frequently understood, not in so mild a sense, but as conveying the idea of legal malice in greater or less degree,—that is, as implying an evil intent without justifiable excuse."

[37] McManus v. State, 36 Ala. 285.

[38] Com. v. Kneeland, 20 Pick. (Mass.) 206, 220.

[39] Com. v. Bradford, 9 Metc. (Mass.) 268.

[40] Thomas v. State, 14 Tex. App. 200.

[41] Rex v. Harvey, 2 Barn. & C. 268; Rex v. Hunt, 1 Mood. C. C. 93, Mikell's Cas. 152; Com. v. Snelling, 15 Pick. (Mass.) 337; Com. v. York, 9 Metc. (Mass.) 93; State v. Grassle, 74 Mo. App. 313; Hollander v. State, 12 Fla. 117; Gallaher v. State, 28 Tex. App. 247, 12 S. W. 1087; Powell v. State, 28 Tex. App. 393, 13 S. W. 599.

acts done with an evil disposition, a wrong and unlawful motive and purpose; the willful doing of an injurious act without lawful excuse."[42] Malice includes the idea of willfulness. An act, to be malicious, must be done willfully.[43]

In penal statutes the terms "malice" and "malicious" are often used in this broad sense, rather than as denoting any ill-will or any specific intent to injure. Thus, under a statute punishing any person who should "willfully and maliciously" place any obstruction on a railroad track, a person who placed an obstruction on the track for the purpose of obtaining a reward from the railroad company by giving notice of the obstruction was held guilty, though he intended to and did signal and stop a train so as to prevent injury. It was held that it was not necessary that he should intend to injure any one.[44]

(*b*) *Wrongful Intent Necessary.*—It must not be supposed from what has been said that there can be malice where the mind is entirely innocent. The term not only implies willful-

[42] Com. v. York, 9 Metc. (Mass.) 93.

In Com. v. Snelling, 15 Pick. (Mass.) 337, 340, it was said by Chief Justice Shaw, in a prosecution for criminal libel: "In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred, and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he willfully inflicts a wrong on others, which is not warranted by law, such act is malicious. A man may, by his example and by his conduct, be doing great injury to society. He may, in fact, be guilty of the most ruinous crimes, and that well known to an individual; that individual may be actuated by the most pure and single-hearted desire to rid society of so mischievous a character, and entertain the firmest conviction that he would be doing great good by it; and yet it is very certain that, in contemplation of law, any attempt upon his life, his liberty, his person or property, made in the accomplishment of such a purpose, would be unlawful, and therefore malicious."

[43] State v. Robbins, 66 Me. 324.

[44] Crawford v. State, 15 Lea (Tenn.) 343.

ness, but it also implies a *wrongful* intent at leas
may act willfully in the sense of voluntarily, and ye
cumstances may be such as to excuse him. In such
does not act maliciously. The act must be done wit
ful excuse.[45] Thus, a person who acts in ignorance of
which render his act unlawful, and without negligenc
not being *malum in se,* cannot be said to act with mali
sense of the word.[46] And so it is if a man acts in nec
fense of his person or property.[47]

(*c*) *Reckless and Wanton Acts.*—In some cases m
be inferred or implied as a matter of law, and indep
the actual intent, from reckless and wanton acts likely
injury. Thus, the malice necessary to constitute mu
be implied from the reckless or wanton use of a deadly
And the same is true of other offenses.[49] "Barbarity,"
Holt, "will often make malice."[50]

(*d*) *Restricted Sense of "Malice."*—The terms "ma
"malicious" are not always used in their broadest
above explained. In relation to some crimes, both at
law and under statutes, they have a narrower meaning
as applied to the offense of malicious mischief, they r
merely a mere wrongful trespass, but they are used in
of resentment or ill-will towards the owner of the pro
jured or destroyed, or wantonness at least.[51]

[45] Holland v. State, 12 Fla. 117; Powell v. State, 28 Tex.
13 S. W. 599.

[46] Post, § 68 et seq.

[47] Post, § 80.

[49] Grey's Case, J. Kelyng, 64, Beale's Cas. 463, Mikell's
State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; post, §

[49] Com. v. Walden, 3 Cush. (Mass.) 558; Porter v. State, 8
35 So. 218. Thus, where a man recklessly shot at another's
run them off his premises, and killed one of them, it was
malice should be implied. State v. Barnard, 88 N. C. 661.

[50] Keate's Case, Comb. 408.

[51] Post, § 391. In Com. v. Walden, 3 Cush. (Mass.) 558,

They also have a particular meaning as applied to murder,[52] and arson,[53] and to many other offenses.[54]

(*e*) *Express and Implied Malice.*—Malice is divided into express and implied malice. Express malice is actual malice, or malice in fact, and exists when a person actually contemplates the injury or wrong which he inflicts,—as where a man shoots at another with the intent to kill him.[55]

Implied malice, otherwise called constructive malice, or malice in law, is where the law implies or imputes malice because of the nature of the act done, and irrespective of the actual intent of the party.[56]

a prosecution for malicious mischief under a Massachusetts statute, the trial court defined the word "maliciously" in the statute to mean "the willful doing of any act prohibited by law, and for which the defendant had no lawful excuse," and told the jury that it was not necessary to show "moral turpitude" of mind. The appellate court held that this was erroneous. "If this definition of the crime charged were correct," it was said, "it would follow that the words 'willfully and maliciously' were intended by the legislature to be understood as synonymous, and that the statute is to be construed in the same manner as it would be if the word 'maliciously' had been omitted. Such a construction, we are of the opinion, cannot be sustained; for, if it could be, it would follow that a person would be liable to be punished for every trespass, however trifling the injury might be, to the personal property of another, which could not be justified or excused in a civil action against him, for the recovery of damages, by the owner. * * * The jury should also have been instructed that, to authorize them to find the defendant guilty, they must be satisfied that the injury was done either out of a spirit of wanton cruelty or wicked revenge. 'Malicious mischief,' amounting to a crime, is so defined by Blackstone (4 Bl. Comm. 244), and in Jacob's Law Dictionary, by Tomlin, under the title 'Mischief, Malicious,' and we have no doubt that such is the true definition of the crime." See, also, Rex v. Kelly, 1 Craw. & D. 186, Beale's Cas. 182.

[52] Post, § 240.

[53] Post, § 415.

[54] See U. S. v. Three Railroad Cars, 1 Abb. U. S. 196, Fed. Cas. No. 16,513.

[55] Darry v. People, 10 N. Y. 120; People v. Clark, 7 N. Y. 393; Anthony v. State, 21 Miss. 264; post, §§ 240(c), 241.

[56] Darry v. People, 10 N. Y. 120; post, §§ 240(c), 242, et seq.

Thus, the malice which is an essential element of murder is implied from the deliberate use of a deadly weapon, without justification or excuse, from the fact that the accused, when he committed the homicide, though it was committed unintentionally, was engaged in resisting a lawful arrest, or in committing some other felony, or from a wanton or reckless act dangerous to life.[57]

63. Specific Criminal Intent.

(*a*) *In General.*—In some crimes a specific intent is an essential ingredient, and no other intent will suffice. On a prosecution for such an offense, the state must affirmatively prove this particular intent, or facts from which it may be inferred.[58]

In the case just cited it was said by Judge Selden: "There is no difference in the nature or degree of the malice intended, whether it be called 'express' or 'implied,' when these terms are used in their most appropriate sense. If properly applied, they refer only to the evidence by which the existence of malice is established. Both alike, the one no less than the other, mean actual malice,—malice shown by the proof to have really existed. It is called 'implied malice' when it is inferred from the naked fact of the homicide, and 'express' when established by other evidence. That this is the true original meaning of these terms, when used in connection with this crime, is apparent, I think, from the natural import of the words themselves, as well as from their accustomed use in other branches of the law. They are appropriate terms to express different modes of proof, and are habitually used for that purpose, but are not adapted to the description of different degrees of malicious intent. The phrase 'implied malice' is properly applied to a case where the evidence shows that the accused did the act which caused the death, but where there is no other proof going to show the existence or the want of malice. In such cases, the law does not impute a malicious intent, irrespective of its real existence, but it presumes, in accordance with the settled rules of evidence, that such an intent did actually exist." Darry v. People, 10 N. Y. 120, 136, 137.

[57] Post, § 242 et seq.

[58] Dobb's Case, 2 East, P. C. 513, Beale's Cas. 181; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; State v. King, 86 N. C. 603; Coleman v. People, 58 N. Y. 555; Reagan v. State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; Rex v. Duffin, Russ. & R. 365, Mikell's Cas. 167; Ogletree v. State, 28

Illustrations.—Thus, to constitute a burglary, the breaking and entering of the house must be with the specific intent to commit a felony, and this intent must be shown as a fact.[59]

Arson is the willful and malicious burning of another's house, and requires an intention to burn. The crime is not committed by one who burns another's house unintentionally, though he may at the time be engaged in the commission of some other felony.[60]

In larceny and robbery there must be a specific intent to permanently deprive the owner of the goods of his property therein. No other intent will do.[61]

In malicious mischief there must be a willful and malicious injury to the property of another. The offense is not committed by one who unintentionally injures another's property while attempting to commit some other wrong.[62]

In every prosecution for an attempt to commit a crime, it must be shown that the accused intended to commit that particular crime.[63]

And to sustain an indictment charging an assault with intent to murder, to rape, or to rob, etc., a specific intent to murder, rape, or rob must be shown.[64]

Ala. 693; Roberts v. People, 19 Mich. 401; U. S. v. Buzzo, 18 Wall. (U. S.) 125; Rex v. Williams, 1 Leach, C. C. 529, Mikell's Cas. 211.

An indictment for killing sheep with intent to steal the carcass is supported by proof of an intent to steal any portion of the carcass. Rex v. Williams, 1 Mood. C. C. 107.

[59] Dobb's Case, 2 East, P. C. 513, Beale's Cas. 181; Rex v. Knight, 2 East, P. C. 510; Price v. People, 109 Ill. 109; Harvick v. State, 49 Ark. 514, 6 S. W. 19; post, § 407.

[60] Post, § 415.

[61] Post, §§ 326 et seq., 378.

[62] Rex v. Kelly, 1 Craw. & D. 186, Beale's Cas. 182; Reg. v. Pemplton, 12 Cox, C. C. 607; Com. v. Walden, 3 Cush. (Mass.) 558; post, § 391.

[63] Rex v. Davis, 1 Car. & P. 306; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; Sharp v. State, 19 Ohio, 379; Reagan v. State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; post, § 121.

[64] Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; People v. Keefer, 18 Cal.

Hence a charge of the statutory offense of maliciously shooting at another with intent to murder him is not supported by proof that the prisoner mistook the person shot at for another whom he intended to kill.[64a]

(*b*) *May be Inferred from Act.*—When a specific intent is necessary, it need not necessarily be shown by direct or positive evidence, but it may be inferred from the circumstances. The principle that a man is presumed to have intended the natural and probable consequences of his acts applies.[65] The inference, however, is one of fact, and may be rebutted.[65a]

Thus, on a prosecution for burglary, if it be shown that the

636; Barcus v. State, 49 Miss. 17, 19 Am. Rep. 1; Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; Rex v. Duffin, Russ. & R. 365, Mikell's Cas. 167; Scott v. State, 49 Ark. 156, 4 S. W. 750; Reg. v. Doddridge, 8 Cox, C. C. 335, Mikell's Cas. 170; Rex v. Williams, 1 Leach, C. C. 529, Mikell's Cas. 211; Com. v. Brosk, 8 Pa. Dist. R. 638; Carter v. State, 28 Tex. App. 355, 13 S. W. 147; People v. Sweeney, 55 Mich. 586, 22 N. W. 50; post, § 208.

In Rex v. Boyce, 1 Mood. C. C. 29, Beale's Cas. 182, a burglar was indicted under a statute for feloniously cutting and maiming a man, "with intent to murder, maim, and disable" him. The jury found that he struck with a crowbar a watchman in the house into which he had broken, but that he did so only with intent to produce a temporary disability, until he could escape. It was held that he was not guilty under the statute. See post, § 208.

[64a] Rex v. Holt, 7 Car. & P. 518, Mikell's Cas. 169; Reg. v. Ryan, 2 Moody & R. 213. Cf. Reg. v. Stopford, 11 Cox, C. C. 643; Scott v. State, 49 Ark. 156, 4 S. W. 750. These decisions are based on the theory that, since the statute denounces the punishment against any person shooting at another with intent to murder him, not only must the intent to murder be proved, but the proof must extend to the particular person named; if the statute had prohibited shooting at another with intent to commit murder no such question could arise. On principle it is difficult to explain why, under familiar rules, the intent to murder is not carried over to the person actually shot at. See ante, § 59(b), post, § 241(b).

[65] Com. v. Hersey, 2 Allen (Mass.) 173, Beale's Cas. 183; Rex v. Dixon, 3 Maule & S. 11, Mikell's Cas. 137; Rex v. Holt, 7 Car. & P. 518, Mikell's Cas. 169.

[65a] People v. Flack, 125 N. Y. 324, 26 N. E. 267, Mikell's Cas. 138.

accused broke into the house, and then committed larceny therein, it may be inferred that he broke and entered with intent to steal.[66]

And on a prosecution for shooting or beating another with a deadly weapon with intent to kill, or for administering poison with such intent, the specific intent to kill may be inferred from the use of the deadly weapon or the administering of the poison.[67]

On the same principle, an intent to defraud a particular person will be inferred from a forgery or the utterance of a forged instrument, if such is the necessary effect of the forging or uttering.[68]

(*c*) *Concurrence of several intents.*—Where the intent necessary to constitute the crime exists, it is immaterial that another intent also exists, nor is it material which is the principal and which the subordinate one.[68a]

64. Motive.

It is a clear principle of law that motive does not enter into any crime as an essential ingredient. And while defendant's motive is always inquirable into for the purpose of establishing an antecedent probability of his committing the offense,[68b] neither failure to prove any motive nor proof of a good motive will prevent a conviction.

(*a*) *Absence of Motive.*—The absence of any motive for a crime, as in the case of homicide, for example, may be considered by the jury as a matter of evidence in determining whether the accused did the act charged, or whether he acted willfully or

[66] State v. Squires, 11 N. H. 37; post, § 407 (c).

[67] Com. v. Hersey, 2 Allen (Mass.) 173, Beale's Cas. 103; post, § 208.

[68] Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; post, § 397.

[68a] Rex v. Gillow, 1 Mood, C. C. 85, Mikell's Cas. 213; Rex v. Williams, 1 Leach, C. C. 529, Mikell's Cas. 211; Rex v. Shadbolt, 5 Car. & P. 504; People v. Carmichael, 5 Mich. 10; State v. Mitchell, 27 N. C. (5 Ired.) 350; State v. Clark, 69 Iowa, 196, 28 N. W. 537.

[68b] Com. v. Hudson, 97 Mass. 565.

maliciously; but if it otherwise appear to their satisfaction that he did do the act, and that he did it willfully and without justification or excuse, the fact that no motive is shown is altogether immaterial.[69]

(*b*) *Good Motive.*—Even when a motive does appear, it need not necessarily be a bad motive. A willful act prohibited and made punishable by the common law or by statute is none the less a crime because the accused was actuated by a good motive.[70]

[69] State v. Coleman, 20 S. C. 441, Mikell's Cas. 139; State v. Workman, 39 S. C. 151, 17 S. E. 694; State v. Miller, 9 Houst. (Del.) 564; Johnson v. U. S., 160 U. S. 546; People v. Feigenbaum, 148 N. Y. 636, 43 N. E. 78.

"Proof of motive is not essential to conviction in any case, nor can it be said in any case that absence of such proof is ground for acquittal. Its existence is a circumstance to be considered by the jury in determining guilt or innocence, along with all the other evidence adduced, and the nonexistence of proof of it is likewise a circumstance which the jury may consider, along with the other evidence, in reaching a conclusion of innocence; but neither its presence nor absence can of itself be justly said to control the finding of the jury. Crimes may be, and frequently are, thoroughly established without any evidence of motive, and the very absence of motive may aggravate the offense." Stone v. State, 105 Ala. 60, 17 So. 114.

The criminal act, and the connection of the accused with it, being proved beyond a reasonable doubt, the act itself furnishes the evidence that to its perpetration there was some cause or influence moving the mind. Brunson v. State, 124 Ala. 37, 27 So. 410.

[70] U. S. v. Harmon, 45 Fed. 414, Beale's Cas. 180; Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Specht v. Com., 8 Pa. 312; Stone v. State, 105 Ala. 60, 17 So. 114; State v. White, 64 N. H. 48, 5 Atl. 828.

See People v. Kirby, 2 Park. Cr. R. (N. Y.) 28, Mikell's Cas. 142, where a father was indicted for the murder of his two infant children to whom he was greatly attached, doing it as he said because he thought they would be better off.

On indictment for maliciously and feloniously setting fire to a building with intent to injure the owner, it is immaterial that defendant's intent was not to injure the owner but that he might procure the reward for giving the first alarm. Reg. v. Regan, 4 Cox, C. C. 335, Mikell's Cas. 141.

It is no defense to a prosecution for carrying a pistol concealed that defendant carried it merely for the purpose of exhibiting it as a curiosity. Walls v. State, 7 Blackf. (Ind.) 572.

This is certainly the general rule, though there are some cases in which it appears to have been ignored. For example, on a prosecution for depositing in the mails or publishing an obscene article or book it is no defense for the accused to show that his object was to correct evils and abuses in intercourse between the sexes, and thus do a public good.[71] And on a prosecution for a nuisance in erecting a wharf on public property it is no defense to show that it has been in fact beneficial to the public.[72] Many other cases might be cited.[73]

65. Religious Belief and Belief in Impropriety of Law.

Since a good motive is no excuse, if a man of sound mind does an act which he knows is prohibited and punished by law, he cannot escape responsibility on the ground that he acted because of and in accordance with his religious belief or scruples. Thus, a man cannot set up his religious belief to escape liability for violation of a statute prohibiting and punishing bigamy and polygamy,[74] or punishing labor on Sunday,[75] or the disinterring of a dead body,[76] or the beating of a drum in the streets of a town.[77]

It has been held in England that the parent of a sick child,

[71] U. S. v. Harmon, supra. And see Reg. v. Hicklin, L. R. 3 Q. B. 360, 11 Cox, C. C. 19; post, § 467.

[72] Respublica v. Caldwell, 1 Dall. (Pa.) 150, Beale's Cas. 177; post, § 456 (c).

[73] In Reg. v. Sharpe, 1 Dears. C. C. 160, 7 Cox, C. C. 214, Beale's Cas. 175, a son was indicted for disinterring the body of his mother, who had been buried in a dissenting congregation's burying grounds, and it was held that the fact that he acted from motives of affection and religious duty, and intended to bury her with his father in other burying grounds, was no defense.

[74] Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Harrison v. State, 44 Tex. Cr. R. 164, 69 S. W. 500.

[75] Specht v. Com., 8 Pa. 312; Com. v. Has, 122 Mass. 40.

[76] Reg. v. Sharpe, 1 Dears. C. C. 160, 7 Cox, C. C. 214, Beale's Cas. 175.

[77] Like the members of the Salvation Army. State v. White, 64 N. H. 48, 5 Atl. 828.

who, though able, willfully fails to call in a physician or furnish proper medicine, by reason of which the child dies, is not guilty of manslaughter if his failure is because of religious scruples, or because of a conscientious belief in the faith cure, and the like.[78] This decision, however, is not sound even at common law, and there is now a statute to the contrary.[79]

Belief in the inexpediency of vaccination will not affect the validity of a statute requiring it, nor entitle the believer to exemption from the statute.[79a]

66. Repentance and Change of Intent.

If an act is done with a criminal intent, no subsequent repentance and change of intent can relieve it of its criminality. Thus, a person who has broken and entered a house with intent to commit a felony is none the less guilty of burglary because he repents and abandons his purpose, since the breaking and entry with such intent constitutes the offense.[80]

A person who has committed larceny or robbery cannot escape responsibility by repenting and abandoning or returning the property, or paying for it.[81]

A person who, with intent to commit a crime, has done enough to render him guilty of an attempt, can be punished for the attempt, though he afterwards abandoned his purpose.[82] Many other illustrations might be given.

[78] Reg. v. Wagstaffe, 10 Cox, C. C. 530. Compare State v. Sandford (Me.) 59 Atl. 597.

[79] See Reg. v. Downes, 1 Q. B. Div. 25, 13 Cox, C. C. 111, Beale's Cas. 195; Reg. v. Senior, 19 Cox, C. C. 219, Mikell's Cas. 143; State v. Chenoweth (Ind.) 71 N. E. 197. And see post, § 265(d).

[79a] Com. v. Pear, 183 Mass. 242, 66 N. E. 719.

[80] Post, § 408.

[81] Post, § 333. See Shultz v. State, 5 Tex. App. 390.

[82] Post, § 126.

67. Negligence.

A criminal intent, and even malice, may be inferred, as a matter of fact or as a matter of law, from negligence.[83]

(*a*) *Negligent Acts of Commission.*—Thus, negligence in doing a lawful act, by which another is injured, may render a person guilty of criminal assault and battery.[84]

And there are any number of cases in which persons have been held guilty of manslaughter, which is a felony, because of negligence in doing an act which would have been lawful except for the negligence, as in the case of immoderate correction of a child by his parent, negligent use of drugs and negligent surgical operations by unskillful and incompetent practitioners, negligent driving, negligence in shooting at a mark or otherwise using a deadly weapon, etc.[85]

Even the malice necessary to constitute murder may be implied from negligence, as from reckless and wanton conduct dangerous to life.[86]

(*b*) *Omission to Act.*—In like manner a criminal intent, and even malice, may be inferred from omission to act at all when there is a duty to act.[87]

[83] Fost. C. L. 262, Beale's Cas. 185; Mirror of Justices (Sel. Soc.) c. 15, Mikell's Cas. 215; Hull's Case, J. Kelyng, 40, Mikell's Cas. 215; Knight's Case, 1 Lewin, C. C. 168, Mikell's Cas. 217; Reg. v. Instan [1893] 1 Q. B. 450, Beale's Cas. 198; U. S. v. Thompson, 12 Fed. 245; and cases more specifically cited in the notes following.

[84] Post, § 204 et seq.

[85] Fost. C. L. 262, Beale's Cas. 185; Reg. v. Lowe, 3 Car. & K. 123, 4 Cox, C. C. 449, 1 Ben. & H. Lead. C. C. 60, Beale's Cas. 192; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Reg. v. Salman, 14 Cox, C. C. 494, Beale's Cas. 189; State v. Hardie, 47 Iowa, 647, 29 Am. Rep. 496; State v. Emery, 78 Mo. 77, 47 Am. Rep. 92; People v. Fuller, 2 Park. Cr. R. (N. Y.) 16; Reg. v. Franklin, 15 Cox, C. C. 163, Mikell's Cas. 158; Knight's Case, 1 Lewin, C. C. 168, Mikell's Cas. 217; Rigmaidon's Case, 1 Lewin, C. C. 180, Mikell's Cas. 217; post, §§ 262-265.

[86] Fost. C. L. 262, Beale's Cas. 185; Reg. v. Marriott, 8 Car. & P. 425, Mikell's Cas. 229; post, §§ 244, 245.

[87] See Rex v. Friend, Russ. & R. 20, Beale's Cas. 190; Reg. v. Lowe, 3 Car. & K. 123, Beale's Cas. 192.

Thus, a person may be guilty of manslaughter if he causes the death of another by negligent omission to ventilate a mine, to adjust a switch on a railroad track, or to furnish food or shelter to a helpless person who is dependent upon him.[88] If the omission to act is willful, he will be guilty of murder.[89]

To render one criminally liable, however, because of an omission to act, he must be under a legal duty to act,[90] and the omission must be due to culpable negligence.[91]

(*c*) *Offenses Requiring a Specific Intent.*—Mere negligence, whether in commission or omission, is not enough to render a man guilty of a crime of which a specific intent is an essential element, as in the case of larceny,[92] malicious mischief,[93] arson,[94] attempts to commit crimes,[95] and assaults with intent to murder, to wound, to inflict great bodily harm, etc.[96]

II. Ignorance or Mistake of Fact.

68. In General.—As a general rule, a bona fide and reasonable belief in the existence of facts which, if they did exist, would render an act innocent, is a good defense. But there are both apparent and real exceptions. Thus:

1. The legislature may punish a person for an act notwithstanding the innocence of his intent, and therefore notwithstanding his ignorance or mistake of fact.

[88] Reg. v. Lowe, 3 Car. & K. 123, Beale's Cas. 192; Reg. v. Hughes, 7 Cox, C. C. 301; Reg. v. Instan [1893] 1 Q. B. 450, Beale's Cas. 198; post, § 265.

[89] See the cases above cited. And see post, § 247.

[90] Reg. v. Smith, 11 Cox, C. C. 210, Beale's Cas. 192; post, § 265(e).

[91] Reg. v. Nicholls, 13 Cox, C. C. 75, Beale's Cas. 193; post, § 265.

[92] Post, § 326 et seq.

[93] Reg. v. Pembliton, 12 Cox, C. C. 607, Beale's Cas. 210, Mikell's Cas. 171; post, § 391.

[94] 1 Hale, P. C. 569, Beale's Cas. 208, Mikell's Cas. 927; Reg. v. Faulkner, 13 Cox, C. C. 550, Beale's Cas. 213; post, § 415.

[95] Post, § 121.

[96] Post, § 208.

2. **If a person's intention is criminal, or even wrongful, per se, he may be responsible for results not intended.**
3. **Ignorance or mistake of fact will not exempt one altogether from criminal responsibility, if due to culpable negligence. But this does not apply to an offense which requires a specific evil intent, where the ignorance or mistake of fact negatives the existence of such intent.**

69. Mistake of Fact at Common Law.

The general rule that ignorance or mistake of fact is a defense, if not due to culpable negligence, is well settled at common law. It follows necessarily from the principle that an act is not a crime unless there is a criminal intent.[97]

Bona fide and reasonable mistake of facts stands on the same footing as absence of the reasoning faculty, as in infancy, and perversion of that faculty, as in insanity.[98]

In a leading English case, in which the defendant was indicted for felonious homicide, the evidence showed that he reasonably believed that there was a burglar in his house, and thrusting his sword in the dark, where he thought the burglar was concealed, killed a woman who had come into the house to assist his servant in her work. It was held that the homicide was excusable because of the mistake of fact.[99]

[97] Levet's Case, Cro. Car. 538, 1 Hale, P. C. 474, Beale's Cas. 279; Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 134, 178; State v. Nash, 88 N. C. 618, Mikell's Cas. 248; Reg. v. Rose, 15 Cox, C. C. 540; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266, Mikell's Cas. 202; State v. Snyder, 44 Mo. App. 429.

"At common law, an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defense." Per Cave, J., in Reg. v. Tolson, supra.

[98] Reg. v. Tolson, supra.

[99] Levet's Case, Cro. Car. 538, 1 Hale, P. C. 474, Beale's Cas. 279. See, also, the case of Sir William Hawksworth related by 1 Hale, P. C.

On the same principle, if a man kills an assailant under an erroneous but reasonable belief that it is necessary to do so to save his own life, he is excusable.[100]

And if a man takes another's property by mistake, or under a reasonable belief of ownership in himself or his master, and appropriates it to his own use, he is not guilty of larceny.[101]

To render a person guilty of vending obscene or immoral publications, a knowledge of the character of the publications is essential. From the vending it would be inferable, but he would not be criminally responsible if it should appear that because of blindness, or for other reasons, he made the sale innocently and in ignorance of the character of the publication.[102] The same principle applies when a person passes, or has in his possession with intent to pass, forged instruments or counterfeit money, in ignorance of their spurious character.[103] Many other illustrations of the rule might be given.[104]

70. Mistake of Fact in Statutory Offenses.

(*a*) *In General.*—As the principle that a criminal intent is necessary generally applies to statutory crimes as well as to

40, Mikell's Cas. 244, in which the knight procured himself to be killed by his parker by pretending to be a poacher.

[100] Campbell v. People, 16 Ill. 17; Steinmeyer v. People, 95 Ill. 383; Marts v. State, 26 Ohio St. 162; State v. Nash, 88 N. C. 618, Mikell's Cas. 248; post, § 280.

[101] Post, § 327.

[102] Post, § 467.

[103] Post, §§ 397, 399.

[104] A street-car conductor who forcibly ejects a passenger under a bona fide but mistaken belief that his fare has not been paid is not criminally responsible. State v. McDonald, 7 Mo. App. 510.

And so as to a railroad employe's ejection of an intending passenger from the platform under a reasonable belief that he is there for a prohibited purpose. Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465.

Exposure of unwholesome food for sale is indictable at common law (post, § 447), but not unless the accused knew its character or condition. State v. Snyder, 44 Mo. App. 429.

A police officer is not liable for assault and battery for arresting a man whom he believes to be drunk though he was in fact not drunk. Com. v. Presby, 80 Mass. (14 Gray) 65, Mikell's Cas. 244.

crimes at common law,[105] so ignorance and mistake of fact is generally a defense in prosecutions for statutory offenses.[106] The principle, however, as was stated in a previous section,[107] is not inflexible in the case of statutory offenses, for the legislature has the power to dispense with the necessity for a criminal intent, and sometimes does so.

Public policy may require the legislature, in prohibiting and punishing particular acts under certain circumstances, to provide, expressly or impliedly, that any person who shall do the act shall do it at his peril, and that he shall not be allowed to escape punishment by showing that he acted in good faith, without negligence, and in ignorance of the existence of the circumstances rendering the act unlawful. If the language and subject-matter of the statute show clearly that this was the intention of the legislature, the courts must give it effect, however harshly the statute may seem to operate in the particular instance.[108]

But it should not thus construe a statute, unless the intention of the legislature is clear.[109] In construing the various statutes

[105] Ante, § 56.

[106] Anon., Fost. C. L. 439, Beale's Cas. 284; Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 134, 178; Myers v. State, 1 Conn. 502, Beale's Cas. 302; Birney v. State, 8 Ohio, 230, Beale's Cas. 303; Squire v. State, 46 Ind. 459; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266, Mikell's Cas. 202; Duncan v. State, 7 Humph. (Tenn.) 148; State v. Hause, 71 N. C. 518.

Sometimes a statute punishes any person who shall "knowingly" do the prohibited act. In such a case, it is clear that the offense is not committed by one who does the act in ignorance of the existence of the facts which render the statute applicable. This is so, for example, under a statute punishing any person who shall "knowingly" sell liquor to a minor without his parent's consent. Fielding v. State (Tex. Cr. App.) 52 S. W. 69.

[107] Ante, § 56.

[108] State v. Presnell, 12 Ired. (N. C.) 103, Beale's Cas. 177; Com. v. Farren, 9 Allen (Mass.) 489; Com. v. Mash, 7 Metc. (Mass.) 472, Beale's Cas. 304; State v. Kelly, 54 Ohio St. 166, 43 N. E. 163; State v. Smith, 10 R. I. 258.

[109] Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 134, 178; Duncan v. State, 7 Humph. (Tenn.) 148.

the courts and judges have differed, and some of the decisions cannot possibly be reconciled.

(*b*) *Particular Statutes.*—Mistake of fact, though *bona fide*, and not due to negligence, has been held by some of the courts, though in some cases not by others, to be no defense in prosecutions under statutes punishing the following offenses: Receiving two or more lunatics into an unlicensed house;[110] transportation of a slave, without written permission of his owner, by any railroad company, or by the owner or captain of any steamboat;[111] cutting and removing timber from school lands;[111a] keeping for sale or selling naphtha under an assumed name;[112] killing, for the purpose of sale, a calf less than four weeks old;[113] keeping for sale or selling adulterated milk,[114] or confectionery,[115] or tobacco,[116] or food or drugs,[117] or liquors;[118] keeping for sale or selling oleomargarine not so marked or colored as to show what it is;[119] keeping for sale or selling intoxicating liquors;[120] selling intoxicating liquors to

[110] Reg. v. Bishop, 5 Q. B. Div. 259.

[111] State v. Baltimore & S. Steam Co., 13 Md. 181.

But see Duncan v. State, 7 Humph. (Tenn.) 148; Birney v. State, 8 Ohio, 230, Beale's Cas. 303; post, notes, 125, 127.

[111a] State v. Dorman, 9 S. D. 528, 70 N. W. 848.

[112] Com. v. Wentworth, 118 Mass. 441.

[113] Com. v. Raymond, 97 Mass. 567.

[114] Com. v. Farren, 9 Allen (Mass.) 489; Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Com. v. Smith, 103 Mass. 444; State v. Smith, 10 R. I. 258; People v. Kibler, 106 N. Y. 321, 12 N. E. 795.

[115] See Com. v. Chase, 125 Mass. 202.

[116] Reg. v. Woodrow, 15 Mees. & W. 404.

[117] State v. Kelly, 54 Ohio St. 166, 177, 43 N. E. 163.

Sale of vinegar below a certain standard. People v. Worden Grocer Co., 118 Mich. 604, 77 N. W. 315.

[118] State v. Stanton, 37 Conn. 421, Mikell's Cas. 161.

[119] State v. Newton, 50 N. J. Law, 534, 14 Atl. 604; Com. v. Weiss, 139 Pa. 247, 21 Atl. 10, 23 Am. St. Rep. 182, Mikell's Cas. 202; State v. Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395; State v. Ryan, 70 N. H. 196, 46 Atl. 49, 85 Am. St. Rep. 629; Fox v. State, 94 Md. 143, 50 Atl. 700, 89 Am. St. Rep. 419.

[120] Com. v. Boynton, 2 Allen (Mass.) 160, Beale's Cas. 306; Com. v. O'Kean, 152 Mass. 584, 26 N. E. 97; Com. v. Goodman, 97 Mass. 117;

minors or to persons who are in the habit of becoming intoxicated;[121] permitting minors to play billiards, or to be in billiard rooms or saloons;[122] crimes against female children under a certain age.[122a]

Mistake or ignorance of fact, when *bona fide* and not due to negligence, has been held a good defense in prosecutions under statutes punishing the following offenses:[123] Being in possession of government stores marked with the government mark;[124] receiving or transporting of any colored person by the owner or captain of any steamboat, without particular evidence of his freedom;[125] allowing a vehicle to be used for travel on Sunday, except in a case of necessity or charity;[126]

King v. State, 66 Miss. 502, 6 So. 188. Contra, Farrell v. State, 32 Ohio St. 456.

[121] Barnes v. State, 19 Conn. 398; McCutcheon v. People, 69 Ill. 601; Farmer v. People, 77 Ill. 322; State v. Thompson, 74 Iowa, 119, 37 N. W. 104; Ulrich v. Com., 6 Bush (Ky.) 400; State v. Heck, 23 Minn. 549; In re Carlson's License, 127 Pa. 330, 18 Atl. 8; Com. v. Zelt, 138 Pa. 615, 21 Atl. 7; State v. Cain, 9 W. Va. 559; State v. Farr, 34 W. Va. 84, 11 S. E. 737; State v. Baer, 37 W. Va. 1, 16 S. E. 368; State v. Hartfiel, 24 Wis. 60; Redmond v. State, 36 Ark. 58; State v. Sasse, 6 S. D. 212, 60 N. W. 853; State v. Gulley, 41 Or. 318, 70 Pac. 385. And see Com. v. Finnegan, 124 Mass. 324.

Contra, Alder v. State, 55 Ala. 16; Brown v. State, 24 Ind. 113; Goetz v. State, 41 Ind. 162; Robinius v. State, 63 Ind. 235; Williams v. State, 48 Ind. 306; Mulreed v. State, 107 Ind. 62, 7 N. E. 884; Faulks v. People, 39 Mich. 200; People v. Welch, 71 Mich. 548, 39 N. W. 747; Crabtree v. State, 30 Ohio St. 382; Smith v. State, 55 Ala. 1.

[122] State v. Kinkead, 57 Conn. 173, 17 Atl. 855; State v. Probasco, 62 Iowa, 400, 17 N. W. 607; Com. v. Emmons, 98 Mass. 6. Contra, Marshall v. State, 49 Ala. 21; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266, Mikell's Cas. 202.

[122a] Reg. v. Prince, 13 Cox, C. C. 138, Mikell's Cas. 173; State v. Ruhl, 8 Iowa, 447; People v. Dolan, 96 Cal. 315, 31 Pac. 107; Riley v. State (Miss.) 18 So. 117; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504.

[123] See the cases cited as contra in notes preceding.

[124] Reg. v. Sleep, Leigh & C. 44. See, also, Rex v. Banks, 1 Esp. 144; Anon., Fost. C. L. 439, Beale's Cas. 284.

[125] Duncan v. State, 7 Humph. (Tenn.) 148. And see note 127, infra. Contra, see note 111, supra.

[126] Myers v. State, 1 Conn. 502, Beale's Cas. 302.

harboring or secreting slaves;[127] keeping for sale or selling diseased meat;[128] permitting Canada thistles to mature seed.[128a]

(*c*) *Bigamy and Adultery.*—In a number of cases the question has arisen whether ignorance or mistake of fact is a good defense in prosecutions for bigamy or adultery. Under statutes punishing any person who, being married, should marry any other person during the life of his or her wife or husband, some courts have held that a *bona fide* and reasonable belief in the death of the former husband or wife is a good defense, while others have held the contrary.[129]

The same is true of prosecutions for adultery in cohabiting after such marriage.[130]

[127] Birney v. State, 8 Ohio, 230, Beale's Cas. 303. See note 125, supra.

[128] Teague v. State, 25 Tex. App. 577, 8 S. W. 667.

[128a] Story v. People, 79 Ill. App. 562.

[129] In the leading English case of Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, Mikell's Cas. 134, 178, the majority of judges of the court of appeal, queen's bench division, held such belief a good defense, notwithstanding a proviso in the statute that it should not apply to any person marrying a second time after the absence of his or her wife or husband for seven years, without being known to such person to have been living within that time. As to this case, see ante, § 56 (b), note. The previous cases of Reg. v. Turner, 9 Cox, C. C. 145, Reg. v. Horton, 11 Cox, C. C. 670, and Reg. v. Moore, 13 Cox, C. C. 544, were in accord with this case; while Reg. v. Gibbons, 12 Cox, C. C. 237, and Reg. v. Bennett, 14 Cox, C. C. 45, were to the contrary.

In this country, there has been the same conflict. That such belief was a good defense was held in Squire v. State, 46 Ind. 459. That it was not a defense was held in State v. Goulden, 134 N. C. 743, 47 S. E. 450; Com. v. Mash, 7 Metc. (Mass.) 472, Beale's Cas. 304; Com. v. Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468; State v. Goodenow, 65 Me. 30, and State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784, overruling State v. Gardner, 5 Nev. 377. See, also, State v. Sherwood, 68 Vt. 414, 35 Atl. 352; Davis v. Com., 13 Bush (Ky.) 318; Rogers v. Com., 24 Ky. L. R. 119, 68 S. W. 14 (belief in divorce); People v. Hartman, 130 Cal. 487, 62 Pac. 823 (belief in invalidity of first marriage); Reynolds v. State, 58 Neb. 49, 78 N. W. 483.

Marrying a second time without reasonable belief of first spouse's death is bigamy. Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2.

[130] Where a woman marries and cohabits with a married man, not

(*d*) *Illegal Voting.*—On a prosecution for illegal voting, it is a good defense to show that the accused believed in good faith in the existence of facts which, if they had existed, would have rendered his vote legal, as that he was twenty-one years of age, that he was born in the United States, that he had resided in the district for the time fixed by the statute, etc.[131]

(*e*) *Keeping Disorderly House.*—A statute punishing any person who shall keep a place resorted to for the purpose of gambling, or for the purpose of prostitution, is to be construed as requiring knowledge that the place is resorted to for such a purpose.[132]

71. Effect of Being Engaged in Unlawful Act.

(*a*) *In General.*—As was explained in a former section, there are many cases in which a person may be held criminally responsible for results not intended by him, because of the fact that he was engaged in the commission of an unlawful act.[133]

knowing of his previous marriage, she is not guilty of adultery. Vaughan v. State, 83 Ala. 55, 3 So. 530; Banks v. State, 96 Ala. 78, 11 So. 404.

In Com. v. Thompson, 6 Allen (Mass.) 591, 83 Am. Dec. 653, Beale's Cas. 308, it was held that a man could not be convicted of adultery, who, in good faith, married and cohabited with a woman whose husband had been absent for more than seven years without being heard from, and was believed by both parties to be dead. The court was influenced by a statute punishing bigamy, which contained a proviso that it should not apply in such a case.

On a new trial in this case, it appeared that the woman had deserted her husband, and remained away for seven years without hearing from him or making inquiry, and a conviction was sustained. Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

[131] Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Carter v. State, 55 Ala. 181; McGuire v. State, 7 Humph. (Tenn.) 54.

If he knew all the facts, however, mistake as to the law is no excuse. Post, § 73.

As to the distinction between mistake of law and mistake of fact, in reference to illegal voting, see McGuire v. State, 7 Humph. (Tenn.) 54.

[132] State v. Currier, 23 Me. 43.

[133] Ante, § 59. See Reg. v. Latimer, 16 Cox, C. C. 70, Mikell's Cas. 163.

In such a case his ignorance or mistake of fact is no defense. Thus, a man may be guilty of murder if he unintentionally kills another while engaged in the commission of some other felony.[134] A man who maliciously shoots at a person and kills him is guilty of murdering that person, though he may have intended to kill some other person.[135] A man is guilty of manslaughter if he assaults another and unintentionally causes his death.[136] It has also been held that a person who stabs another with intent to kill is guilty of an assault with intent to kill him, though he may have mistaken him for some one else.[137]

(*b*) *Immoral Acts.*—If a man is engaged in the commission of an immoral act, even though it may not be indictable, and unintentionally commits a crime, it is generally no defense for him to show that he was ignorant of the existence of the circumstances rendering his act criminal.[138] Thus, a man who has unlawful sexual intercourse with a woman cannot defend against a charge of adultery on the ground that he did not know that the woman was married.[139] And a man who has intercourse with a girl below the age of consent, with her consent, cannot defend against a charge of rape, or unlawful carnal knowledge punished by statute, on the ground that he reasonably believed her to be above the age of consent.[140]

The same principle applies under a statute punishing any person who shall unlawfully take any unmarried girl under a

[134] Post, § 248.

[135] Post, § 241(b).

[136] Post, § 263.

[137] McGehee v. State, 62 Miss. 772. As to this, however, there is a conflict in the cases. See post, § 208.

[138] State v. Ruhl, 8 Iowa, 447; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496.

[139] Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; Fox v. State, 3 Tex. App. 329, 30 Am. Rep. 144.

[140] Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496; State v. Houx, 109 Mo. 654, 19 S. W. 35; State v. Newton, 44 Iowa, 45.

certain age out of the possession and against the will of her father,[141] or who shall abduct or entice away any girl under a certain age for the purpose of prostitution, etc.[142]

(*c*) *Acts Merely Mala Prohibita.*—The principle that a man who is engaged in the commission of an unlawful act is responsible for unintended results due to his ignorance of fact does not apply where the act is merely *malum prohibitum.* Thus it has been held that a man who drives over another is not guilty of criminal assault and battery merely because he was driving at a speed prohibited by an ordinance.[143]

(*d*) *Mere Civil Wrongs.*—Nor does the principle apply where the act was a mere civil wrong. Thus, a man who wrongfully threw another's package into the sea, though guilty of a civil trespass, was held not guilty of manslaughter because he unintentionally killed a person who was bathing in the sea.[144]

[141] In Reg. v. Prince, L. R. 2 C. C. 154, 13 Cox, C. C. 138, Mikell's Cas. 173, a man was convicted under a statute of unlawfully taking an unmarried girl, under the age of 16, out of the possession and against the will of her father. It was proved that he did take the girl, and that she was under 16, but that he believed and had good reason for believing that she was over 16. It was held that this mistake of fact was no defense, and that he was properly convicted. See, also, Reg. v. Robins, 1 Car. & K. 456; Reg. v. Booth, 12 Cox, C. C. 231. Compare Reg. v. Hibbert, L. R. 1 C. C. 184, 11 Cox, C. C. 246.

[142] State v. Ruhl, 8 Iowa, 447; People v. Dolan, 96 Cal. 315, 31 Pac. 107. Contra, Mason v. State, 29 Tex. App. 24, 14 S. W. 71.

[143] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204, Mikell's Cas. 160; 1 Hale, P. C. 39; Fost. C. L. 259.

"It is true that one in pursuit of an unlawful act may sometimes be punished for another act, done without design and by mistake, if the act done was one for which he could have been punished if done willfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction: That if the act the party was doing was merely malum prohibitum, he should not be punishable for the act arising from misfortune or mistake; but, if malum in se, it is otherwise." Com. v. Adams, supra.

[144] Reg. v. Franklin, 15 Cox, C. C. 163, Beale's Cas. 203, Mikell's Cas. 158.

72. Negligence.

Ignorance of fact is no defense, as a general rule, if the accused could have known the facts if he had exercised reasonable care and diligence.[145] Thus, a person who negligently throws a board from a building into the street, and kills a person on the street, cannot escape responsibility for the homicide on the ground that he did not know any person was passing along the street.[146] The same is true of a man who causes another's death by negligent use of a gun which he believes to be unloaded,[147] or by the use of dangerous drugs which he does not understand, etc.[148]

The same principle applies to statutory offenses, on a prose cution for which non-negligent ignorance of fact would be hel an excuse. Thus, in those states in which it is held that statute punishing the sale of intoxicating liquors to minors drunkards does not apply where a person sells to a minor drunkard in the *bona fide* and reasonable belief that he is ov twenty-one years of age, or not a drunkard,[149] it has been h that such belief is no defense if there is negligence, as wh the belief is based merely on the statement of the party h self.[150]

The same is true under a statute punishing bigamy.[151]

[145] Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2; Swigart v. Stat Ind. 111.

[146] Post, § 264.

[147] Post, § 264(c).

[148] Post, § 264(c).

[149] Ante, § 70 (b).

[150] Swigart v. State, 99 Ind. 111; Goetz v. State, 41 Ind. 162; tree v. State, 30 Ohio St. 382.

[151] A man who marries a second time during his first wife without reasonable grounds to believe her to be dead, is liable dictment for bigamy. Dotson v. State, 62 Ala. 141, 34 Am.] Reynolds v. State, 58 Neb. 49, 78 N. W. 483.

[152] 1 Coke, 177; Broom, Leg. Max. 253; 1 Hale, P. C. 42; Rex v. Russ. & R. 1, Beale's Cas. 280; The Barronet's Case, 1 El. & Bl.

III. Ignorance or Mistake of Law.

73. In General.—Every person is conclusively presumed to know the law, and, on a prosecution for a crime, ignorance or mistake of law is no excuse. The rule does not apply, however, where, by reason of mistake as to one's legal rights, there was an absence of a specific criminal intent which is essential to the crime charged.

There is no principle of the criminal law that is better settled than this. The maxim is, *"ignorantia legis neminem excusat."* Every man is conclusively presumed to know the law, and on a prosecution for a crime, whether common law or statutory, he cannot escape responsibility by showing that he was ignorant or mistaken as to the law,[152] even though he may

v. Esop, 7 Car. & P. 456, Beale's Cas. 282; Rex v. Thurston, 1 Lev. 91, Mikell's Cas. 237; Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; State v. Goodenow, 65 Me. 30, Beale's Cas. 309; Jellico Coal Min. Co. v. Com., 96 Ky. 373, 29 S. W. 26; Halstead v. State, 41 N. J. Law, 552, 32 Am. Rep. 247, Mikell's Cas. 192; Lancaster v. State, 3 Cold. (Tenn.) 340, 91 Am. Dec. 288; State v. Welch, 73 Mo. 284, 39 Am. Rep. 515; Fraser v. State, 112 Ga. 13, 37 S. E. 114; State v. Foster, 22 R. I. 163, 46 Atl. 833; Weston v. Com., 111 Pa. 251, 2 Atl. 191; State v. McLean, 121 N. C. 589, 28 S. E. 140; State v. Southern Ry. Co., 122 N. C. 1052, 30 S. E. 133; State v. Carver, 69 N. H. 216, 39 Atl. 973; Begley v. Com., 22 Ky. L. R. 1546, 60 S. W. 847. And see the other cases cited in the notes following.

"'Ignorantia legis neminem excusat.' Everyone competent to act for himself is presumed to know the law. No one is allowed to excuse himself by pleading ignorance. Courts are compelled to act upon this rule, as well in criminal as civil matters. It lies at the foundation of the administration of justice. And there is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced into every trial by conflicting evidence upon the question of ignorance. * * * To allow ignorance as an excuse would be to offer a reward to the ignorant." Per Pearson, J., in State v. Boyett, 10 Ired. (N. C.) 336, 343, Mikell's Cas. 238.

"The maxim, *ignorantia legis neminem excusat*, is a stern, but inflexible and necessary rule of law, that has no exceptions in judicial

have acted in the most perfect good faith, and under advice of counsel.[153]

Application of the Rule.—Thus, on a prosecution for bigamy in violation of an act of congress, it was held that the accused could not escape responsibility by showing that he was a Mormon, and that he married the second wife in accordance with his religious belief, and thinking that he had a right to do so. His belief that the law did not apply to him, or that it was unconstitutional, was nothing more than ignorance or mistake of the law.[154]

The principle also applies in a prosecution for bigamy or adultery, in which the accused sets up in defense that he believed that a void decree of divorce obtained by him or the other party was valid,[155] or that by reason of any other mistake as to the law he believed he had a right to do the act with which he is charged.[156]

administration, and the former erroneous ruling of this court furnishes no excuse which we can recognize." Hoover v. State, 59 Ala. 60. Compare State v. Bell, 136 N. C. 674, 49 S. E. 163.

[153] Halstead v. State, 41 N. J. Law, 552, 32 Am. Rep. 247, Mikell's Cas. 192; State v. Huff, 89 Me. 521, 36 Atl. 1000. And see State v. Goodenow, 65 Me. 30, Beale's Cas. 309; State v. Hughes, 58 Iowa, 165, 11 N. W. 706; People v. Weed, 29 Hun (N. Y.) 628; Com. v. Bradford, 9 Metc. (Mass.) 268; State v. Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339.

[154] Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179.

[155] State v. Goodenow, 65 Me. 30, Beale's Cas. 309; State v. Hughes, 58 Iowa, 165, 11 N. W. 706; State v. Whitcomb, 52 Iowa, 85, 2 N. W. 970, 35 Am. Rep. 258; Russell v. State, 66 Ark. 185, 49 S. W. 821; Reynolds v. State, 58 Neb. 49, 78 N. W. 483. And see Davis v. Com., 13 Bush (Ky.) 318; State v. Armington, 25 Minn. 29. Compare Squire v. State, 46 Ind. 459.

[156] See Medrano v. State, 32 Tex. Cr. R. 214, 22 S. W. 684; State v. Hughes, 58 Iowa, 165, 11 N. W. 706; People v. Weed, 29 Hun (N. Y.) 628.

In People v. Cook, 39 Mich. 236, defendant believed he had a right to kill deceased to prevent seduction of his sister.

In State v. Goodenow, 65 Me. 30, Beale's Cas. 309, a man and woman attempted to marry and cohabited while the woman had another husband living. On a prosecution for adultery, it appeared that her

The same is true when ignorance or mistake of law is set up as a defense in prosecutions for illegally voting at an election,[157] for gaming or keeping a gaming house or device, etc.,[158] for compounding felony,[158a] for carrying concealed weapons,[158b] or for obtaining property by means of false and fraudulent representations.[159]

husband had married again, and that they were advised by the justice who married them that this gave her a right to marry again, and that they married and cohabited in good faith. It was held that this was no excuse, as they could not set up their ignorance of law.

In Hoover v. State, 59 Ala. 57, which was a prosecution against a negro man for cohabiting with a white woman, in violation of a statute making it an offense for white and colored persons to intermarry or to live together in adultery or fornication, and declaring such marriages void, it was held no defense for the defendant to show that, prior to his attempted marriage with the woman, the probate judge advised him that it was lawful for him to marry her, since ignorance of the law was no excuse. "The maxim '*ignorantia legis neminem excusat*,'" said the court, "is a stern but inflexible and necessary rule of law, that has no exceptions in judicial administration."

[157] U. S. v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459; Hamilton v. People, 57 Barb. (N. Y.) 625; State v. Boyett, 10 Ired. (N. C.) 336, Mikell's Cas. 238; McGuire v. State, 7 Humph. (Tenn.) 54. And see State v. Sheeley, 15 Iowa, 404.

The contrary was held under a statute punishing any person who should vote, "knowing himself not to be a qualified voter." Com. v. Bradford, 9 Metc. (Mass.) 268; Winehart v. State, 6 Ind. 30.

[158] Thus, a person exhibiting and keeping a gambling device, in violation of a statute, cannot escape liability on the ground that he did so in good faith, believing he had a right to do so under a license, where the license was unauthorized and void. Atkins v. State, 95 Tenn. 474, 32 S. W. 391.

In a prosecution for keeping and operating a pool room for betting on horse races, in violation of a statute, it is no defense that the accused was ignorant of the law, and believed that a license issued to him by the municipal authorities authorized his illegal act. Debardelaben v. State, 99 Tenn. 649, 42 S. W. 684.

[158a] State v. Carver, 69 N. H. 216, 39 Atl. 973.

[158b] An unconstitutional statute attempting to confer the right is no defense. Swincher v. Com., 24 Ky. L. R. 1897, 72 S. W. 306.

[159] When a person obtains another's property by making false representations, with intent to deceive, it is no defense that he did not

74. Reasonable and Unavoidable Ignorance of Law.

The presumption that every person knows the law, within the meaning of this rule, is not a rebuttable presumption of fact, but it is a conclusive presumption of law. It can make no difference, therefore, in the application of the rule, that the accused was a foreigner, temporarily in the country, and that the act was permitted by the laws of his own country.[160]

The rule applies in all cases, even though it may clearly appear that the accused could not possibly know the law.[161]

It applies even though the state may admit his ignorance of the law at the trial.[162]

75. Mistake of Law Negativing Specific Intent.

The rule that mistake of law is no defense does not apply where a specific evil intent is an essential element of the offense charged, and proof of the mistake as to the law negatives the existence of such intent. Thus, on a prosecution for larceny or robbery, to constitute which an intent to steal is necessary, the

know that he was violating the statute against false pretenses. Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77.

[160] See The Barronet's Case, 1 El. & Bl. 1, where a Frenchman fought a duel in England, by the laws of which dueling was unlawful, though it was lawful under the French law; and Rex v. Esop, 7 Car. & P. 456, Beale's Cas. 282, where a person from Bagdad committed an unnatural crime on a ship, at the dock in England, and was convicted, though, by the laws of his own country, it was not considered a crime.

[161] See Rex v. Bailey, Russ. & R. 1, Beale's Cas. 280, where the defendant was convicted of a crime under a statute passed after he had sailed from England, the act having been committed on the vessel before its return to England, and Rex v. Thurston, 1 Lev. 91, Mikell's Cas. 237, in which the question of murder depended on the legality of an attempted arrest, which was illegal when attempted but was subsequently made legal by act of parliament.

[162] Jellico Coal Min. Co. v. Com., 96 Ky. 373, 29 S. W. 26. Want of notice of a municipal ordinance, other than that given the general public, is no defense to a prosecution for violating it. Sands v. Inhabitants of Trenton (N. J. Law) 57 Atl. 767.

accused may show that he believed in good faith that he had a legal right to the property.[163] Likewise an officer on indictment for extortion may show that he believed he had a legal right to the fee collected.[163a] And on a prosecution for perjury the accused may show that there was no corrupt intent because he swore in good faith after seeking the advice of counsel.[164]

The same principle has been applied in prosecutions for malicious mischief,[164a] trespass,[164b] "maliciously" setting fire to any furze or fern,[165] conspiracy,[165a] neglect of official duty,[165b] and defrauding the revenue.[165c]

The existence of a custom or usage to violate the law is no defense.[165d]

IV. Justification.

76. In General.—There are some circumstances under which an act which would otherwise be a crime is justifiable. In such a case no crime at all is committed. The grounds which have been relied upon as constituting justification, and which may or may not justify, according to the circumstances, are:

1. Public authority.

2. Domestic authority.

3. Prevention of offenses.

[163] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; People v. Husband, 36 Mich. 306; post, §§ 327, 378; Com. v. Stebbins, 8 Gray (Mass.) 494. Finding bank note, Reg. v. Reed, Car. & M. 306.

[163a] Cutler v. State, 36 N. J. Law, 125, Mikell's Cas. 241; Leeman v. State, 35 Ark. 438.

[164] U. S. v. Stanley, 6 McLean (U. S.) 409, Fed. Cas. No. 16,376; U. S. v. Conner, 3 McLean (U. S.) 573, Fed. Cas. No. 14,847; State v. McKinney, 42 Iowa, 205; post, § 431(d).

[164a] Goforth v. State, 8 Humph. (Tenn.) 37.

[164b] State v. Hause, 71 N. C. 518; Wiggins v. State, 119 Ga. 216, 46 S. E. 86.

[165] Reg. v. Twose, 14 Cox, C. C. 327, Beale's Cas. 283.

[165a] People v. Powell, 63 N. Y. 88.

[165b] State v. Bair (Ohio) 73 N. E. 514.

[165c] Reg. v. Allday, 8 Car. & P. 136.

[165d] Post, § 84.

4. Defense of one's person or property.
5. Defense of other persons.
6. Necessity.
7. Compulsion or command.
8. Custom.

77. Public Authority.

(*a*) *In General.*—It may be laid down as an undoubted principle that a person who does an act under valid public sanction or authority, and without exceeding or abusing such authority, is guilty of no crime, though the same act would be a crime if committed without such authority.[166]

Some of the plainest cases are the execution of a criminal by the proper officer in a proper manner under a valid conviction and sentence for a capital offense;[167] authorized arrest and imprisonment of criminals or persons accused of crime;[168] and the killing of a person necessarily in order to arrest for a felony or to prevent an escape.[169]

What would otherwise be a common nuisance may be justified on this ground. If, in order to prevent the spread of an epidemic disease, inconvenience is caused to a few persons by the smoke and noxious vapors arising from the burning of infected clothing and bedding, and if the burning is done by public authority or sanction, in good faith, for the public safety, and such means are employed as are usually resorted to and approved by medical science in such cases, and if done with

[166] See Reg. v. Lesley, Bell, C. C. 220, 8 Cox, C. C. 269, Beale's Cas. 311, Mikell's Cas. 86; State v. Mayor, etc., of Knoxville, 12 Lea (Tenn.) 146, Beale's Cas. 313.

[167] Fost. C. L. 267; Beale's Cas. 311; 1 Hale, P. C. 496, Mikell's Cas. 392; post, § 267.

[168] See Reg. v. Lesley, supra. And see post, § 211.

[169] Fost. C. L. 267; Beale's Cas. 311; U. S. v. Clark, 31 Fed. 710, Beale's Cas. 310; †Leonin's Case, Select Pleas of the Crown, Sel. Soc. Pl. 133, Mikell's Cas. 393; U. S. v. Rice, 1 Hughes, 560, Fed. Cas. No. 16,153, Mikell's Cas. 394; post, § 271.

reasonable care and regard for the safety of others, there is no indictable nuisance.[170]

And where one was prosecuted for illegally taking fish, it was held that authority from the fish commissioner to take them for him for the purpose of obtaining spawn was a complete defense.[170a]

(*b*) *Laws are without Extra-territorial Effect.*—When the laws of a country are relied upon as justification for an act, it must be borne in mind that the laws of a country have no extra-territorial effect, subject to the qualification that the ships of a country are regarded as a part of its territory, though they may be on the high seas. This is well illustrated by an English case in which the defendant was convicted on an indictment charging him with assaulting the prosecutors on the high seas, and imprisoning and detaining them. It appeared that the prosecutors were Chilian subjects, and had been ordered by the government of Chili to be banished from that country to England. The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, contracted with the Chilian government to take the prosecutors from Valparaiso to Liverpool, and they were accordingly brought on board his vessel by the officers of the government, and carried by him to Liverpool under his contract. It was held that, although the conviction could not be supported for the assault and imprisonment in the Chilian waters, it must be sustained for that which was done out of the Chilian territory. Although the defendant was justified in receiving the prosecutors on board his vessel in Chili, that justification ceased when he passed the line of Chilian jurisdiction, and, as his wrongful detention thereafter was on an English vessel, he was guilty of an offense punishable by English law.[171]

[170] State v. Mayor, etc., of Knoxville, 12 Lea (Tenn.) 146, Beale's Cas. 313.

[170a] State v. McDonald, 109 Wis. 506, 85 N. W. 502.

[171] Reg. v. Lesley, Bell, C. C. 220, 8 Cox, C. C. 269, Beale's Cas. 311, Mikell's Cas. 86.

78. Domestic Authority.

A father, or other person standing *in loco parentis,* has authority to give reasonable correction to his child, and in doing so he is not guilty of an assault and battery, nor of felonious homicide if death ensues without his fault; but if the correction exceeds the bounds of moderation, either in the measure of it or in the instrument used, his authority is no justification, but he is guilty of assault and battery, manslaughter, or murder, according to the circumstances.[172]

The same principles were formerly applicable to husband and wife, master and servant, and teacher and pupil, but the extent to which this is now the case is not clear.[173]

79. Prevention of Offenses.

It is not only the right, but the duty, of every person, whether an officer or merely a private person, to prevent the commission of a felony, and acts done for this purpose, if necessary, are justifiable. If a felony can be prevented in no other way, even a homicide will be justifiable.[174] To be justifiable, the homicide must be necessary, and must be committed in order to prevent the felony.[175] For this reason the rule does not extend to a secret felony, like larceny, but only to such felonies as are committed by force or surprise, like murder, rape, robbery, burglary, etc.[176]

Homicide to prevent the commission of a misdemeanor or of a bare trespass is not justifiable,[177] though an assault and battery may be justified on such ground.[178] Even a homicide may

[172] Fost. C. L. 262; Beale's Cas. 315; Reg. v. Griffin, 11 Cox, C. C. 402, Beale's Cas. 315; post, §§ 211, 263(c), 274.

[173] See post, §§ 211, 263(c), 274.

[174] Rex v. Compton, Lib. Ass'n 97, pl. 55, Beale's Cas. 316; †Howell's Case, Select Pleas of the Crown, Sel. Soc. Pl. 145, Mikell's Cas. 406; post, § 268.

[175] Reg. v. Dadson, 4 Cox, C. C. 358, Beale's Cas. 317; post, § 268(c).

[176] Reg. v. Murphy, 1 Craw. & D. 20, Beale's Cas. 318; post, § 268(c).

[177] Post, § 269.

[178] Post, § 211.

be justifiable if necessarily committed in an attempt to suppress a riot or affray.[179]

80. Defense of One's Person or Property.

(*a*) *In General.*—It is an elementary principle of the common law that a man has the right to defend his life, liberty, and property. This right is not only given to him by the common law, but in many states it is guaranteed by the declaration of rights or constitution, so that he cannot be deprived of the right by the legislature. Speaking generally, "the right of defense is the right to do whatever apparently is reasonably necessary to be done in defense under the circumstances of the case."[180]

(*b*) *Defense of One's Person.*—A man is not bound to submit to an assault upon himself, and seek redress in the courts, but may oppose force by force in self-defense, and his acts will be justifiable, provided they do not exceed the bounds of necessity, and provided he was not himself in fault in bringing on the necessity for self-defense. Striking another to prevent a threatened assault and battery is not a crime at all. A homicide is justifiable, not merely excusable, if necessarily committed by a person, who is without fault himself, in order to save his own life or to prevent great bodily harm, or to prevent the commission of a known felony by violence or surprise upon his person, his habitation, or his property. It was said by Foster: "In the case of justifiable self-defense the injured party may repel force by force in defense 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 bound 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. * * * Where a known felony is attempted

[179] Post, § 270.

[180] Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

upon the person, be it to rob or murder, here the party assaulted may repel force by force * * * and, if death ensueth, the party will be justified. * * * A woman, in defense of her chastity, may lawfully kill a person attempting to commit a rape upon her. * * * An attempt is made to commit arson or burglary in the habitation; the owner, or any part of his family, or even a lodger with him, may lawfully kill the assailants for preventing the mischief intended."[181]

(*c*) *Defense of One's Property.*—A man not only has a right to defend his life and his person, but he also has a right to defend his property. He cannot take another's life, or inflict grievous bodily harm, merely in defense of property, but he may use necessary means short of this, and his acts in such necessary defense will not be a crime either at common law or under a statute.[182]

Where a statute imposed a penalty upon any person who, between certain days, should in any way destroy mink, beaver, otter, etc., it was held that the statute did not apply to one who killed minks between such days, where he did so in apparently necessary defense of his poultry.[183]

The same principle has been applied to the killing, trapping, or otherwise injuring dogs, hogs, and other animals in defense of property.[184]

(*d*) *Necessity for Defense.*—To give rise to the right of defense, whether of life, or of the person, or of property, there

[181] Fost. C. L. 273; Beale's Cas. 326; †Anon. Fitzh. Abr., Corone. Pl. 284, Mikell's Cas. 411; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286, Beale's Cas. 330. See post, §§ 276-285, where the right of self defense is treated at length.

[182] Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

An unintentional homicide, committed in the necessary defense of property, is excusable. Hinchcliffe's Case, 1 Lewin, C. C. 161, Mikell's Cas. 446.

[183] Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

[184] Hodge v. State, 11 Lea (Tenn.) 528, 47 Am. Rep. 307; Thompson v. State, 67 Ala. 106, 42 Am. Rep. 101; Lott v. State, 9 Tex. App. 206. And see the note in 47 Am. Rep. 310.

must be necessity for defense, and the acts done in defense, to be justifiable, must not go beyond the necessity.[185] "When force, purely defensive at first, increases and becomes more than is reasonably necessary for defense, the excess is aggressive, and not defensive."[186]

To justify the defensive destruction of human life, the danger must be, not problematical and remote, but evident and immediate, or imminent.[187] And so it is in defense of property.[188] But imminence of danger, as was said in a New Hampshire case, "is relative and not absolute, and is measured more by the nature of the consequences than by the lapse of time. It is not a condition of things in which the party whose person or property is imperiled is allowed to anticipate, and prevent the impending mischief by making a deadly defense only a precise and invariable number of seconds, minutes, hours, or days before the mischief would happen without such defense. The law does not fix the distance of time between the justifiable defense and the mischief, for all cases, by the clock or calendar. The chronological part of the doctrine of defense, like the rest of it, is a matter of reasonableness; and the reasonableness depends upon circumstances."[189]

Apparent Danger.—In determining whether an act claimed to have been done in self-defense was necessary, the question is not whether there was *real* necessity, but whether there was

[185] Creighton v. Com., 84 Ky. 103, Beale's Cas. 339; Floyd v. State, 36 Ga. 91, Mikell's Cas. 412; Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339; State v. Rheams, 34 Minn. 18, 24 N. W. 302.

[186] Aldrich v. Wright, supra.

[187] Post, § 279.

[188] Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

[189] Aldrich v. Wright, supra. This was a case in which the defendant killed minks in defense of his poultry, and set up defense of property in an action for a penalty under a statute against destroying minks between certain dates.

reasonably apparent necessity. This is true as respects both defense of life[190] and defense of property.[191]

Elsewhere Treated.—The whole subject of self-defense and defense of property will be fully treated, and to better advantage, in dealing with homicide and assault and battery.[192] To treat it further here would result in useless repetition.

81. Defense of Others.

There are many cases in which a person may be justified in interfering in defense of others than himself. If a man is assaulted by another, his servant may interfere in his defense, and *vice versa*.[193] The same is true of parent and child.[194] And in the case of attempted arson or burglary, a guest or lodger may interfere and act in defense in the same manner as the owner himself might do.[195]

As was shown in a previous section, any person may lawfully interfere, and even take life, to prevent a felony attempted by violence or surprise.[196] In other cases the right of a person to

[190] Shorter v. People, 2 N. Y. 197, 51 Am. Dec. 286, Beale's Cas. 330; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

[191] Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

[192] Post, §§ 212-214, 276-288.

[193] 1 East, P. C. 289; Fost. C. L. 273, Beale's Cas. 326, 343; post, §§ 215, 288.

[194] Reg. v. Rose, 15 Cox, C. C. 540, Beale's Cas. 343; (where a son shot his father in defense of his mother); Campbell v. Com., 88 Ky. 402, 11 S. W. 290 (where it was held that a father has a right to defend his daughter against an assault and battery by her husband); Com. v. Malone, 114 Mass. 295 (where it was held that an assault and battery by a mother to prevent an indecent assault upon her sixteen-year-old daughter was justifiable). Patten v. People, 18 Mich. 314, Mikell's Cas. 433 (where a son killed a rioter in defense of his mother). And see post, §§ 215, 288.

A parent may not protect his child in committing an assault. State v. Herdina, 25 Minn. 161.

[195] 1 East, P. C. 290, Fost. C. L. 273; Beale's Cas. 326, 343; post, §§ 287, 288.

interfere in defense of a stranger is not clear. A stranger would no doubt be justified in interfering to prevent an assault upon one who is clearly without fault without being guilty of an assault and battery, and he may interfere as a mediator to preserve the peace in the case of an affray.[197] A stranger, however, cannot lawfully interfere in an affray, and take the part of one party against the other.[198]

82. Necessity.

(*a*) *In General.*—"An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided."[199]

The cases referred to in previous sections under this subdivision are treated in the books as cases of necessity, as the execution of criminals, the arrest and detention of criminals, the prevention of felony, suppression of riots and affrays, necessary defense of person or property, etc. There are many other cases of necessity besides these.

[196] Ante, § 79.

[197] See 1 East, P. C. 290, Beale's Cas. 343.

[198] 1 East, P. C. 290, Beale's Cas. 343.

[199] Steph. Dig. Crim. Law, art. 32, citing Rex v. Stratton, 21 How. St. Tr. 1045, wherein it was said by Lord Mansfield: "Wherever necessity forces a man to do an illegal act,—forces him to do it,—it justifies him, because no man can be guilty of a crime without the will and intention of his mind." See Beale's Cas. 361, note.

A parent cannot be convicted of withdrawing his child from school without consent of the school board, where such action is necessary because of the child's ill health. State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

(*b*) *Larceny.*—It is said by Lord Bacon that, if a man steal viands to satisfy his present hunger, this is no felony nor larceny;[200] and this is no doubt true if the case is one of actual necessity. Stealing cannot be justified on the ground of necessity, however, where, as is now generally the case, relief may be obtained by application to the public authorities.

(*c*) *Homicide to Save Life.*—It is also said by Lord Bacon that "if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat side, to keep himself above water, and another, to save his life, thrust him from it, whereby he is drowned, this is neither *se defendendo,* nor by misadventure, but is justifiable."[201]

It is extremely doubtful, however, whether a man is justified in taking another's life to save his own, where the necessity is not due to the other's fault, and there are decisions to the effect that he is not.[202] Homicide in self-defense has been considered in a previous section.

[200] Bacon's Maxims, reg. 5, Beale's Cas. 356.

[201] Bacon's Maxims, reg. 5, Beale's Cas. 356.

[202] Brewer v. State (Ark.) 78 S. W. 773. Thus, in Reg. v. Dudley, 15 Cox, C. C. 624, 14 Q. B. Div. 273, Beale's Cas. 357, Mikell's Cas. 131, note, it was held that a man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder, although at the time of the act he is in such circumstances that he believes, and has reasonable grounds for believing, that it affords the only chance of preserving his life. In this case it appeared that the defendants, D. and S., seamen, and the deceased, a boy who was with them, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1,000 miles from land; that on the eighteenth day, when they had been seven days without food, and five without water, D. proposed to S. that lots should be cast to determine who should be put to death to save the others, and that they afterwards thought it would be better to kill the boy, that their lives should be saved; that on the twentieth day they killed the boy, and fed on his flesh for four days, when they were rescued by a vessel. At the time of the act there was no sail in sight, nor any reasonable prospect of

(*d*) *Failure to Repair Highway.*—Other cases of necessity are clearer. Thus, a person cannot be held responsible for failure to repair or restore a highway, where all the materials with which the same might be repaired or restored have been swept away by the act of God, as by the sea, so that it is impossible for him to repair or restore it.[203]

(*e*) *Joining Rebellion.*—A person is not guilty in joining a rebellion, if it is necessary to save his life.[204]

(*f*) *Crew Deposing Master.*—The crew of a vessel are not guilty of a crime in arising and deposing the master, if it is a case of necessity.[205]

(*g*) *Violation of Embargo Laws.*—A vessel is not liable for a violation of the embargo laws where during a legitimate voyage she is obliged by stress of weather to take refuge in a proscribed port.[205a]

(*h*) *Stopping a Vehicle in Street.*—The driver of a vehicle is not liable for stopping in the street in violation of a statute,

relief. It was held that the homicide was not justifiable, and that the defendants were guilty of murder.

In U. S. v. Holmes, 1 Wall, Jr. 1, Fed. Cas. No. 15,383, Mikell's Cas. 132, n. there is dictum by Judge Baldwin to the effect that, if two persons, who owe no duty to each other that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive, neither would commit a crime in saving his own life in a struggle for the only means of safety; and also that, if several persons should be cast away in a boat without food, and the killing and eating of one should be necessary to save the others, a killing of one after the casting of lots would be justifiable. It was held, however, that, in applying the law, regard must be had not only to the jeopardy in which the parties are, but also to the relations in which they stand, and that the slayer must be under no obligation to make his own safety secondary to the safety of the person killed. And it was therefore held that a sailor on a vessel is not justified in killing a passenger in order to save himself.

[203] Reg. v. Bamber, 5 Q. B. 279, Beale's Cas. 356.

[204] See Respublica v. McCarty, 2 Dall. (Pa.) 86, Beale's Cas. 364; McGrowther's Case, Fost. C. L. 13, Beale's Cas. 273.

[205] U. S. v. Ashton, 2 Sumn. 13, Fed. Cas. No. 14,470, Mikell's Cas. 128.

[205a] The William Gray, 1 Paine, 16, Fed. Cas. No. 17,694.

where he is unavoidably delayed by the crowding of other vehicles.[206]

(*i*) *Violation of Liquor Laws.*—A physician or druggist who furnishes intoxicating liquors as a medicine, in good faith, and in a proper case, is not guilty under a statute punishing generally the sale of intoxicating liquors.[207]

But a prosecution for carrying liquor to church cannot be defended on the ground that it had been prescribed for defendant's wife.[207a]

(*j*) *Violation of Food Law.*—The sale of an adulterated article of food has been held criminal in Ohio, though made pursuant to a statute requiring manufacturers and dealers to furnish samples for analysis on demand and tender of price.[207b]

(*k*) *Sunday Labor.*—Labor on Sunday may be justifiable in a case of necessity, notwithstanding a statute prohibiting and punishing labor on that day.[208]

83. Compulsion or Command.

(*a*) *In General.*—"An act which, if done willingly, would make a person a principal in the second degree, or an aider and abettor, in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because, during the whole of the time it is being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm, if he refuses; but threats of future injury, or the com-

[206] Com. v. Brooks, 99 Mass. 434, Beale's Cas. 364.

[207] State v. Wray, 72 N. C. 253, Beale's Cas. 366, Mikell's Cas. 209; Nixon v. State, 76 Ind. 524.

[207a] Bice v. State, 109 Ga. 117, 34 S. E. 202.

[207b] State v. Rippeth (Ohio) 72 N. E. 298.

[208] Com. v. Knox, 6 Mass. 76. The necessity, however, must be actual; where defendant harvested his wheat on Sunday, after working through the week for others, the facts that he was poor, had no cradle and waited until his neighbor had finished to borrow one, and that his wheat was overripe, are no defense. State v. Goff, 20 Ark. 289, Mikell's Cas. 132; post, § 451.

mand of any one not the husband of the offender, do not excuse any offense."[209]

Illustrations.—According to this principle, a person who joins with others in a rebellion or in other treasonable acts is not criminally responsible therefor, if, during the whole time he is with them, he is compelled to remain and take part by threats of death or great bodily harm.[210]

The same is true where a person is so compelled to go with a mob and to assist in the destruction of property, or to join in a riot.[211] It is very doubtful, however, whether fear of personal danger will excuse a man who joins in committing a homicide.[212]

(*b*) *Threats of Future Injury.*—Compulsion does not amount to a defense where the threats are of future injury only. The threatened injury must be present and impending.[213]

(*c*) *Threats of Injury to Property.*—And the only threats which will be sufficient to make out a case of compulsion are threats of injury to the person,—either death or grievous bodily harm. Fear of injury to property, as of having houses burned, crops destroyed, or goods taken, is not enough to excuse any offense.[214]

[209] Steph. Dig. Cr. Law, art. 31. See People v. Repke, 103 Mich. 459, 61 N. W. 861, and Thomas v. State, 134 Ala. 126, 33 So. 130. To justify joining a mutiny the fear must be of death or great bodily harm and be well grounded. U. S. v. Haskell, 4 Wash. C. C. 402, Fed. Cas. No. 15,321. But see Reg. v. Tyler, 8 Car. & P. 616.

[210] See McGrowther's Case, Fost. C. L. 13, Beale's Cas. 273; Respublica v. McCarty, 2 Dall. (Pa.) 86, Beale's Cas. 364; Rex v. Gordon, 1 East, P. C. 71.

[211] Rex v. Crutchley, 5 Car. & P. 133, Beale's Cas. 367.

[212] 4 Blackst. 30; Reg. v. Tyler, 8 Car. & P. 616; Arp v. State, 97 Ala. 5, 12 So. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137, Mikell's Cas. 121; Leach v. State, 99 Tenn. 584, 42 S. W. 195; State v. Fisher, 23 Mont. 540, 59 Pac. 919; State v. Nargashian (R. I.) 58 Atl. 953.

[213] Steph. Dig. Cr. Law, art. 31; People v. Repke, 103 Mich. 459, 61 N. W. 861. Threats to kill are no defense to a charge of perjury. Bain v. State, 67 Miss. 557, 7 So. 408, Mikell's Cas. 118.

(*d*) *Continuance after Cessation of Danger.*—If a person joins others in a crime—as in rebellion, for instance—because of fear of death or grievous bodily harm, he must leave as soon as the cause of his fear and the fear cease. If he continues with them after this, he is guilty, and the compulsion at the outset is no defense.[215]

(*e*) *Command of Husband.*—As will be shown in another section, a wife is not guilty of a crime, except in the case of treason or murder, if the act is done under coercion by her husband, and, if an act is committed by her in the presence of her husband, there is a rebuttable presumption of coercion.[216]

(*f*) *Command of Parent, Master, or Other Superior.*—The case of husband and wife is the only case in which the command of one person will justify or excuse a crime committed by another. If a child who is old enough and of intelligence enough to be criminally responsible commits a crime, it is no defense that he did so by command of his parent.[217]

[214] McGrowther's Case, Fost. C. L. 13, Beale's Cas. 273; Respublica v. McCarty, 2 Dall. (Pa.) 86, Beale's Cas. 364. Indeed, in these two cases, which were cases of rebellion, it was said that nothing less than fear of immediate death was enough to excuse. See, also, U. S. v. Vigol, 2 Dall. (Pa.) 346, Mikell's Cas. 117.

[215] In a case of rebellion it was said: "The only force that doth excuse is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defense, to show an actual force, and that he quitted the service as soon as he could; agreeably to the rule laid down in Oldcastle's Case, that they joined pro timore mortis, et recesserunt quam cito potuerunt." McGrowther's Case, Fost. C. L. 13, 18 How. St. Tr. 391, Beale's Cas. 273. And see, to the same effect, Respublica v. McCarty, 2 Dall. (Pa.) 86, Beale's Cas. 364.

In Texas, a statute provides that, to render duress a defense to a criminal charge, the act must be done when the party threatening is "actually present." A person is actually present, within the meaning of this statute, if he is in such proximity to the place where the act is done as to have control over the person threatened. Paris v. State, 35 Tex. Cr. R. 82, 31 S. W. 855.

[216] Post, § 85 et seq.

[217] Steph. Dig. Crim. Law, art. 31; 1 Hawk. P. C. c. 1, § 14; People

The same is true of a crime committed by a servant or agent in obedience to the command of his master or principal;[218] of a crime committed by a soldier, sailor, or civilian, by command of his superior officer.[219]

v. Richmond, 29 Cal. 414 (larceny); Carlisle v. State, 37 Tex. Cr. R. 108, 38 S. W. 991 (poisoning of her infant child by girl of sixteen, because of request, command, or persuasion of her mother).

The command of the parent, however, may be taken into consideration by the jury, in connection with the age of the child, in determining whether the child knew that he was committing a crime. Com. v. Mead, 10 Allen (Mass.) 398; State v. Learnard, 41 Vt. 585. See post, § 88, et seq.

A child of ten was acquitted of possession of tools for counterfeiting, while living with his parents who were convicted. Reg. v. Boober, 4 Cox, C. C. 272.

[218] 1 Hawk. P. C. c. 1, § 14; Com. v. Hadley, 11 Metc. (Mass.) 66, Beale's Cas. 372; Sanders v. State, 31 Tex. Cr. R. 525, 21 S. W. 258.

In Sanders v. State, supra, it was held that, where an employe of a railroad company knowingly obstructs a highway, he cannot escape responsibility by showing that he did so in obedience to the orders of his superior officer. And see Smith v. District of Columbia, 12 App. D. C. 33.

[219] U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494, Beale's Cas. 368. In this case a first lieutenant on a privateer schooner was indicted for feloniously and piratically entering another vessel and assaulting the captain, and the defense was that he was acting in obedience to the orders of his superior officer. It was said by Mr. Justice Washington, in charging the jury: "No military or civil officer can command an inferior to violate the laws of his country, nor will such a command excuse, much less justify, the act. Can it be for a moment pretended that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not. In relation to the navy, let it be remarked that the fourteenth section of the law for the better government of that part of the public force, which enjoins on inferior officers or privates the duty of obedience to their superior, cautiously speaks of the lawful orders of that superior. Disobedience of an unlawful order must not, of course, be punishable; and a court martial would, in such a case, be bound to acquit the person tried upon a charge of disobedience. We do not mean to go further than to say that the participation of the inferior officer in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior."

See, also, Rex v. Thomas, 1 Russ. Crimes (9th Ed.) 823, 4 Maule & S.

"In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstances that he acts in obedience to orders given him by a civil or military superior; but the fact that he does so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders."[220]

An order given by an officer to his private, which does not expressly and clearly show on its face its own illegality, the soldier is bound to obey and such order is his full protection.[220a]

84. Custom and Usage.

If a person does an act which is prohibited and punished by the common law or statute as a crime, he cannot escape responsibility by showing that it was the custom in the particular locality to do the act.[221]

Application of This Rule.—There are few cases in which this rule has been applied, but there can be no doubt of its soundness. It has been actually applied in some cases. Thus, it has been held, on a prosecution for larceny under certain circumstances, that it was no defense to show that it was the cus-

442, where a marine on a man of war was held guilty of murder where he fired upon a boat which approached the ship after being warned away, and killed a person in it, though he acted in obedience to the orders of his officer. And see U. S. v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732; Com. v. Blodgett, 12 Metc. (Mass.) 56; Mem., J. Kelyng, 13, Mikell's Cas. 114; Riggs v. State, 3 Cold. (Tenn.) 85, Mikell's Cas. 114.

[220] Steph. Dig. Crim. Law, art. 202. See Reg. v. Trainer, 4 Fost. & F. 105, 1 Russ. Crimes, 878.

[220a] In re Fair, 100 Fed. 149; Com. v. Shortall, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759.

[221] Reg. v. Reed, 12 Cox, C. C. 1, Beale's Cas. 369; Com. v. Perry, 139 Mass. 198, 29 N. E. 656.

tom in the particular locality to take the goods of others under such circumstances.[222]

So, on an indictment for a riot in making a great noise tumultuously, in the nighttime, by shouting and blowing horns or shooting off guns, as in a charivari, it is no defense to show that it was the custom to do such acts.[223]

And on an indictment against a public officer for embezzlement in appropriating the public moneys unlawfully, a custom among public officers to use or appropriate moneys in such a way is no defense.[224]

In an English case, custom to bathe at a certain place was set up by bathers to defeat a prosecution for unlawful and indecent exposure of their persons in the sight of others passing and repassing on a highway, and to the common nuisance of the subjects of the queen; but the custom, though shown to have existed for more than half a century without complaint, was held to be no defense.[225]

[222] Hendry v. State, 39 Fla. 235, 22 So. 647; State v. Welch, 73 Mo. 284, 39 Am. Rep. 515; Lancaster v. State, 3 Cold. (Tenn.) 340, 91 Am. Dec. 288; Com. v. Doane, 1 Cush. (Mass.) 5; Lawrence v. State, 20 Tex. App. 536, Mikell's Cas. 106.

As was said in Hendry v. State, supra, there can be no legal custom to justify one man in stealing the property of another, as such a custom would be contrary to law, and bad.

A defendant indicted for larceny, in whose possession a portion of the cargo of a vessel is found, under circumstances which, if unexplained, would authorize a jury to presume a felonious taking by him, is not entitled, in order to negative the inference of an intent to steal, to give evidence of a custom for the officers of vessels to appropriate a small part of the cargo to themselves, or to prove that instances had occurred in which the mates of vessels, under a claim of right, had appropriated to themselves parts of the cargoes in their possession. Such evidence is inadmissible, because the custom, which it purports to prove, is wanting in the elements of a legal custom, and cannot be sustained as such. Com. v. Doane, 1 Cush. (Mass.) 5.

[223] Bankus v. State, 4 Ind. 114. And see post, § 425.

[224] Bollin v. State, 51 Neb. 581, 595, 71 N. W. 444.

[225] Reg. v. Reed, 12 Cox, C. C. 1, Beale's Cas. 369.

On a prosecution for maintaining a common nuisance by keeping a

V. Responsibility of Married Women.

85. In General.—A married woman is criminally responsible for any offense committed of her own free will, but she is not responsible for offenses, other than treason or murder, committed under coercion by her husband. There is a presumption of coercion, rebuttable by the state, if the husband was present when the offense was committed, or so near as to be able to exert an immediate control or influence.

It is a well-settled doctrine, said by Blackstone to have been recognized in England for at least a thousand years, that if a woman commits larceny, burglary, "or other civil offenses against the laws of society,"[226] by the coercion of her husband, she is considered as acting under compulsion and not of her own will, and is not guilty of any crime; and, as we shall see, there is a rebuttable presumption of coercion if she commits an offense in the presence of her husband.[227]

86. Particular Offenses.

The principle that a woman is not responsible for offenses committed under coercion by her husband has been applied to larceny,[228] receiving stolen goods,[229] burglary,[230] arson,[231] rob-

large number of swine in the neighborhood of certain dwellings and highways, it is no defense to show that it is a custom to tolerate the location of such establishments in populous localities. Com. v. Perry, 139 Mass. 198, 29 N. E. 656.

[226] 4 Bl. Comm. 28. By this phrase, Blackstone meant to exclude treason, murder, and perhaps other offenses prohibited by the law of nature. See post, § 86.

[227] 4 Bl. Comm. 28; 1 Hale, P. C. 45; Anon., Lib. Ass'n, 137, pl. 40, Beale's Cas. 272; Anon., W. Kelyng, 28, Beale's Cas. 273; Reg. v. Dykes, 15 Cox, C. C. 771, Beale's Cas. 274; Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105; and cases hereafter cited.

See valuable note in 33 Am. St. Rep. 89-96.

[228] Anon., Lib. Ass'n, 137, pl. 40, Beale's Cas. 272; Rex v. Knight, 1 Car. & P. 116; Seiler v. People, 77 N. Y. 413, Mikell's Cas. 112.

"If a ceorl steal a chattel and bear it into his dwelling, and it be attached therein, then shall he be guilty for his part, without his wife, for she must obey her lord. If she dare to declare by oath that she

bery,[232] mayhem,[233] assault and battery,[234] forgery,[235] abortion,[236] uttering counterfeit money,[237] selling intoxicating liquors,[238] and having possession of burglars' tools.[239]

The principle does not apply, however, to treason,[240] murder,[241] or perjury.[241a] Nor does it apply to such misdemeanors as keeping a bawdy house,[241b] or gaming house.[241c]

tasted not of the stolen property, let her take her third part. Laws of King Ina, Cap. 57; Mikell's Cas. 109. See, also, Bracton, bk. 3, Cap., 32, Mikell's Cas. 109.

[229] State v. Houston, 29 S. C. 108, 6 S. E. 943, Mikell's Cas. 111, n; Goldstein v. People, 82 N. Y. 233.

[230] Anon., W. Kelyng, 28, Beale's Cas. 273.

[231] Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559.

[232] Reg. v. Dykes, 15 Cox, C. C. 771, Beale's Cas. 274; Reg. v. Torpey, 12 Cox, C. C. 45; People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; Quinlan v. People, 6 Park. Cr. R. (N. Y.) 9.

[233] Reg. v. Smith, Dears. & B. C. C. 553, 8 Cox, C. C. 27; State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414, Mikell's Cas. 113.

[234] Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105; State v. Parkerson, 1 Strob. (S. C.) 169; Com. v. Gaunon, 97 Mass. 547; State v. Williams, 65 N. C. 398.

[235] People v. Ryland, 28 Hun (N. Y.) 568, 97 N. Y. 126.

[236] Tabler v. State, 34 Ohio St. 127.

[237] Rex v. Price, 8 Car. & P. 19; Conolly's Case, 2 Lewin, C. C. 229, Mikell's Cas. 110; Rex v. Hughes, 2 Lewin, C. C. 229, Mikell's Cas. 110.

[238] Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684; Com. v. Burk, 11 Gray (Mass.) 437; State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422.

[239] State v. Potter, 42 Vt. 495.

[240] 1 Hale, P. C. 47; 4 Bl. Comm. 29.

[241] 4 Bl. Comm. 29; Anon., W. Kelyng, 28 Beale's Cas. 273 (citing the Case of the Earl of Somerset and his wife, who were found equally guilty of the murder of Sir Thomas Overby, by poisoning him in the Tower of London. 2 How. St. Tr. 951, 3 Co. Inst. 49). And see Reg. v. Manning, 2 Car. & K. 887; Bibb v. State, 94 Ala. 31, 10 So. 506, 33 Am. St. Rep. 88; State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414, Mikell's Cas. 113. But see State v. Kelly, 74 Iowa, 589, 38 N. W. 503, which is to the contrary.

[241a] Though she testifies for and in presence of her husband. Com. v. Moore, 162 Mass. 441, 38 N. E. 1120, Mikell's Cas. 112, n.; Smith v. Meyers, 54 Neb. 1, 74 N. W. 277.

[241b] Reg. v. Williams, 10 Mod. 63; State v. Jones, 53 W. Va. 613, 45

"A wife," said Hawkins, "may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy house; for this is an offense as to the government of the house, in which the wife has a principal share, and also such an offense as may generally be presumed to be managed by the intrigues of her sex."[242]

87. Presumption of Coercion and Rebuttal Thereof.

When a woman commits an offense in the presence of her husband it is presumed that she acted by his coercion, and she must be acquitted in the absence of evidence to the contrary.[243] But this presumption may always be rebutted by proof that she acted of her own free will, and not by his coercion, and, if this is shown, she is as fully responsible as a *feme sole*.[244]

S. E. 916, even though her husband resided in the house and hired, furnished, and provided for it. Com. v. Cheney, 114 Mass. 281.

[241c] Rex v. Dixon, 10 Mod. 335.

[242] 1 Hawk. P. C. c. 1, § 12. And see 4 Bl. Comm. 29.

[243] Anon., W. Kelyng, 28, Beale's Cas. 273; Rex v. Price, 8 Car. & P. 19; State v. Kelly, 74 Iowa, 589, 38 N. W. 503; Com. v. Burk, 11 Gray (Mass.) 437; Com. v. Gaunon, 97 Mass. 547; Com. v. Eagan, 103 Mass. 71; State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414, Mikell's Cas. 113; State v. Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498; State v. Williams, 65 N. C. 398; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559; State v. Potter, 42 Vt. 495.

In Arkansas, by force of a statute, the presence of the husband is no defense unless it affirmatively "appear from the circumstances in the case that violence, threats, commands, or coercion were used." Freel v. State, 21 Ark. 212.

[244] Reg. v. Torpey, 12 Cox, C. C. 45; Rex v. Hughes, 2 Lewin, C. C. 229, Mikell's Cas. 110; Com. v. Daley, 148 Mass. 11, 18 N. E. 579, Beale's Cas. 275; State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422; People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414, Mikell's Cas. 113; Seiler v. People, 77 N. Y. 413, Mikell's Cas. 112; Goldstein v. People, 82 N. Y. 233; People v. Ryland, 28 Hun (N. Y.) 568, 97 N. Y. 126; State v. Williams, 65 N. C. 398; Tabler v. State, 34 Ohio St. 127; State v. Collins, 1 McCord (S. C.) 355; State v. Parkerson, 1 Strob. (S. C.) 169; Uhl v. Com., 6 Grat. (Va.) 706; Miller v. State, 25 Wis. 384.

In Com. v. Moore, 162 Mass. 441, 38 N. E. 1120, Mikell's Cas. 112, n.,

"The question of fact to be determined is whether she really and in truth acted under such coercion, or whether she acted of her own free will and independently of any coercion or control by him."[245]

When an offense is committed by a woman in the absence of her husband, coercion is not presumed, for no presumption arises from the mere fact of coverture; but coercion may be shown as a fact.[246] To give rise to the presumption of coercion, however, the presence of the husband need not have been at the very spot where the offense was committed, or even in

it was held that since, under a statute, a wife could not be compelled to be a witness on an indictment against her husband, there was no presumption of coercion where a wife testified in favor of her husband on a criminal prosecution, and committed perjury. See Rex v. Dix, 1 Russ. Crimes, 147.

A married woman may be indicted alone, or jointly with her husband, for keeping a bawdy house, gaming house, or liquor nuisance. Reg. v. Williams, 10 Mod. 63; Rex v. Dixon, 10 Mod. 335; Com. v. Tryon, 99 Mass. 442; State v. Collins, 1 McCord (S. C.) 355; State v. Bentz, 11 Mo. 27.

[245] Com. v. Daley, 148 Mass. 11, 18 N. E. 579, Beale's Cas. 275; Com. v. Adams, 186 Mass. 101, 71 N. E. 78.

The fact that the wife is more active than the husband in committing the offense is evidence to be considered in determining whether she acted under his coercion, but it does not, as a matter of law, make her guilty, since the cause of her activity may have been her husband's influence, and, if it was so, she is not guilty. State v. Houston, 29 S. C. 108, 6 S. E. 943, Mikell's Cas. 111, n.

Where a wife choked a man, and told him to keep still, while her husband picked his pockets, it was held that the jury was justified in finding that she was not acting under coercion. People v. Wright, 38 Mich. 744, 31 Am. Rep. 331.

[246] 2 East, P. C. 559; Rex v. Morris, Russ. & R. 270; Reg. v. Cohen, 11 Cox, C. C. 99; Reg. v. John, 13 Cox, C. C. 100; Rex v. Hughes, 2 Lewin, C. C. 229, Mikell's Cas. 110; Brown v. Attorney General (1898) App. Cas. 234, 18 Cox, C. C. 658; State v. Nelson, 29 Me. 329; Com. v. Murphy, 2 Gray (Mass.) 510; Com. v. Munsey, 112 Mass. 287; Quinlan v. People, 6 Park. Cr. R. (N. Y.) 9; Seiler v. People, 77 N. Y. 413, Mikell's Cas. 112; State v. Shee, 13 R. I. 535; State v. Potter, 42 Vt. 495.

the same room, but it is sufficient if he was near enough for the wife to be under his immediate control or influence.[247]

VI. Responsibility of Infants.

88. In General.—A child is not criminally responsible for his acts or omissions if he is of such tender years as to be incapable of distinguishing between right and wrong, and of understanding the nature of the particular act. At common law—

1. **Under the age of seven years the presumption of incapacity is conclusive.**
2. **Between the ages of seven and fourteen there is a presumption of incapacity, but it may be rebutted.**
3. **After the age of fourteen there is a presumption of capacity, which must be rebutted by the accused.**

Criminal and Civil Liability Distinguished.—With a few exceptions, a child is liable for his torts in a civil action to the same extent as an adult, for the object of the action is to compensate the party injured, and not to punish the child, and his

[247] Com. v. Burk, 11 Gray (Mass.) 437; Com. v. Munsey, 112 Mass. 287; Com. v. Flaherty, 140 Mass. 454, 5 N. E. 258. But see State v. Shee, 13 R. I. 535; Rex v. Hughes, 2 Lewin, C. C. 229, Mikell's Cas. 110.

In Conolly's Case, 2 Lewin, C. C. 229, Mikell's Cas. 110, a wife went from house to house uttering base coin, her husband accompanying her, but remaining outside. It was held that she was not guilty.

It was said in a Massachusetts case: "No exact rule applicable to all cases can be laid down as to what degree of proximity will constitute such presence, because this may vary with the varying circumstances of particular cases. And where the wife did not act in the direct presence of her husband, or under his eye, it must usually be left to the jury to determine incidentally whether his presence was sufficiently immediate or direct to raise the presumption. But the ultimate question, after all, is whether she acted under his coercion or control, or of her own free will, independently of coercion or control by him; and this is to be determined in view of the presumption arising from his presence, and of the testimony or circumstances tending to rebut it, if any such exist." Com. v. Daley, 148 Mass. 11, 18 N. E. 579, Beale's Cas. 275.

mental capacity, therefore, is generally immaterial. It is very different, however, when it is proposed to hold a child amenable to the criminal law, for then a criminal intent is necessary. A child is not criminally responsible unless he is old enough, and intelligent enough, to be capable of entertaining a criminal intent; and to be capable of entertaining a criminal intent he must be capable of distinguishing between right and wrong as to the particular act.

89. Children Under the Age of Seven Years.

Children under the age of seven years are, by an arbitrary rule of the common law, conclusively presumed to be *doli incapax*, or incapable of entertaining a criminal intent, and no evidence at all can be received to show capacity in fact.[248]

90. Children Between the Ages of Seven and Fourteen.

Children between the ages of seven and fourteen are presumed to be incapable of entertaining a criminal intent, but the presumption is not conclusive, as in the case of children under the age of seven. It may be rebutted by showing in the particular case that the accused was of sufficient intelligence to distinguish between right and wrong, and to understand the nature and illegality of the particular act, or, as it is sometimes said, that he was possessed of "a mischievous discretion."[249]

[248] This rule applies to both common law and statutory offenses. Reg. v. Smith, 1 Cox, C. C. 260, Beale's Cas. 276; Marsh v. Loader, 14 C. B. (N. S.) 535; State v. Goin, 9 Humph. (Tenn.) 175; People v. Townsend, 3 Hill (N. Y.) 479; Com. v. Mead, 92 Mass. 398.

In Illinois, and perhaps in some other jurisdictions, the age under which a child is absolutely irresponsible has been raised by statute to ten years. Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132.

In Texas it is nine years. Pen. Code, art. 34. Mikell's Cas. 254, n.

[249] 1 Hale, P. C. 26, 27; 4 Bl. Comm. 23. "Proof that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the law. It must be shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the

The burden of showing this is upon the state, and if no evidence at all is introduced on this point, or if the evidence does not show a knowledge of right and wrong, there must be an acquittal.[250] If such capacity is shown, a child over seven years of age is just as fully responsible as an adult, the maxim being *"malitia supplet aetatem."*[251]

crime." Carr v. State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

[250] This rule applies in all cases, whether the offense be a felony, or a mere misdemeanor, and whether it be a common-law or statutory offense. Reg. v. Smith, 1 Cox, C. C. 260, Beale's Cas. 276; Rex v. Owen, 4 Car. & P. 236; Reg. v. Vamplew, 3 Fost. & F. 520; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494, Mikell's Cas. 252; Martin v. State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Heilman v. Com., 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207; Com. v. Mead, 10 Allen (Mass.) 398; State v. Adams, 76 Mo. 355; State v. Tice, 90 Mo. 112, 2 S. W. 269; State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592; State v. Goin, 9 Humph. (Tenn.) 175; Carr v. State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; State v. Leanard, 41 Vt. 585; Law v. Com., 75 Va. 885, 40 Am. Rep. 750.

In Illinois, by statute, the age at which this rebuttable presumption of incapacity arises is between ten and fourteen. Angelo v. People, supra.

In Texas it is between nine and thirteen. Pen. Code, art. 34, Mikell's Cas. 254, n.

In Minnesota the rebuttable presumption ceases at twelve. Pen. Code, § 17.

The burden of proof of nonage, however, is on the prisoner. State v. Arnold, 35 N. C. (13 Ired.) 184, Mikell's Cas. 255.

[251] "If the intelligence to apprehend the consequences of acts, to reason upon duty, to distinguish between right and wrong, if the consciousness of guilt and innocence be clearly manifested, then capacity is shown." Per Southard, J., in State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592, 601.

Whether a child had such capacity must generally be determined from his conduct, and the circumstances surrounding the commission of the act. See Carr v. State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

In York's Case, Fost. C. L. 70, a boy of ten years, who, after killing a little playmate, hid the body, was convicted of murder, and executed, and it was considered that the circumstances showed a consciousness

Capacity must be shown beyond any reasonable doubt.[252] The presumption of incapacity decreases with the increase of years.[252a]

91. Children Over Fourteen Years of Age.

Children over fourteen years of age are in substantially the same position with regard to criminal responsibility as an adult. A child who has reached this age is presumed to be *doli capax,* and therefore responsible, unless he shows, as he may, that he was not of sufficient capacity. To escape responsibility, he has the burden of satisfying the jury that he did not have sufficient intelligence to understand the nature and consequences of his act, and to know that he was doing wrong.[253]

of guilt, and knowledge of right and wrong. In another English case, a child of eight was convicted of arson. Emlyn on 1 Hale, P. C. 25, note. See, also, Year Book 12 Edw. III., 626, Mikell's Cas. 252.

In this country, also, there are cases in which children of such tender years have been convicted, and even hanged. See State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404, where a boy of twelve was hung for murder, Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494, where a child of eleven was convicted of murder, and the conviction was sustained, and State v. Nickleson, 45 La. Ann. 1172, 14 So. 134, where a boy between ten and twelve was convicted of arson.

Other cases in which convictions of children of tender years have occurred are State v. Milholland, 89 Iowa, 5, 56 N. W. 403; Martin v. State, 90 Ala. 602, 8 So. 858.

[252] The "evidence of that malice which is to supply age ought to be strong and clear, beyond all doubt and contradiction." 4 Bl. Comm. 24. And see Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Law v. Com., 75 Va. 885, 40 Am. Rep. 750; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; State v. Tice, 90 Mo. 112, 2 S. W. 269.

In Law v. Com., supra, a conviction of a boy of nearly twelve years as principal in the second degree in the crime of attempt to rape was set aside, where the only evidence of his mental capacity and guilty knowledge was that he was a boy of average capacity for his age (which, as the court said, amounted to nothing), and that he put his hand over the girl's mouth, while his elder brother attempted to rape her.

[252a] Martin v. State, 90 Ala. 602, 8 So. 858; McCormack v. State, 102 Ala. 156, 15 So. 438.

[253] State v. Goin, 9 Humph. (Tenn.) 175; Irby v. State, 32 Ga. 496, and other cases cited in the preceding notes. For him to state that

92. Incapacity Other Than Mental.

(*a*) *In General.*—There are some offenses which an infant cannot commit because of incapacity other than mental incapacity. Blackstone says: "The law of England in some cases privileges an infant under the age of twenty-one as to common misdemeanors, so as to escape fine, imprisonment, and the like, and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offenses; for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires."[254]

It is doubtful if a minor can be convicted of vagrancy, certainly not if he has a parent,[254a] and in a Michigan case it was held that a minor could not be prosecuted and convicted for not supporting his wife, if there was no evidence that he was emancipated, or that he owned any property.[255]

(*b*) *Physical Incapacity.*—A boy cannot be guilty of rape, as principal in the first degree, unless he has physical capacity to have intercourse with a woman. At common law a boy under fourteen years of age was conclusively presumed to be incapable of committing this crime, but in this country some of the courts have repudiated this doctrine, and allow capacity in fact to be shown.[256]

(*c*) *Effect of Privilege as to Contracts.*—Since an infant is not bound by his contracts, it has been held by most of the courts that he cannot be made liable in an action for deceit when he obtains goods under a contract by false misrepresentations as to his age; and it has been contended that his privilege in this respect renders him exempt from responsibility to the criminal law in these cases. It has been held, however, that

he did not know the act was wrong will have no tendency to remove the presumption of capacity. State v. Kluseman, 53 Minn. 541, 55 N. W. 741.

[254] 4 Bl. Comm. 22; 1 Hale, P. C. 20-22.

[254a] Teasley v. State, 109 Ga. 282, 34 S. E. 577.

[255] People v. Todd, 61 Mich. 234, 28 N. W. 79.

[256] Post, § 302(a).

his privileges do not exempt him from responsibility for his crimes, and an infant, if of sufficient mental capacity to be responsible, may be convicted of forgery, or counterfeiting, or cheating at common law, or obtaining goods by false pretenses, though he cannot be held civilly liable.[257] And since he is liable for his torts, it was held in Kentucky that infancy was no defense to a charge of bastardy, such proceedings being civil rather than criminal in that state.[257a] But it has been held that an infant cannot be guilty under a statute punishing any person who shall dispose of property upon which he has given a chattel mortgage, since an infant has a right to avoid a mortgage given by him, and a disposal of the property by him amounts to a disaffirmance of the mortgage.[258]

VII. Responsibility of Insane Persons.

93. In General.—A man is not criminally responsible for his acts if he is so insane, either from lack or disease of the mind, as to be incapable of entertaining a criminal intent; but the courts do not agree entirely as to the proper test of insanity. The law may be summarized as follows:

1. **All courts now agree that a man is not criminally responsible for an act if, by reason of lack or disease of the mind, he was incapable of distinguishing between right and wrong with respect to the particular act.**
2. **Some courts, in addition to this, hold that a man is not responsible for an act if, by reason of disease of the mind, he was irresistibly impelled to do the act, though he may have known that the act was wrong. Other courts refuse to recognize such a ground of exemption.**

[257] People v. Kendall, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240.

[257a] Chandler v. Com., 4 Metc. (61 Ky.) 66.

[258] State v. Howard, 88 N. C. 650; State v. Plaisted, 43 N. H. 413; Jones v. State, 31 Tex. Cr. R. 252, 20 S. W. 578.

3. A mere perverted condition of the moral system, called moral insanity, where the mind is not diseased, or mere uncontrollable passion, is no ground of exemption.

Criminal and Civil Liability Distinguished.—What has been said in reference to the difference between the criminal and civil liability of children is equally applicable to insane persons. An insane person is generally liable in a civil action for his torts, since the object of an action for a tort is compensation to the party injured, and not the punishment of the wrongdoer. It is otherwise, however, in a criminal prosecution, for a criminal intent must then be shown. It is therefore settled that a man is not criminally responsible for an act, if he was so insane, at the time he committed the act, that he was incapable of entertaining a criminal intent.[258a] As to this there can be no question; but the courts do not agree entirely as to when a man is so insane as to be considered incapable of entertaining such an intent.

94. Tests of Responsibility in General.

Various tests have been laid down from time to time by judges and commentators for determining when a man is to be deemed so insane as to be irresponsible. Tests have been adopted and adhered to long enough to give a few precedents, and then abandoned for new ones; and these in turn have been abandoned for others, as discoveries in medical science have shown them to be erroneous. Unfortunately, however, the courts have not always kept pace with the progress of thought and discovery in medical science, and the result is that there is now a direct conflict in the decisions as to the true test of responsibility.

Abandoned Tests.—Sir Matthew Hale said, in effect, that though a man may be laboring under mental defect or disease,

[258a] Beverley's Case, 4 Coke, 124, Mikell's Cas. 256.

yet, if he has as great understanding as a child of fourteen years, he is responsible for his acts.[259] This test, however, though it has at times been recognized by the courts,[260] has long ago been abandoned as too vague and uncertain for practical application.[261]

Another test, announced by an English judge nearly two centuries ago, is called the "wild beast test." He charged a jury that a man, to be exempt from responsibility, "must be a man that is totally deprived of his reason and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast."[262] This test is not now recognized in any jurisdiction. To render a man irresponsible on the ground of insanity, his reason need not be totally dethroned.[263]

95. Capacity to Distinguish between Right and Wrong.

In many jurisdictions, if not in most, the sole test of responsibility, when insanity is set up as a defense, is the capacity of the accused to distinguish between right and wrong as to the particular act at the time it was committed. As we shall presently see, some courts go further. The leading case on insanity as a defense in criminal prosecutions arose in England in 1843, and is known as "McNaghten's Case."[264] One McNaghten killed the private secretary of Sir Robert Peel, the premier of England, mistaking him for the premier, and was acquitted of murder on the ground of insanity. This caused so much

[259] 1 Hale, P. C. 30.

[260] See State v. Richards, 39 Conn. 591, Beale's Cas. 238; where this test was given to the jury on a prosecution of a weak-minded person for arson.

[261] See the cases cited under § 95 et seq.

[262] Mr. Justice Tracy's charge to the jury in 1724 in Arnold's Case, 16 How. St. Tr. 764.

[263] See State v. Richards, 39 Conn. 591, Beale's Cas. 238, and cases hereafter cited.

[264] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, 8 Scott, N. R. 595, Beale's Cas. 231, Mikell's Cas. 256.

public excitement that the question of insanity as a defense came up on debate in the house of lords, and the lords addressed certain questions to the judges. In reply the judges said that, "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

This statement has since been accepted as the law in England,[265] and in many of our states it has been adopted as the only test.[266] In all states it is recognized as far as it goes;[267] but, as will be shown in a subsequent section, some courts go further than this, and hold that a person is not criminally responsible for an act if done solely by reason of an insane irresistible impulse, though he may have known that it was both morally and legally wrong.[268]

The knowledge of right and wrong test is capacity to distinguish between right and wrong, not in the abstract, but as

[265] See Reg. v. Haynes, 1 Fost. & F. 666, Beale's Cas. 234; Reg. v. Law, 2 Fost. & F. 836; Reg. v. Tounley, 3 Fost. & F. 839.

[266] Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731, Beale's Cas. 241; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360, Mikell's Cas. 306; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; Johnson v. State, 100 Tenn. 254, 45 S. W. 436; State v. Potts, 100 N. C. 457, 6 S. E. 657; State v. Cole, 2 Penn. (Del.) 348; Fouts v. State, 4 G. Greene (Iowa) 500; People v. McDonell, 47 Cal. 134. And see post, § 97, note 280.

[267] Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, Beale's Cas. 235; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Spann v. State, 47 Ga. 553; Brinkley v. State, 58 Ga. 296; Williams v. State, 50 Ark. 511, 9 S. W. 5; U. S. v. Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Thomas v. State, 40 Tex. 60, 63; Hawe v. State, 11 Neb. 537, 10 N. W. 452, 38 Am. Rep. 375; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; and cases hereafter cited.

[268] Post, § 97b.

to the particular act. If such capacity existed, the accused is fully responsible, though in other respects he may have been insane.[269]

Mere Weakness of Mind, where there is sufficient capacity to know that the act is wrong, is no ground of exemption.[270]

Ability to Comprehend Ingredients of Offense.—But when a person is in fact of unsound mind, it is necessary, in order

[269] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, 8 Scott, N. R. 595, Beale's Cas. 231, Mikell's Cas. 256; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Guiteau's Case, 10 Fed. 161; U. S. v. McGlue, 1 Curt. 1, Fed. Cas. No. 15,679; Brown v. Com., 78 Pa. 122; Blackburn v. State, 23 Ohio St. 146; Hornish v. People, 142 Ill. 620, 32 N. E. 677; Dunn v. People, 109 Ill. 635; Thomas v. State, 40 Tex. 60, 63; post, § 96b.

The capacity to plan a crime does not necessarily imply sanity. And it has been held wrong, therefore, to instruct the jury that a person accused of homicide is responsible, if he had sufficient power of mind "to deliberate and premeditate a design to effect the death" of the deceased. Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

It has been held that there is no grade of insanity sufficient to acquit of murder, but not of manslaughter. U. S. v. Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293. But see Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669.

[270] Patterson v. People, 46 Barb. (N. Y.) 625; Wartena v. State, 105 Ind. 445, 5 N. E. 20; Conway v. State, 118 Ind. 482, 21 N. E. 285; Travers v. U. S., 6 App. D. C. 450; State v. Flowers, 58 Kan. 702, 50 Pac. 938; State v. Palmer, 161 Mo. 152, 61 S. W. 651, Mikell's Cas. 297.

"While a slight departure from a well-balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law when a person is on trial for the commission of a high crime. The just and necessary protection of society requires the recognition of a rule which demands a greater degree of insanity to exempt from punishment." Per Chief Justice Mercur in Taylor v. Com., 109 Pa. 262, 271.

It is proper to refuse to charge the jury that the mental condition of the accused, to render him responsible, "must have been such that he was capable of a careful weighing of reasons in order to a decision." State v. Swift, 57 Conn. 496, 18 Atl. 664.

Mere oddity or hypochondria is not insanity. Hawe v. State, 11 Neb. 537, 10 N. W. 452, 38 Am. Rep. 375; State v. Shippey, 10 Minn. 223.

Where the defense is idiocy the jury must be satisfied of the prisoner's capacity. Com. v. Heath, 11 Gray (Mass.) 303.

that he may be capable of committing a crime, that he shall have sufficient mind "to see all the essential ingredients of the offense, and acknowledge their existence."[271]

96. Insane Delusion.

(*a*) *In General.*—A man may be insane as to certain objects, or on certain subjects only, and perfectly sane with respect to other objects and on other subjects. In such a case he labors under partial insanity, or insane delusions. Because of disease of the mind he sees objects in a false light, or believes in the existence of facts which do not exist. This phase of insanity was also covered by the answer of the judges in the McNaghten Case referred to in the preceding section. They said: In case "he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."[272]

This statement of the law as to partial insanity, or insane de-

[271] People v. Cummins, 47 Mich. 334, 11 N. W. 184, 186. For this reason, in the case cited, where temporary insanity was set up as a defense in the prosecution for larceny, it was held erroneous to charge that, if the accused knew enough to know that he was taking property that did not belong to him, he was sane enough to be guilty. He might have had mind enough to know this, it was said, and yet not enough to fraudulently intend to deprive the owner permanently of his property.

[272] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, 8 Scott, N. R. 595, Beale's Cas. 231, Mikell's Cas. 256.

lusions, is still recognized in England,[273] and has been adopted and applied by some of the courts in this country.[274]

It has not been accepted, however, by all of our courts. Some of them apply the same test in the case of partial insanity as in the case of general insanity, namely, the capacity to distinguish between right and wrong as to the particular act, regarding the question of delusion as important only in so far as it throws light on the question of such capacity.[275]

An insane delusion, as was stated in the McNaghten Case, above referred to, is no ground of exemption, unless the party would be exempt if the facts were really as he supposed.[276]

[273] See Reg. v. Burton, 3 Fost. & F. 772; Hadfield's Case, 27 How. St. Tr. 1281.

[274] Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; People v. Taylor, 138 N. Y. 398, 34 N. E. 275; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, Beale's Cas. 235; Com. v. Freth, 3 Phila. (Pa.) 105, 5 Clark, 455; Com. v. Winnemone, 1 Brewst. (Pa.) 356; Taylor v. Com., 109 Pa. 262; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Smith v. State, 55 Ark. 259, 18 S. W. 237; Roberts v. State, 3 Ga. 310; State v. Lawrence, 57 Me. 574; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360, Mikell's Cas. 306; Merritt v. State, 39 Tex. Cr. R. 70, 45 S. W. 21, Mikell's Cas. 259.

If a person commits a homicide while in such a condition of somnambulism that he does not comprehend his situation, and the circumstances surrounding him, but supposes that he is being assailed, and that it is necessary for him to kill to save his life, or prevent great bodily harm, he is not responsible. Fain v. Com., 78 Ky. 183, 39 Am. Rep. 213, Mikell's Cas. 220, n., 297.

[275] "If a man," said Judge Cox, in his charge to the jury in Guiteau's Case, "is under an insane delusion that another is attempting his life, and kills him in self defense, he does not know that he is committing an unnecessary homicide. If a man insanely believes that he has a command from the Almighty to kill, it is difficult to understand how such a man can know that it is wrong for him to do it. A man may have some other insane delusion, which would be quite consistent with a knowledge that such an act is wrong,—such as that he had received an injury,—and he might kill in revenge for it, knowing that it would be wrong." Guiteau's Case, 10 Fed. 161. See, also, People v. Pine, 2 Barb. (N. Y.) 566; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360, Mikell's Cas. 306; U. S. v. Faulkner, 35 Fed. 730; State v. Gut, 13 Minn. 341; Merritt v. State, 39 Tex. Cr. R. 70, 45 S. W. 21.

[276] Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; People v. Taylor,

Thus, a man is responsible for a homicide notwithstanding he was laboring under an insane delusion that the deceased was trying to marry his mother, and the killing was caused thereby.[277]

(*b*) *Connection between the Delusion and the Act.*—In all cases of delusion, the delusion must be connected with the act in the relation of cause and effect. A man is not exempt from responsibility merely because he is partially insane. If he does an act, the nature of which he understands, and which he knows to be wrong, he is none the less responsible because he is insane on other subjects.[278]

(*c*) *Erroneous Belief Based upon Reasoning and Reflection.*—A delusion, to be an *insane* delusion, so as to exempt a man from responsibility, must be the result of disease of the mind rendering him incapable of reason with respect to the object of the delusion. It must be an *unreasoning* belief in the existence of facts, and not merely an erroneous belief based upon reason-

138 N. Y. 398, 34 N. E. 275; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Com. v. Wireback, 190 Pa. 138, 42 Atl. 542; Thurman v. State, 32 Neb. 224, 49 N. W. 338; People v. Hubert, 119 Cal. 216, 51 Pac. 329; State v. Lewis, 20 Nev. 333, 22 Pac. 241.

[277] Bolling v. State, 54 Ark. 588, 16 S. W. 658.

This rule was also applied by the New York court of appeals in the late case of People v. Taylor, 138 N. Y. 398, 34 N. E. 275, where a convict had killed a fellow convict under an alleged insane delusion that the deceased was spying upon him, and had divulged a plan to escape.

And in People v. Hubert, 119 Cal. 216, 51 Pac. 329, it was applied where a husband killed his wife under an alleged insane delusion, for several months, that she was putting poison in his food.

[278] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, 8 Scott, N. R. 595, Beale's Cas. 231, Mikell's Cas. 256; Guiteau's Case, 10 Fed. 161; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; Smith v. State, 55 Ark. 259, 18 S. W. 237; Bovard v. State, 30 Miss. 600; Ford v. State, 73 Miss. 734, 19 So. 665; People v. Coffman, 24 Cal. 230; State v. Geddis, 42 Iowa, 264; State v. Hockett, 70 Iowa, 442, 446, 30 N. W. 742; State v. Stickley, 41 Iowa, 232; State v. Danby, 1 Houst. (Del.) 166; Dejarnette v. Com., 75 Va. 867, 877; State v. Maier, 36 W. Va. 757, 15 S. E. 991; State v. Huting, 21 Mo. 464; U. S. v. Ridgeway, 31 Fed. 144.

ing and reflection. This distinction was brought out with admirable clearness by Judge Cox in his charge to the jury in the Guiteau Case. An opinion, he said, however erroneous or absurd, formed upon reasoning and reflection, or examination of evidence, is not an insane delusion, and never exempts a man from responsibility for his acts. If a man, from mental disease, should believe that God had appeared to him, and commanded him to kill his child as a sacrifice, this would be an insane delusion, and, if he should sacrifice his child in obedience to the supposed command of the Almighty, he would not be responsible for the homicide; but if a man, by reading newspapers and by reasoning, however absurdly, should come to the conclusion that the good of the country required the removal of the president, and should assassinate him, he would be guilty of murder.[279]

97. Insane Irresistible Impulse.

(*a*) *View That It is no Defense.*—Whether or not an insane

[279] It was further said by Judge Cox in the Guiteau case: "The important thing is that an insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and vicious resolutions, but he cannot be reasoned or persuaded into insanity or insane delusions. Whenever convictions are founded on evidence, or comparison of facts and opinions and arguments, they are not insane delusions. The insane delusion does not relate to mere sentiments or theories on abstract questions in law, politics, or religion. All these are subjects of opinions, which are beliefs founded on reasoning and reflection. * * * When men reason, the law requires them to reason correctly, as far as their practical duties are concerned. When they have the capacity to distinguish between right and wrong, they are bound to do it. Opinions, properly so called, i. e., beliefs resulting from reasoning, reflection, or examination of evidence, afford no protection against the penal consequences of crime. * * * A man may reason himself into a conviction of the expediency and patriotic character of political assassination, but to allow him to find shelter behind that belief, as an insane delusion, would be monstrous." Guiteau's Case, 10 Fed. 161. And see State v. Lewis, 20 Nev. 333, 22 Pac. 241.

irresistible impulse to do an act exempts one from responsibility, when he has the capacity to distinguish between right and wrong, and does know, when he does the act, that it is wrong, is a question upon which the courts do not agree. The English courts, since the McNaghten Case, and many of the courts in this country, refuse to recognize this condition of the mind as a ground of exemption, but limit the test to the capacity to distinguish between right and wrong as to the particular act. Some of them, even in the face of medical testimony to the contrary, refuse to recognize the existence of such a mental condition as an *insane* irresistible impulse to do an act known to be wrong, but regard it as mere moral perversion. These courts hold that the only test of responsibility is the capacity to know that the act is wrong, and that a man who has such capacity is fully responsible, no matter what impulse may have driven him to do the act.[280]

[280] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, 8 Scott, N. R. 595, Beale's Cas. 231, Mikell's Cas. 256; Reg. v. Haynes, 1 Fost. & F. 666, Beale's Cas. 234; Reg. v. Stokes, 3 Car. & K. 185; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; People v. Hubert, 119 Cal. 216, 51 Pac. 329; People v. Owens, 123 Cal. 482, 56 Pac. 251; State v. Lawrence, 57 Me. 574; State v. Knight, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373; Spencer v. State, 69 Md. 28, 37, 13 Atl. 809; State v. Scott, 41 Minn. 365, 43 N. W. 62; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360, Mikell's Cas. 306; State v. Pagels, 92 Mo. 300, 317, 4 S. W. 931; State v. Miller, 111 Mo. 542, 20 S. W. 243; State v. Soper, 148 Mo. 217, 49 S. W. 1007; State v. Mowry, 37 Kan. 369, 15 Pac. 282; Hawe v. State, 11 Neb. 537, 10 N. W. 452, 38 Am. Rep. 375; State v. Lewis, 20 Nev. 333, 22 Pac. 241 (collecting the cases pro and con); Genz v. State, 59 N. J. Law, 488, 37 Atl. 69; Mackin v. State, 59 N. J. Law, 495, 36 Atl. 1040; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731, Beale's Cas. 241; People v. Carpenter, 102 N. Y. 238, 6 N. E. 584, 38 Hun, 490; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; State v. Levelle, 34 S. C. 120, 131, 13 S. E. 319; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; Cannon v. State, 41 Tex. Cr. R. 467, 56 S. W. 351; Davis v. State, 44 Fla. 32, 32 So. 822; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, Mikell's Cas. 263; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Carter

(*b*) *Contrary and More Reasonable View.*—This position cannot be sustained in reason, and is opposed to the plainest principles of law. On questions like this the courts must keep pace with the progress of thought and discovery in medical science. They cannot blindly and obstinately refuse to recognize a phase of insanity, and adhere to old tests of responsibility, merely because such a state of mind was unknown to medical science half a century ago. Experts in the science of medicine, who certainly are better qualified to speak on the subject than the judges, virtually agree that *disease* of the mind, as distinguished from mere moral perversion, may irresistibly impel a man to the commission of a deed, while it leaves him with sufficient capacity to know that the deed is both morally and legally wrong. Thus, they say that a man may be afflicted with kleptomania, or an insane irresistible impulse to steal, with pyromania, or an insane irresistible impulse to burn buildings, etc., or with homicidal mania, or an insane irresistible impulse to kill. If, as a fact, such a condition of the mind can and does exist, it must follow that a man who commits an act *solely* by reason of it is not responsible. No fault can be imputed to the victim of such a disease. The act, because of *mental disease,* is *involuntary,* and no principle of law is better settled than the principle that a man is not to be punished for his involuntary acts. And surely he should not be pun-

v. State, 12 Tex. 500, 62 Am. Dec. 539; Williams v. State, 7 Tex. App. 163.

In New York, the Penal Code exempts a man on the ground of insanity only where "he was laboring under such a defect of reason as either (1) not to know the nature and quality of the act he was doing, or (2) not to know that the act was wrong." Pen. Code N. Y. § 21. See People v. Taylor, 138 N. Y. 398, 34 N. E. 275.

The early cases in Texas (Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646; Harris v. State, 18 Tex. App. 287), holding the view that kleptomania, or an irresistible impulse to steal was a defense to a charge of theft, have been overruled. Hurst v. State, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719; Cannon v. State, 41 Tex. Cr. R. 467, 56 S. W. 351; Lowe v. State, 44 Tex. Cr. R. 224, 70 S. W. 206.

ished for his mental disease. The only ground upon which the courts can refuse to recognize an exemption from responsibility in such cases is that such a state of mind cannot result from mental disease, and to take this position they must disregard the line between the respective provinces of the court and the jury. Medical experts say that such a state of mental disease does exist. Whether it did exist in any particular case, therefore, is a question of fact for the jury. There are well-considered cases in which this view of the question has been taken, and in which it has been held that a man is not responsible for an act done under and *solely* by reason of an *insane and irresistible* impulse, though he may have known that it was wrong.[281]

[281] Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, Beale's Cas. 242; Williams v. State, 50 Ark. 511, 9 S. W. 5; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Green v. State, 64 Ark. 523, 43 S. W. 973; State v. Johnson, 40 Conn. 136; Flanagan v. State, 103 Ga. 619, 30 S. E. 550; Dacey v. People, 116 Ill. 555, 6 N. E. 165; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Bradley v. State, 31 Ind. 492; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; State v. Felter, 25 Iowa, 67; Smith v. Com., 1 Duv. (Ky.) 224; Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, Beale's Cas. 235; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242, Mikell's Cas. 275; Blackburn v. State, 23 Ohio St. 146, 165; Com. v. Mosler, 4 Pa. 264, Mikell's Cas. 260; Coyle v. Com., 100 Pa. 573, 45 Am. Rep. 397; Taylor v. Com., 109 Pa. 262; Com. v. Wireback, 190 Pa. 138, 42 Atl. 542; State v. Windsor, 5 Harr. (Del.) 512; State v. Reidell, 9 Houst. (Del.) 470; Dejarnette v. Com., 75 Va. 867, 877; Butler v. State, 102 Wis. 364, 78 N. W. 590; State v. Keerl, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579.

In Com. v. Mosler, 4 Pa. 264, it was said by Chief Justice Gibson: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance." This was approved in Coyle v. Com., 100 Pa. 573, 45 Am. Rep. 397.

Compare Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461, where

In order that a person may be exempt on the ground of irresistible impulse, the impulse must be the result of disease of

it was held that the disease need not have manifested itself in former acts of like character.

Leading Case: In Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, Beale's Cas. 242, the leading authorities and cases on insanity as a defense were exhaustively reviewed, and it was held, on reasoning that is unanswerable, that, if there is such a state of mind as insane irresistible impulse, it must constitute an exemption from responsibility, and that the court has no right to say that it does not exist, but must leave that question to the jury. It was said: "We think that the inquiries to be submitted to the jury, in every criminal trial where the defense of insanity is interposed are these:

First: Was the defendant, at the time of the commission of the alleged crime, as a matter of fact, afflicted with a disease of the mind, so as to be either idiotic or otherwise insane?

Second: If such be the case, did he know right from wrong, as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.

Third: If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely."

This doctrine was clearly recognized by Lord Denman in England before the McNaghten Case, referred to in a preceding section. In Reg. v. Oxford, 9 Car. & P. 525, he said, referring to the accused: "If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible."

It has been objected that it is difficult to apply this rule; but, as was said by Judge Sommerville in Parsons v. State, supra, the difficulty does not lie in the rule, but is inherent in the subject of insanity itself; and the same objection applies to the "right and wrong test," and will apply to any other test.

In Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231, the supreme court of Illinois, after expressing doubt as to what the rule or tests should be in cases of alleged insanity laid down this rule: "Whenever it should appear from the evidence that, at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be

the mind;[282] and it must be irresistible, or, in other words, the disease must exist "to such an extent as to subjugate the intellect, and render it impossible for the person to do otherwise than yield thereto."[283] The act must have been the product of the disease solely.[284]

98. Moral and Emotional Insanity, So Called.

Whenever irresistible impulse is relied upon as a defense, care must be taken to distinguish between *insane* irresistible impulse—that is, irresistible impulse resulting from *disease* of the mind—and mere moral perversion and passion. The expression "moral insanity" is often used, but, strictly speaking, it is not insanity at all. It is merely a perverted or abnormal condition of the moral system, where the mind is sound. It is well settled that there is no exemption from responsibility merely because of moral insanity, or because of ungovernable passion, sometimes called "emotional insanity."[285]

acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them." And see Dacey v. People, 116 Ill. 555, 6 N. E. 165.

Kleptomania, or an irresistible impulse to steal, has been held a defense to a charge of larceny in the following cases: State v. McCullough, 114 Iowa, 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. Rep. 382; Com. v. Fritch, 9 Pa. Co. Ct. R. 164; People v. Sprague, 2 Park. Cr. R. (N. Y.) 43. As to Texas see ante, note 280.

[282] Bolling v. State, 54 Ark. 588, 16 S. W. 658; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, Beale's Cas. 242, and other cases cited in the note preceding; and post, § 98.

[283] Taylor v. Com., 109 Pa. 262. And see Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Com. v. Wireback, 190 Pa. 138, 42 Atl. 542.

[284] Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, Beale's Cas. 242; Green v. State, 64 Ark. 523, 43 S. W. 973; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Stickley, 41 Iowa, 232.

[285] Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, Beale's Cas. 242; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Williams v. State, 50 Ark. 511, 9 S. W. 5; Smith v. State, 55 Ark. 259, 18 S. W. 237; People v. Kerrigan,

99. Periodical Insanity.

A man may be periodically insane,—that is, insane at times only, with lucid intervals. When such a man is charged with a crime, the question is, what was his mental condition at the very time the act was committed? His condition then, and not before or afterwards, determines his responsibility,[286] though, of course, his condition before and afterwards may be considered in determining his condition at the time, and may give rise to presumptions.

VIII. Responsibility of Drunken Persons.

100. In General.—Drunkenness furnishes no ground of exemption from responsibility for crime except in the following cases:

1. Where it was involuntary, and so excessive as to temporarily deprive the accused of his reason.

73 Cal. 222, 14 Pac. 849; Choice v. State, 31 Ga. 424, 473, Beale's Cas. 269; Spann v. State, 47 Ga. 553; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Goodwin v. State, 96 Ind. 550; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; State v. Mewherter, 46 Iowa, 88; State v. Stickley, 41 Iowa, 232; State v. Felter, 25 Iowa, 67; Spencer v. State, 69 Md. 28, 37, 13 Atl. 809; People v. Mortimer, 48 Mich. 37, 11 N. W. 776; People v. Finley, 38 Mich. 482; People v. Foy, 138 N. Y. 664, 34 N. E. 396; State v. Murray, 11 Or. 413, 5 Pac. 55, 6 Cr. Law Mag. 255; Taylor v. Com., 109 Pa. 262; Lynch v. Com., 77 Pa. 205, 213; State v. Levelle, 34 S. C. 120, 131, 13 S. E. 319; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Harrison v. State, 44 Tex. Cr. R. 164, 69 S. W. 500.

Construing the language of the court literally, moral insanity seems to have been regarded as a defense in Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461, but there can be little doubt that the court meant insane irresistible impulse.

In a Connecticut case it was said that moral insanity may reduce a homicide from murder in the first degree to murder in the second degree. Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669. But see U. S. v. Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293.

[286] U. S. v. Sickles, 2 Hayw. & H. 319, Fed. Cas. No. 16,287a; Guiteau's Case, 10 Fed. 161; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; State v. Spencer, 21 N. J. Law, 196; Com. v. Winnemore, 1 Brewst. (Pa.) 356; People v. Barber, 115 N. Y. 475, 22 N. E. 182.

2. **Where the act was done while suffering from settled insanity or delirium tremens.**
3. **Where it negatives the commission of the act by the accused.**
4. **Where it negatives the existence of a specific intent, or of a knowledge of facts, which is an essential element of the crime charged.**
5. **In prosecutions for murder, evidence that the accused was drunk is immaterial, except for the following purposes:**
   - **(a) By the weight of authority, it may be considered in determining whether he acted under provocation and not from malice, if there was provocation, but not otherwise.**
   - **(b) And by the weight of authority, it may be considered for the purpose of determining whether he was capable of the premeditation and deliberation, or the specific intent to kill, necessary to constitute murder in the first degree.**

101. Voluntary Drunkenness.

(*a*) *In General.*—No rule of law is more firmly established, and few have been more frequently applied, than the rule that voluntary drunkenness does not exempt a man from criminal responsibility for his acts. A drunken man is as fully responsible for his acts as a sober man, though he may have been so drunk as to be temporarily deprived of his reason and rendered incapable of knowing what he was doing, unless the fact of drunkenness negatives the existence of a specific intent or knowledge, which is an essential ingredient of the particular offense charged, or unless the accused was suffering from *delirium tremens,* or settled insanity resulting from previous habits of intemperance. "This vice," said Sir Matthew Hale, "doth deprive a man of his reason, and puts many men into a perfect but temporary frenzy; but by the laws of England

such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses."[287]

[287] 1 Hale, P. C. 32. And see 1 Inst. 247; 3 Inst. 46; 4 Bl. Comm. 25, 26; Beverley's Case, 4 Coke, 125a, Mikell's Cas. 311; Pearson's Case, 2 Lewin, C. C. 144, Beale's Cas. 261; Burrow's Case, 1 Lewin, C. C. 75; Choice v. State, 31 Ga. 424, 472, Beale's Cas. 269; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264.

The doctrine is applied in the following cases: U. S. v. McGlue, 1 Curt. 1, Fed. Cas. No. 15,679; U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; People v. Ferris, 55 Cal. 588; Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Beck v. State, 76 Ga. 452, 470; Rafferty v. People, 66 Ill. 118; Upstone v. People, 109 Ill. 169; Goodwin v. State, 96 Ind. 550; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; State v. Kraemer, 49 La. Ann. 766, 22 So. 254; Com. v. Hawkins, 3 Gray (Mass.) 463; Com. v. Malone, 114 Mass. 295; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Roberts v. People, 19 Mich. 401; State v. Welch, 21 Minn. 22; Warner v. State, 56 N. J. Law, 686, 29 Atl. 505, 44 Am. St. Rep. 415; Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556, Mikell's Cas. 316; State v. John, 8 Ired. (N. C.) 330, 49 Am. Dec. 396; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 37 Am. St. Rep. 811; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; State v. Tatro, 50 Vt. 483; Boswell v. Com., 20 Grat. (Va.) 860; Willis v. Com., 32 Grat. (Va.) 929; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

"If a man chooses to get drunk," said Baron Alderson, "it is his own voluntary act. It is very different from madness, which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for." Rex v. Meakin, 7 Car. & P. 297.

"Such a principle is absolutely essential to the protection of life and property. In the forum of conscience, there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes

(*b*) *Does not Aggravate Offense.*—Lord Coke said that drunkenness, instead of exempting a man from criminal responsibility, aggravates the offense,[288] but this is not the law.[289]

102. Use of Morphine and Cocaine.

It would seem clear that if a person voluntarily uses morphine and cocaine, not as a medicine, but for the same reason for which one uses intoxicating liquors to excess, and thereby puts himself in such a condition as to be unable to reason or to distinguish between right and wrong, he should occupy precisely the same position as one who voluntarily becomes drunk by the use of intoxicating liquors. There seems to be no good reason for making any distinction. It has been held, however, in a late Texas case, that the rule is not the same, and that a person who is in such a condition by reason of the recent and voluntary use of morphine and cocaine, even in conjunction with the use of intoxicating liquors, is not responsible.[290]

103. Drunkenness of Insane Person.

If a person is insane to such an extent as to be irresponsible,

to his fellow men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if, by voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society." Per Denio, J., in People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264.

[288] 3 Inst. 46; Beverley's Case, 4 Coke, 125a, Mikell's Cas. 311.

[289] McIntyre v. People, 38 Ill. 514.

[290] Edwards v. State, 38 Tex. Cr. R. 386, 43 S. W. 112. In this case, the charge was assault with intent to murder, and the decision may be sustained because of the rule that voluntary drunkenness, even from intoxicating liquors, may be shown to negative the existence of a necessary specific intent. § 107. The court, however, clearly held, contrary to reason, it seems, that temporary insanity from the voluntary use of cocaine and morphine is not subject to the same rules as temporary insanity from the voluntary use of intoxicating liquors.

under the rules governing the criminal responsibility of insane persons,[291] the fact that he is also voluntarily drunk at the time he commits an act does not render him responsible.

"It is as possible for an insane man to get drunk as a sane man. The addition of drunkenness to insanity does not withdraw from such person the protection due to insanity, but, where a person commits homicide during drunkenness, reliance must be placed upon the original insanity itself, and not upon the subsequent drunkenness."[292]

104. Involuntary Drunkenness.

The rule that drunkenness is no defense does not apply in the case of involuntary drunkenness, as where a man is intoxicated by liquor which he has been compelled to drink against his will, or which has been prescribed by a physician.[293] Drunkenness is not to be regarded as involuntary, within this exception, however, merely because it is the result of an inor-

[291] Ante, § 93 et seq.

[292] State v. Kraemer, 49 La. Ann. 766, 774, 22 So. 254; Choice v. State, 31 Ga. 424, 472, Beale's Cas. 269; Terrill v. State, 74 Wis. 278, 42 N. W. 243; People v. Cummins, 47 Mich. 334, 11 N. W. 184, 186. And see Edwards v. State, 38 Tex. Cr. R. 386, 43 S. W. 112.

In a late Louisiana case it was held that, when a charge of murder is defended on the ground that the accused was laboring under delirium tremens at the time of the commitment of the act, and that he was therefore unable to know, realize, or appreciate what he was doing, the delirium tremens must be shown to have antedated the fit of drunkenness during which the act was committed. The court said: "In other words, if a person, being in possession of his mental faculties, voluntarily gets into a fit of drunkenness, and during such drunkenness commits a homicide under a diseased mental condition, occasioned by the same, he cannot set up such diseased mental condition as an excuse for his act; that, in order that a man should stand excused for a homicide committed during drunkenness, and while in a diseased mental condition, the diseased mental condition which excuses the homicide should be able to be successfully urged as an excuse for the act of getting drunk." State v. Kraemer, 49 La. Ann. 766, 22 So. 254.

[293] 1 Hale, P. C. 32; Pearson's Case, 2 Lewin, C. C. 144, Beale's Cas. 261. And see People v. Robinson, 2 Park. Cr. R. (N. Y.) 235.

dinate and irresistible appetite for drink, overcoming the will and amounting to a disease.[294] Nor, it seems, is there any exemption from responsibility merely because a man, by reason of previous injury to his head or brain, or other constitutional infirmity, is more liable to be maddened by liquor than another man.[295]

105. Settled Insanity or Delirium Tremens.

The general rule that voluntary drunkenness is no defense does not apply in the case of settled insanity, or *delirium tremens,* resulting from previous habits of intemperance, for such a condition is the remote, and not the immediate, cause of the voluntary drinking, and the law does not ordinarily regard remote causes.[296] Such insanity will exempt one from responsibility under the same circumstances, but only under the same circumstances, that insanity from any other cause would exempt him.[297]

[294] Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; Choice v. State, 31 Ga. 424, 472, Beale's Cas. 269.

[295] Choice v. State, supra.

It is said by Wharton that drunkenness is not to be regarded as voluntary when it is the result of moderate and customary indulgence, and is caused by some temporary disease or debility, or unsuspected susceptibility. 1 Whart. Crim. Law (10th Ed.) § 55, citing Roberts v. People, 19 Mich. 401, and Rogers v. State, 33 Ind. 543. See McCook v. State, 91 Ga. 740, 17 S. E. 1019.

[296] Per Mr. Justice Story, in U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993.

The insane condition must be the remote and not the immediate effect of intoxication. That defendant had from the length of his debauch become "crazy drunk" is no defense. State v. Haab, 105 La. 230, 29 So. 725, Mikell's Cas. 320.

[297] 1 Hale, P. C. 32; Reg. v. Davis, 14 Cox, C. C. 563, Beale's Cas. 262; U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264; and see U. S. v. McGlue, 1 Curt. 1, Fed. Cas. No. 15,679; Beasley v. State, 50 Ala. 149, 2 Am. Rep. 292; Upstone v. People, 109 Ill. 169; Wagner v. State, 116 Ind. 181, 18 N. E. 833; Erwin v. State, 10 Tex. App. 700; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Evers v. State, 31 Tex. Cr. R.

106. Drunkenness may Negative Commission of the Act.

The fact that the accused was drunk at or about the time the deed with which he is charged was committed may always be proven if it tends to show that he could not have committed the deed, the evidence being admitted in such case, not to exempt him from responsibility for an act done by him, but to show that some other person, and not he, must have committed it.[298]

107. Drunkenness may Negative Specific Intent or Knowledge.

(*a*) *Specific Intent.*—Proof of drunkenness, though voluntary, is also admissible, and may constitute a defense, when the accused is charged with an offense of which some specific intent is an essential element. As the offense cannot be committed without such an intent, if the fact of drunkenness negatives its existence, as where it appears that the accused was so drunk that he could not have entertained such an intent, it necessarily constitutes a complete defense.[299]

There is some conflict in the decisions, but by the weight of authority this principle admits proof of drunkenness in prose-

318, 20 S. W. 744, 37 Am. St. Rep. 811; People v. Robinson, 2 Park. Cr. R. (N. Y.) 235; Boswell v. Com., 20 Grat. (Va.) 860; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Terrill v. State, 74 Wis. 278, 42 N. W. 243; French v. State, 93 Wis. 325, 67 N. W. 706; State v. Hand, 2 Hard. (Del.) 149, 1 Marv. 545, 41 Atl. 192; State v. Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052.

[298] Thus, drunkenness may be shown when it tends to prove an alibi, as where it is shown that the accused, shortly before the time the act was done, was at another place, and in such a state of drunkenness that he could not have been at the place where the act was done. Ingalls v. State, 48 Wis. 647, 4 N. W. 785.

[299] Steph. Dig. Crim. Law, art. 29; Reg. v. Doody, 6 Cox, C. C. 463, Beale's Cas. 261; People v. Walker, 38 Mich. 156, Beale's Cas. 271; Roberts v. People, 19 Mich. 401, 416; Loza v. State, 1 Tex. App. 488, 28 Am. Rep. 416; Cline v. State, 43 Ohio St. 332, 1 N. E. 22; State v. Garvey, 11 Minn. 154; People v. Ferris, 55 Cal. 588; Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; People v. Robinson, 2 Park. Cr. R. (N. Y.) 235; Hill v. State, 42 Neb. 503, 60 N. W. 916; Head v. State, 43 Neb. 30, 61 N. W. 494.

cutions for assault with intent to kill, to wound, to rape, or to rob, in which it is necessary to prove the specific intent to kill, to wound, to rape, or to rob;[300] and in prosecutions for burglary, wherein a specific intent to commit a felony must be shown;[301] for larceny or robbery, wherein an intent to steal,—*the animus furandi*,—must be shown;[302] for an attempt to commit a crime, wherein it must be shown that there was the specific intent to commit the particular crime charged to have been attempted;[303] for conspiracy;[303a] for perjury;[304] for bribery;[305] or for forgery.[306]

(*b*) *Knowledge.*—On the same principle, proof of voluntary drunkenness may be shown to negative the existence of a knowledge of particular facts, when such knowledge is an

[300] Roberts v. People, 19 Mich. 401, 416; Crosby v. People, 137 Ill. 325, 27 N. E. 49; Cline v. State, 43 Ohio St. 332, 1 N. E. 22; State v. Garvey, 11 Minn. 154; Reagan v. State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; Whitten v. State, 115 Ala. 72, 22 So. 483, Mikell's Cas. 326; Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; Booher v. State, 156 Ind. 435, 60 N. E. 156; Head v. State, 43 Neb. 30, 61 N. W. 494; State v. Grear, 28 Minn. 426, 10 N. W. 472.

[301] State v. Bell, 29 Iowa, 316; Schwabacher v. People, 165 Ill. 618, 46 N. E. 809. Contra, State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875, 886.

[302] People v. Walker, 38 Mich. 156, Beale's Cas. 271; Chatham v. State, 92 Ala. 47, 9 So. 607; Wood v. State, 34 Ark. 341, 36 Am. Rep. 13; State v. Schingen, 20 Wis. 74, 78; Loza v. State, 1 Tex. App. 488, 28 Am. Rep. 416; Bartholomew v. People, 104 Ill. 601; Keeton v. Com., 92 Ky. 522, 18 S. W. 359; State v. Koerner, 8 N. D. 292, 78 N. W. 981. Contra, Dawson v. State, 16 Ind. 428, 79 Am. Dec. 439.

[303] Reg. v. Doody, 6 Cox, C. C. 463, Beale's Cas. 261 (where the charge was attempt to commit suicide); Reagan v. State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833 (where the charge was attempt to rape).

[303a] Booher v. State, 156 Ind. 435, 60 N. E. 156.

[304] Lytle v. State, 31 Ohio St. 196; Lyle v. State, 31 Tex. Cr. R. 103, 19 S. W. 903. Compare People v. Willey, 2 Park. Cr. R. (N. Y.) 19 and Schaller v. State, 14 Mo. 502.

[305] White v. State, 103 Ala. 72, 16 So. 63.

[306] People v. Blake, 65 Cal. 275, 4 Pac. 1.

essential element of the offense charged, as in prosecutions for passing counterfeit money or uttering a forged instrument, in which it is necessary to allege and prove that the accused knew that the money was counterfeit or the instrument forged.[307] The same would seem to be true of a prosecution for illegally voting at an election.[308]

(*c*) *Degree of Drunkenness.*—Voluntary drunkenness is no defense, even when a specific intent or a guilty knowledge is an essential element of the crime charged, unless the accused was so drunk as to be mentally incapable of entertaining the requisite intent, or of possessing the requisite knowledge. It is only material when it negatives the existence of such intent or knowledge.[309]

108. Homicide Cases.

(*a*) *Murder at Common Law.*—The application of the principles stated above to homicide cases is of so much importance as to require special mention. As will be shown in a subsequent chapter, to constitute murder at common law it is not necessary that there shall be a specific intent to kill, but it is sufficient to show malice generally, or implied malice, as by showing the

[307] Pigman v. State, 14 Ohio, 555, 45 Am. Dec. 558; U. S. v. Roudenbush, Baldw. 514, Fed. Cas. No. 16,198.

[308] People v. Harris, 29 Cal. 678. But see State v. Welch, 21 Minn. 22, where it was held that drunkenness could not be shown on a prosecution for illegally voting twice at an election. See, to the same effect, McCook v. State, 91 Ga. 740, 17 S. E. 1019.

[309] U. S. v. Roudenbush, Baldw. 514, Fed. Cas. No. 16,198. In this case it was said by Judge Baldwin: "If the mind still acts,—if its reasoning and discriminating faculty remains,—a state of partial intoxication affords no ground of a favorable presumption in favor of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same act when sober. The simple question is, did he know what he was about?" See, also, Reagan v. State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; Warner v. State, 56 N. J. Law, 686, 29 Atl. 505, 44 Am. St. Rep. 415.

deliberate use of a deadly weapon without justification or excuse.[310] It is well settled, therefore, that, on a prosecution for murder at common law, voluntary drunkenness, however excessive, is no defense. It neither excuses nor mitigates the offense.[311]

(*b*) *Statutory Degrees of Murder* (*1*) *First Degree.*—In many states, however, murder is by statute divided into degrees, and an actual intent to kill, or some deliberation and premeditation, is made necessary to constitute murder in the first degree, but not to constitute murder in the second degree.[312] In these jurisdictions, by the decided weight of authority, drunkenness may be shown to negative the existence of such a state of mind, and so to show that a homicide was not murder in the first degree.[313]

[310] Post, § 244.

[311] U. S. v. McGlue, 1 Curt. 1, Fed. Cas. No. 15,679; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264; Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; Choice v. State, 31 Ga. 424, 472, Beale's Cas. 269; State v. John, 8 Ired. (N. C.) 330, 49 Am. Dec. 396; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Kraemer, 49 La. Ann. 766, 22 So. 254; Willis v. Com., 32 Grat. (Va.) 929; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 262; State v. Tatro, 50 Vt. 483; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Upstone v. People, 109 Ill. 169.

The case of Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493, seems to be opposed to this well-settled doctrine.

[312] Post, § 251 et seq.

[313] In some states, this doctrine is not recognized. People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264; Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; State v. Tatro, 50 Vt. 483.

The doctrine, however, is a sound one, and has been recognized by the supreme court of the United States, and by most of the state courts. Hopt v. People, 104 U. S. 631; Tucker v. U. S., 151 U. S. 164; Boswell v. Com., 20 Grat. (Va.) 860; Willis v. Com., 32 Grat. (Va.) 929; Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Com. v. Dorsey, 103 Mass. 412; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Pirtle v. State, 9 Humph. (Tenn.) 663; Lancaster v. State, 2 Lea (Tenn.) 575; Jones v. Com., 75 Pa. 403; Keenan v. Com., 44

The fact of drunkenness will not mitigate the offense, if it was in fact committed willfully, deliberately, and premeditatedly, but it may be proved, and is entitled to weight in so far only as it tends to show that the accused was not in such a state of mind as to be capable of acting with that deliberation and premeditation that is required by the statutes to constitute murder in the first degree.[314]

(*2*) *Second Degree.*—Neither an actual intent to kill nor premeditation is necessary under the statutes to constitute murder in the second degree, but general or implied malice is sufficient, as in the case of murder at common law.[315] Drunkenness, therefore, is no defense on a charge of this degree of murder.[316]

(*3*) *Intent Conceived Before Becoming Drunk.*—Even in a prosecution for murder in the first degree, the fact that the accused was drunk when he committed the deed is immaterial, if he had determined to commit it before becoming drunk.[317]

Pa. 55, 84 Am. Dec. 414, Mikell's Cas. 312; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; People v. Belencia, 21 Cal. 544; People v. Williams, 43 Cal. 344; State v. Johnson, 40 Conn. 136, Beale's Cas. 270; State v. Johnson, 41 Conn. 584; State v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293; Schlencker v. State, 9 Neb. 241, 1 N. W. 857; Wilson v. State, 60 N. J. Law, 171, 37 Atl. 954, 38 Atl. 428; People v. Corey, 148 N. Y. 476, 42 N. E. 1066; People v. Leonardi, 143 N. Y. 360, 38 N. E. 372; State v. Faino, 2 Hard. (Del.) 153, 1 Marv. 492; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 37 Am. St. Rep. 811.

[314] Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Warner v. State, 56 N. J. Law, 686, 29 Atl. 505, 44 Am. St. Rep. 415; and other cases cited in the note preceding.

[315] Post, § 254.

[316] Boswell v. Com., 20 Grat. (Va.) 860; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Jones v. Com., 75 Pa. 403; Wilson v. State, 60 N. J. Law, 171, 37 Atl. 954, 38 Atl. 428; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 37 Am. St. Rep. 811.

[317] If a man, while sober, deliberately resolves to kill another, and then drinks for the purpose of nerving himself to the commission of the deed, and kills the other when he is so drunk as to be incapable of forming such a design, and temporarily unconscious of what he is

(*c*) *Manslaughter.*—The extent to which drunkenness may be shown at common law to reduce a homicide from murder to voluntary manslaughter is not altogether clear.[318]

The weight of authority is in favor of the rule that, if the homicide was committed after such provocation as the law deems adequate to reduce a killing under the influence of passion and heat of blood caused thereby to manslaughter, evidence that the accused was drunk at the time of the homicide may be admitted and considered in determining whether the killing was in the heat of blood caused by the provocation, or whether it was with malice.[319]

But it must be regarded as settled that the mere fact of drunkenness will not reduce to manslaughter a homicide committed on inadequate provocation, or on adequate provocation after the lapse of a reasonable time for the blood to cool. In other words, if the provocation would not reduce a homicide by a sober man from murder to manslaughter, it will not so reduce a homicide by a drunken man.[320]

doing, he is still guilty of murder in the first degree. State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

[318] As to what constitutes voluntary manslaughter, see post, § 255 et seq.

[319] Rex v. Thomas, 7 Car. & P. 817, Mikell's Cas. 311; Marshall's Case, 1 Lewin, C. C. 76, Mikell's Cas. 311; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264. See, also, McIntyre v. People, 38 Ill. 514; Rafferty v. People, 66 Ill. 118; Malone v. State, 49 Ga. 210; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465. And see Pearson's Case, 2 Lewin, C. C. 144, Beale's Cas. 261.

[320] Rex v. Carroll, 7 Car. & P. 145; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Com. v. Hawkins, 3 Gray (Mass.) 463; Keenan v. Com., 44 Pa. 55, 84 Am. Dec. 414, Mikell's Cas. 312; Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; McIntyre v. People, 38 Ill. 514; Rafferty v. People, 66 Ill. 118; State v. Tatro, 50 Vt. 483.

In Shannahan v. Com., supra, it was said: "The proper rule is that one in a state of voluntary intoxication is subject to the same rule of conduct, and to the same rules and principles of law, that a sober man is; and that, where a provocation is offered, and the one

IX. Responsibility of Corporations.

109. In General.—A corporation is liable to indictment:

1. **For nonfeasance.**
2. **By the weight of authority, for misfeasance, if the offense does not involve the element of personal violence or the element of malice or actual criminal intent.**
3. **But it seems that it is not indictable for an offense of which malice or an actual criminal intent is an essential element.**
4. **It is not indictable for felony.**

110. Nonfeasance.

In view of the fact that a corporation is, in the language of Chief Justice Marshall, "an artificial being, invisible, intangible, and existing only in contemplation of law," it was at one time doubted whether a corporation could be guilty of any crime. Lord Holt is reported as having said that "a corporation is not indictable, but the particular members of it are."[321] This, however, is not now the law. A corporation cannot be imprisoned, but it may be deprived of its charter, or it may be fined; and it is now well settled that it may be indicted and fined for offenses consisting in mere nonfeasance, as for failure to repair a public road or a bridge, or to perform other duties imposed upon it by law.[322]

offering it is killed, if it mitigates the offense of the man drunk, it should also mitigate the offense of the man sober."

[321] Anon., 12 Mod. 559, Mikell's Cas. 328.

[322] Reg. v. Birmingham & G. R. Co., 3 Q. B. 223, 9 Car. & P. 469; U. S. v. John Kelso Co., 86 Fed. 304, Mikell's Cas. 328; Louisville, etc., R. Co. v. Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; State v. Godwinsville, etc., Road Co., 49 N. J. Law, 266, 10 Atl. 666, 60 Am. Rep. 611; New York & G. L. R. Co. v. State, 50 N. J. Law, 303, 13 Atl. 1, 53 N. J. Law, 244, 23 Atl. 168; Susquehanna & B. Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267; People v. Albany Corp., 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; Louisville, etc., R. Co. v. State, 3 Head (Tenn.) 523, 75

111. Misfeasance.

In several of the earlier cases a distinction was made, with respect to the criminal responsibility of corporations, between nonfeasance and misfeasance, and, while it was conceded that

Am. Dec. 778; State v. Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519; Com. v. Central Bridge Corp., 12 Cush. (Mass.) 242. And see Clark & M. Priv. Corp. § 247; 7 Am. & Eng. Enc. Law (2d Ed.) 841, 842.

It was said by Bigelow, J., in Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, Beale's Cas. 277: "Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, of perjury, or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury committed by a corporation impossible, because it would leave the only means of redress to be sought against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way, to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts, to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses."

Thus, in Susquehanna & B. Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267, it was held that a turnpike-road company was liable to indictment at common law for suffering its road to be out of repair.

And in Com. v. Central Bridge Corp., 12 Cush. (Mass.) 242, it was held that a provision in the charter of a toll-bridge corporation, that the bridge should "at all times be kept in good, safe, and passable repair," required the company to light the bridge, if necessary to make it safe and convenient for passage at night, and that an indictment would lie for failure to do so.

And in Louisville, etc., R. Co. v. Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205, it was held that it was the duty of a railroad company to cause signals to be given, where the safety of travelers on intersecting roads demanded that a warning should be given of approaching trains, and that an habitual failure to give such signals or warnings was an indictable nuisance.

an indictment would lie for nonfeasance, it was held that it would not lie for misfeasance, as for a nuisance in erecting a dam across a navigable river,[323] or in obstructing a highway by digging it up and placing stones and dirt therein.[324] This view, however, has been almost universally repudiated, and it may now be regarded as settled that a corporation may be indicted for misfeasance as well as for nonfeasance.[325] Thus, indictments have been sustained against railroad companies and other corporations for obstructing a highway by positive acts, as by cutting through the same,[326] by permitting their engines and cars to remain on the track at highway intersections,[326a] or by building station houses, depots, or other structures thereon.[327]

Indictments have also been sustained against corporations for contempt,[327a] for creating a nuisance by building a bridge

[323] State v. Great Works Milling, etc., Co., 20 Me. 41, 37 Am. Dec. 38. Contra, State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586.

[324] Com. v. Swift Run Gap Turnpike Co., 2 Va. Cas. 362; State v. Ohio & M. R. Co., 23 Ind. 362.

[325] Reg. v. Great North of England R. Co., 9 Q. B. 315; State v. Passaic County Agr. Soc., 54 N. J. Law, 260, 23 Atl. 680; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, Beale's Cas. 277; Palatka, etc., R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663; State v. Baltimore & O. R. Co., 15 W. Va. 362, 26 Am. Rep. 803; Com. v. Pulaski County Agr. & M. Ass'n, 92 Ky. 197, 17 S. W. 442.

"When a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them when the punishment provided for its infraction is one that can be inflicted upon a corporation,—as, for instance, a fine." De Haven, J., in U. S. v. John Kelso Co., 86 Fed. 304, Mikell's Cas. 328.

[326] Reg. v. Great North of England R. Co., 9 Q. B. 315.

[326a] State v. Western N. C. R. Co., 95 N. C. 602.

[327] State v. Morris & E. R. Co., 23 N. J. Law, 360; State v. Vermont Cent. R. Co., 27 Vt. 103.

[327a] Telegram Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445; Clark & M. Priv. Corp. 662, and cases cited.

across a navigable river,[328] or other misfeasance,[328a] by building a railway crossing so as to obstruct the highway,[328b] and by polluting a watercourse,[329] for keeping a disorderly house,[330] for permitting gaming on its premises,[331] for unlawfully selling liquor,[331a] for taking usury,[332] for publishing a libel,[332a] for violation of the Sunday laws,[333] for peddling by an agent without a license,[333a] for defrauding the revenue,[333b] for violating a statute regulating hours of labor,[333c] and for cutting down timber and obstructing a river, in violation of a statute.[334]

112. Offenses Involving Personal Violence or Evil Intent.

It has been said that a corporation cannot be indicted for an offense involving the element of personal violence, as assault and battery, or for an offense involving the element of malice or evil intent.[335] And perhaps this must now be regarded as

[328] Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, Beale's Cas. 277.

[328a] People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735.

[328b] Northern Cent. R. Co. v. Com., 90 Pa. 300.

[329] In Rex v. Medley, 6 Car. & P. 292, an indictment was sustained against a gas company for nuisance in so conducting its works as to convey large quantities of noisome liquids, arising from the manufacture of gas, into the river Thames, whereby the water was polluted, and fish destroyed. See, also, State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586.

[330] State v. Passaic County Agr. Soc., 54 N. J. Law, 260, 23 Atl. 680.

[331] Com. v. Pulaski County Agr. & M. Ass'n, 92 Ky. 197, 17 S. W. 442. Compare State v. Sullivan County Agr. Soc., 14 Ind. App. 369, 42 N. E. 963.

[331a] Action for penalty, Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 32 N. W. 275.

[332] State v. Security Bank of Clark, 2 S. D. 538, 51 N. W. 337.

[332a] State v. Atchison, 3 Lea (71 Tenn.) 729, 31 Am. Rep. 663. And see Telegram Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445.

[333] State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[333a] Standard Oil Co. v. Com., 107 Ky. 606, 55 S. W. 8.

[333b] U. S. v. Baltimore & O. R. Co., 7 Am. Law Reg. (N. S.) 757, Fed. Cas. No. 14,509.

[333c] U. S. v. John Kelso Co., 86 Fed. 304, Mikell's Cas. 328.

[334] State v. White Oak River Corp., 111 N. C. 661, 16 S. E. 331.

[335] Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339,

the law. It is well settled, however, that a corporation may be made liable in a civil action for an assault and battery committed by an agent in the course of his employment, and for malicious wrongs of its agents, and some of the courts have shown a tendency to extend this doctrine to criminal prosecutions.[335a] Malice is an element of criminal libel, and an indictment for libel has been sustained against a corporation.[336]

Wharton says that there is no reason why the same acts for which a corporation is subject to a civil action may not equally be the basis of a criminal proceeding, when they result in injury to the public at large;[337] and he is sustained by *dicta* in some of the late cases.[338]

There are some crimes of which, from their very nature, corporations cannot be guilty, as perjury.[339] And they cannot be indicted for a felony, because, if for no other reason, they cannot be subjected to the punishment prescribed for felony.[340]

113. Municipal Corporations.

The doctrine that corporations may be liable to indictment applies, not only to private corporations, but to municipal cor-

Beale's Cas. 277; Reg. v. Birmingham & G. R. Co., 3 Q. B. 223, 9 Car. & P. 469; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; Orr v. Bank of U. S., 1 Ohio, 36; Com. v. Punxsutawney St. Pass. R. Co., 24 Pa. Co. Ct. R. 25.

[335a] Com. v. Pulaski County Agr. & M. Ass'n, 92 Ky. 197, 17 S. W. 442; State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[336] State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

[337] 1 Whart. Crim. Law, § 87.

[338] See Com. v. Pulaski County Agr. & M. Ass'n, 92 Ky. 197, 17 S. W. 442; State v. Passaic County Agr. Soc., 54 N. J. Law, 260, 23 Atl. 680; State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[339] Com. v. Pulaski County A. & M. Ass'n, supra. And see U. S. v. John Kelso Co., 86 Fed. 304, Mikell's Cas. 328.

[340] Com. v. Pulaski County A. & M. Ass'n, supra. And see Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, Beale's Cas. 277.

porations as well. Thus, it has been held that a municipal corporation may be indicted for nuisance where it so constructs its public sewers that the outfalls thereof create a public nuisance, noisome and prejudicial to the public health, and fails to promptly remove the accumulations of filth.[341]

X. Concurrence of Act and Intent.

114. In General.—When a particular intent is essential to constitute a crime, the act and the intent must concur in point of time.[341a]

For example, to constitute larceny it is essential that there shall be a trespass in taking the property, and that the property shall be taken with felonious intent. The offense is not committed unless these two elements concur in point of time. If a man obtains possession of another's goods by delivery by the other, and without any fraudulent intent at the time, he does not commit a trespass, and he cannot commit a trespass so long as he has lawful possession. If, therefore, while thus in possession, he conceives a felonious intent, and appropriates the goods to his own use, he does not commit larceny.[342]

[341] State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586.

In People v. Albany Corp., 11 Wend. (N. Y.) 539, it was held that where the corporation of a city had power to direct the excavating, deepening, and cleansing of a basin connected with a river, and neglected to take the necessary measures in that respect after the basin had become foul by the aggregation of mud and other substances, so that the water was corrupted, and the air infected by noisome and unwholesome stenches, and a nuisance was thus created, an indictment would lie against it.

[341a] A criminal act as well as a criminal intent is necessary. Post, § 116.

[342] Reg. v. Matthews, 12 Cox, C. C. 489, Mikell's Cas. 333; post, §§ 316, 317, 318, 320, 332.

An indictment for killing a sheep with intent to steal the carcass is sustained by proof that the prisoner when interrupted had given it a deadly wound of which it died two days later. Reg. v. Sutton, 2 Mood. C. C. 29, Mikell's Cas. 335.

And so it is in the case of burglary, which is the breaking and entering of the dwelling house of another in the nighttime with intent to commit a felony. This intent must exist at the time of the breaking and entry. It is not burglary to break and enter a dwelling house without any felonious intent, and afterwards form and carry out such an intent.[343]

Likewise where a police officer went into a house in good faith to prevent a violation of law and arrest the offender, and after entry violated the law himself, his subsequent conduct did not relate back so as to make his original entry a trespass.[343a]

115. Ratification of Another's Act.

If an unlawful act is done by a person's agent or servant without his authority, subsequent ratification of the act will not render him responsible.[344]

[343] State v. Moore, 12 N. H. 42, Beale's Cas. 224; post, § 407.
[343a] Milton v. State, 40 Fla. 251, 24 So. 60, Mikell's Cas. 334.
[344] Morse v. State, 6 Conn. 9, Beale's Cas. 223; post, § 194(i).

CHAPTER IV.

THE CRIMINAL ACT—IN GENERAL.

I. Necessity for a Criminal Act, §§ 116-118.
II. Attempt to Commit Crime, §§ 119-129.
III. Solicitation to Commit Crime, §§ 130-133.
IV. Criminal Conspiracy, §§ 134-149.
V. Consent as Between Individuals, §§ 150-154.
VI. Recovery in Civil Action, § 155.
VII. Settlement and Condonation, § 156.
VIII. Wrong of Person Injured, § 157.
IX. Contributory Negligence of Person Injured, § 158.
X. Contributing Acts or Negligence of Third Persons, § 159.
XI. Entrapment, §§ 160-162.

I. Necessity for a Criminal Act.

116. In General.—To constitute a crime there must be a criminal act, as well as a criminal intent. The law does not punish a mere intent to commit a crime. There is a sufficient act, however,

1. **Where a person attempts to commit a crime, though he may not succeed in accomplishing his purpose.**
2. **Where a person solicits another to commit a felony, or in some jurisdictions a misdemeanor, though the other may not do so.**
3. **Where two or more agree or conspire to commit a crime or do any other unlawful act, though no attempt may be made to carry out the conspiracy.**

117. Mere Intention to Commit a Crime.

The general rule that the state does not take cognizance of or undertake to punish a criminal intent, unless it is accompanied by a criminal act, has repeatedly been laid down in text-books and in the cases. "It is certain that a bare intention is not punishable;" but "when joined with acts whose circumstances

may be tried, it is so."[1] The authorities, however, while agreeing on the general principle, have not always agreed as to what constitutes a sufficient act to render one amenable to the criminal law.

Having Possession of Articles with Criminal Intent.—According to the better opinion, a man is not punishable at common law for merely having possession of articles with intent to commit a crime, as of burglars' tools with intent to commit burglary, stamps or dies with intent to counterfeit coin, counterfeit money or obscene publications with intent to utter or publish the same, etc.[2]

[1] Per Lee, J., in Rex v. Sutton, Cas. t. Hardw. 370, 1 East, P. C. 172, 2 Strange, 1074, Beale's Cas. 125; Kelly v. Com., 1 Grant's Cas. (Pa.) 484, Mikell's Cas. 342. And see Rex v. Heath, Russ. & R. 184; Respublica v. Malin, 1 Dall. (Pa.) 33; State v. Asher, 50 Ark. 427, 8 S. W. 177, Beale's Cas. 229; U. S. v. Riddle, 5 Cranch (U. S.) 311, Beale's Cas. 222; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; Miles v. State, 58 Ala. 390; Cunningham v. State, 49 Miss. 685.

A bystander's mere mental approval of a crime committed by another in his presence does not make him guilty as a principal in the second degree, or render him otherwise liable to punishment. State v. Cox, 65 Mo. 29, Mikell's Cas. 483, n. See post, § 174.

The mere fact of going to a place with the intention of doing an unlawful act will not of itself subject the party to the punishment denounced against such act unless he also carries his intention into effect. Yoes v. State, 9 Ark. 42, Mikell's Cas. 20. Defendant went to a meeting-house and called prosecutor out for the purpose of having a difficulty with him.

[2] In Rex v. Heath, Russ. & R. 184, it was held that having counterfeit silver in one's possession, with intent to utter the same as good, was not indictable prior to the statute of 2 & 3 Wm. IV., c. 34, § 8, making it so. See, to the same effect, Rex v. Stewart, Russ. & R. 288. In Dugdale v. Reg., 1 El. & Bl. 435, Dears. C. C. 64, Beale's Cas. 221, it was held that having possession of indecent prints, with intent to publish them, was not indictable. See, also, Com. v. Morse, 2 Mass. 138 (possession of forged bills, with intent to pass them), and Rex v. Rosenstein, 2 Car. & P. 414 (possession of an obscene libel with intent to publish it).

There are some decisions to the contrary. Thus, in Rex v. Sutton, Cas. t. Hardw. 370, 1 East, P. C. 172, 2 Strange, 1074, Beale's Cas. 125, it was held that it was a misdemeanor at common law for a per-

Procuring with Criminal Intent.—It has been held, however, that the procuring of tools, etc., with intent to use them in counterfeiting, or the procuring of counterfeit coin, with intent to utter it as good, or of indecent prints with intent to publish them, is a sufficient act to render one indictable at common law.[3] The act of procuring is not punished as an attempt to commit a crime, for it does not go far enough to constitute an attempt.[4]

Statutes.—It is, of course, within the power of the legislature to punish the mere having possession of articles with intent to use them in the commission of crimes. Both in England and in this country statutes have been enacted punishing the bare possession, with criminal intent, of implements for coining,[5] counterfeit money,[6] burglars' tools,[7] etc.

118. Act Intended as, but not Constituting, a Crime.

Since the law does not punish a mere criminal intent unaccompanied by a criminal act, a person who intends a particular

son to have tools for coining in his possession, with intent to use them. And in Rex v. Parker, 1 Leach, C. C. 41, it was held that having possession of counterfeit money, with intent to pass it as good, was indictable at common law.

[3] In Rex v. Fuller, Russ. & R. 308, it was held that procuring base coin, with intent to utter it as good, was a misdemeanor; and also that having possession of a large quantity of base coin was prima facie evidence of having procured it with intent to utter it.

In Dugdale v. Reg., 1 El. & Bl. 435, Dears. C. C. 64, Beale's Cas. 221, this case was followed, and it was held a misdemeanor to procure indecent prints with intent to publish them.

In Reg. v. Roberts, Dears. C. C. 539, 7 Cox, C. C. 39, the doctrine was again applied, and it was held a misdemeanor to procure stamps or dies with intent to use them in counterfeiting coin.

[4] Reg. v. Roberts, Dears. C. C. 539, 7 Cox, C. C. 39. See post, § 123.

[5] See Rex v. Foster, 7 Car. & P. 495; Reg. v. McMillan, 1 Cox, C. C. 41.

[6] See Reg. v. Williams, Car. & M. 259.

[7] See Reg. v. Oldham, 2 Den. C. C. 472, 3 Car. & K. 249, 5 Cox, C. C. 551; Reg. v. Bailey, Dears. C. C. 244, 6 Cox, C. C. 241.

crime, and thinks he is committing it, is not for that reason guilty, if his acts do not in fact amount to a crime.

Such a case arose during the Revolutionary War. An American, mistaking a corps of American troops for British, went over to them. It was held that the fact that he thought they were British did not make him guilty of treason.[8]

The same principle applies where a person obtains another's goods or money by making representations which he supposes to be false, but which happen to be true.[9] And it would apply to a man forcibly having intercourse with his wife against her will, mistaking her for some other woman.[10] Whether there may be a conviction for an attempt in such case is elsewhere considered.[11]

II. Attempt to Commit a Crime.

119. In General.—As a general rule, any attempt to commit a crime is a misdemeanor at common law, whether the crime attempted be a felony or merely a misdemeanor, and whether it be a common-law or a statutory offense. But it has been held that the rule does not apply to statutory misdemeanors which are merely mala prohibita.

To constitute an indictable attempt to commit a crime, there must be:

1. An intent to commit that particular crime.

[8] Respublica v. Malin, 1 Dall. (Pa.) 33, Beale's Cas. 127.

[9] State v. Asher, 50 Ark. 427, 8 S. W. 177, Beale's Cas. 229; State v. Garris, 98 N. C. 733, 4 S. E. 633; People v. Reynolds, 71 Mich. 343, 38 N. W. 923; post, § 362.

The same is true where a person attempts to obtain another's property by false pretenses, but, for some reason, no injury results. See post, § 368.

[10] Post, § 300.

[11] Post, § 129.

An act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party, with which it has no connection. U. S. v. Fox, 95 U. S. 670, Beale's Cas. 227.

2. **An act done in pursuance of such intent, which falls short of the actual commission of the crime. Neither the bare intent, without any act, nor mere preparation, is sufficient.**
3. **There must be at least apparent ability to commit the intended crime.**[12]

120. What Attempts are Indictable.

(*a*) *In General.*—It is settled beyond any question that it is an indictable misdemeanor at common law to attempt to commit any crime, except as hereafter explained, whether the crime intended is a felony, as murder, rape, robbery, etc., or merely a misdemeanor, as cheating, forgery, etc., and whether it is a common-law or a statutory crime.[13] "If an offense is made a misdemeanor by statute," said Parke, B., "it is made so for all purposes. There are many cases in which an attempt to

[12] "An attempt, in criminal law, is an apparent unfinished crime, and hence is compounded of two elements, viz.: (1) The intent to commit a crime, and (2) a direct act done towards its commission, but falling short of the execution of the ultimate design. It need not, therefore, be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently adapted to produce the result intended. It must be something more than mere preparation." Per Lewis, P., in Glover v. Com., 86 Va. 382, 10 S. E. 420, Beale's Cas. 133, citing Uhl v. Com., 6 Grat. (Va.) 706; Hicks v. Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131. See, also, Kelly v. Com., 1 Grant's Cas. (Pa.) 484, Mikell's Cas. 342, where a conviction of murder predicated on an attempt to rape was reversed because no attempt but a mere intent was shown.

[13] 1 Whart. Crim. Law (10th Ed.) § 173 et seq.; 1 Hawk. P. C. c. 25, § 3; Rex v. Roderick, 7 Car. & P. 795, Beale's Cas. 127; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; Com. v. Barlow, 4 Mass. 439; State v. Boyden, 13 Ired. (N. C.) 505; State v. Jordan, 75 N. C. 27; Rafferty v. State, 91 Tenn. 655, 16 S. W. 728; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; Hicks v. Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

By statute in some states, an attempt to commit a felony is made a felony by being made punishable by imprisonment in the state prison. Rafferty v. State, 91 Tenn. 655, 16 S. W. 728; ante, § 3.

commit a misdemeanor has been held to be a misdemeanor; and an attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute or was an offense at common law."[14]

(*b*) *Suicide.*—At common law, suicide was regarded as a crime, and was punished by forfeiture of goods and an ignominious burial;[15] and an attempt to commit suicide is a misdemeanor at common law.[16]

(*c*) *Misdemeanors Merely Mala Prohibita.*—It has been held that the rule that an attempt to commit a misdemeanor is a misdemeanor does not apply to statutory misdemeanors that are merely *mala prohibita,* as selling cotton in the seed between sunset and sunrise,[17] usury,[18] selling intoxicating liquors,[19] etc. But the extent of this deception is not clear.[20]

(*d*) *Attempt to Commit an Attempt.*—There can be no such thing as an attempt to attempt a crime.[21] Since a simple assault, as we shall see, is nothing more than an attempt to commit a battery, and aggravated assaults are nothing more than attempts to commit murder, rape, robbery, etc.,[22] there can be no such thing as an attempt to commit an assault, whether simple or aggravated.[23]

[14] Rex v. Roderick, 7 Car. & P. 795, Beale's Cas. 127.

[15] Post, § 250.

[16] Reg. v. Doody, 6 Cox, C. C. 463, Beale's Cas. 261; State v. Carney, 69 N. J. Law, 478, 55 Atl. 44. See, also, Com. v. Dennis, 105 Mass. 162; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109.

Suicide is not now punished at all, and in Massachusetts, where the statute punishes attempts to commit "indictable offenses," it has been held that an attempt to commit suicide is not indictable in that state. Com. v. Dennis, supra.

[17] Whitesides v. State, 11 Lea (Tenn.) 474. And see Taylor v. State, 11 Lea (Tenn.) 708.

[18] See Rex v. Upton, 2 Strange, 816.

[19] Pulse v. State, 5 Humph. (Tenn.) 108. See, also, Com. v. Willard, 22 Pick. (Mass.) 476.

[20] See 3 Am. & Eng. Enc. Law (2d Ed.) 252.

[21] State v. Sales, 2 Nev. 268.

[22] Post, §§ 200, 208.

121. The Intent.

Obviously, there cannot be an attempt to commit a particular crime unless there is an intention to commit that crime. A general criminal intent is sometimes sufficient to render one guilty of a crime, but it is never sufficient to render him guilty of an attempt. The specific intent is absolutely essential.[24]

For example, to constitute murder, an intent to kill need not be shown. It is murder to kill a person while engaged in the commission of another felony, or in resisting a lawful arrest, or in doing a wanton act which has a natural tendency to cause death.[25] But to constitute an attempt to murder, the specific intent to kill is necessary.[26] And the same is true of an attempt to commit any other crime, as rape,[27] larceny,[28] robbery,[29] abortion,[30] mayhem,[31] etc.

[23] Wilson v. State, 53 Ga. 205; People v. Thomas, 63 Cal. 482; People v. Stouter, 142 Cal. 146, 75 Pac. 780; White v. State, 22 Tex. 608.

[24] Rex v. Boyce, 1 Mood. C. C. 29, Beale's Cas. 182; Rex v. Davis, 1 Car. & P. 306; Reg. v. Cruse, 8 Car. & P. 541; Reg. v. Donovan, 4 Cox, C. C. 399; Hall v. Com., 78 Va. 678; Sharp v. State, 19 Ohio, 379; Cunningham v. State, 49 Miss. 685; Lewis v. State, 35 Ala. 380; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; Reagan v. State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

[25] Post, §§ 244, 248, 249.

[26] Reg. v. Donovan, 4 Cox, C. C. 399; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; Maher v. People, 10 Mich. 212; Pruitt v. State, 20 Tex. App. 129; Slatterly v. People, 58 N. Y. 354; Morgan v. State, 33 Ala. 413; post, § 208.

[27] On a prosecution for attempt to rape, there must be a specific intent to have intercourse in such a way as will constitute rape,—by force and against the will of the woman. Lewis v. State, 35 Ala. 380; Carroll v. State, 24 Tex. App. 366, 6 S. W. 190; State v. Kendall, 73 Iowa, 255, 34 N. W. 843, 5 Am. St. Rep. 679; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; Charles v. State, 11 Ark. 389; post, § 208.

This does not apply where the girl is under the age of consent, so that want of consent is not necessary. Reg. v. Beale, L. R. 1 C. C. 10, 10 Cox, C. C. 157; State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754; People v. McDonald, 9 Mich. 150.

[28] Hall v. Com., 78 Va. 678.

Intent Inferred.—In a prosecution for an attempt, as in other cases where the intent is material, the intent need not be proved by positive or direct evidence. It may be inferred—as a matter of fact, however—from the conduct of the party and the other circumstances.[32]

122. The Act in General—Intention and Attempt Distinguished.

To constitute an attempt to commit a crime, there must be something more than a mere intention to commit it. There is a clear distinction between intention and attempt. The former indicates the purpose existing in the mind, while the latter indicates some act done in pursuance of the intent. Without an overt act there cannot be an attempt.[33]

123. Preparation and Attempt Distinguished.

There is also a distinction, though it is not so very clearly defined, between preparation and attempt. For a man to make

[29] Hanson v. State, 43 Ohio St. 376, 1 N. E. 136.

[30] State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776.

[31] Rex v. Boyce, 1 Mood. C. C. 29, Beale's Cas. 182; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143.

[32] Scott v. People, 141 Ill. 195, 30 N. E. 329 (intent to procure abortion, inferred from use of instruments without any other apparent reason); State v. Grossheim, 79 Iowa, 75, 44 N. W. 541 (intent to commit rape, inferable from conduct); Com. v. Hersey, 2 Allen (Mass.) 173, Beale's Cas. 183 (intent to kill, inferable from administering poison or use of deadly weapon under such circumstances as to evince such an intent). See, also, as to inference of intent to kill, Rex v. Howlett, 7 Car. & P. 274; Jeff v. State, 37 Miss. 321, 39 Miss. 593. And as to intent to rape, see Lewis v. State, 35 Ala. 380; Carter v. State, 35 Ga. 263; Hays v. People, 1 Hill (N. Y.) 351; State v. Smith, 80 Mo. 516.

[33] Reg. v. Roberts, Dears. C. C. 539, 7 Cox, C. C. 39; U. S. v. Riddle, 5 Cranch (U. S.) 311, Beale's Cas. 311; Kelly v. Com., 1 Grant's Cas. (Pa.) 484, Mikell's Cas. 342; People v. Murray, 14 Cal. 160; Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653; State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505; Com. v. Clark, 6 Grat. (Va.) 675; Cox v. People, 82 Ill. 191; Cunningham v. State, 49 Miss. 702. And see Lovett v. State, 19 Tex. 174; Yoes v. State, 9 Ark. 42, Mikell's Cas. 20.

up his mind to commit a crime, and to make preparations to commit it, is not an attempt. He must go further than mere preparation, and do some act directly tending to a carrying out of his unlawful intent.[34] Procuring or loading a gun, or buying poison, or walking to a particular place, with intent to kill another, is not enough to make one guilty of an attempt to commit murder.[35] The same is true of similar preparations to commit burglary,[35a] or robbery,[35b] and of a purchase of coal oil and matches with intent to commit arson,[36] or the procuring of metal and dies with intent to commit the offense of counterfeiting money.[37] And so it is in many other cases.[38]

[34] Reg. v. Roberts, Dears. C. C. 539, 7 Cox, C. C. 39; Reg. v. Eagleton, Dears. C. C. 515; U. S. v. Stephens, 8 Sawy. 116, 12 Fed. 52, Beale's Cas. 130; State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505; People v. Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108; Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55; Com. v. Kennedy, 170 Mass. 18, 48 N. E. 770.

[35] Reg. v. Cheeseman, 9 Cox, C. C. 100, Leigh & C. 140; Reg. v. Williams, 1 Den. C. C. 39; Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653; Hicks v. Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

[35a] People v. Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108. It was held an attempt to procure tools and go to the place intended, though defendants were surprised while merely reconnoitering. People v. Sullivan, 173 N. Y. 122, 65 N. E. 989.

[35b] Groves v. State, 116 Ga. 516, 42 S. E. 755, 59 L. R. A. 598.

[36] Per Pollock, C. B., in Reg. v. Taylor, 1 Fost. & F. 511. And see McDade v. People, 29 Mich. 50. See, also, Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55, Mikell's Cas. 348, where defendant had the combustibles prepared and in place and solicited another to set them afire, but abandoned the project before completion.

[37] Reg. v. Roberts, Dears. C. C. 539, 7 Cox, C. C. 39. Such an act is punishable, but not as an attempt. See ante, § 117.

[38] In U. S. v. Stephens, 8 Sawy. 116, 12 Fed. 52, Beale's Cas. 130, the defendant was charged with an attempt to introduce spirituous liquors into Alaska, in violation of an act of congress. The evidence showed that he sent from Alaska, where he resided, to a wholesale dealer in San Francisco, an order for 100 gallons of whisky, to be shipped to him in Alaska. It was held that he was not guilty of an attempt to in-

These acts are mere preparations, indifferent in their character, and do not advance the conduct of the party far enough to constitute an attempt.[39] "Between preparations for the attempt and the attempt itself," it has been said, "there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made."[40] It is said by Wharton: "To make the act an indictable attempt, it must go so far that it would result in the crime unless frustrated by extraneous circumstances."[41]

124. Acts Going beyond Mere Preparation.

If a man goes further than mere preparation, and does an act that is not indifferent in itself, but tends directly towards the commission of the crime intended, and which will ap-

troduce the whisky into Alaska, as he had done no act to carry out his illegal intent of which the law could take cognizance, the offer to purchase the whisky being an act preparatory and indifferent in its character.

In People v. Murray, 14 Cal. 160, the defendant was convicted of an attempt to contract an incestuous marriage. From the evidence it appeared that he intended to contract a marriage with his niece, that he eloped with her for that purpose, and that he requested a third person to get a magistrate to perform the ceremony. On appeal, the judgment was reversed on the ground that this was a mere preparation.

In State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505, it was held that an attempt to administer cantharides to a woman, with intent to have intercourse with her by this means, was not an attempt to rape, even conceding that having intercourse by this means would constitute rape.

One who starts out with a loaded gun to hunt game in close season is not guilty of an attempt to kill game. His conduct does not go beyond mere preparation. Cornwell v. Fraternal Acc. Ass'n, 6 N. D. 201, 69 N. W. 191, 66 Am. St. Rep. 601, 40 L. R. A. 437.

[39] See the cases above cited.

[40] People v. Murray, 14 Cal. 160.

[41] 1 Whart. Crim. Law (10th Ed.) § 181.

parently result in its commission unless frustrated by extraneous circumstances, he is guilty of an attempt. The act done need not be the last proximate act towards the consummation of the intended crime.[42] Thus, one who mixes poison with food, and places it on a table with the intent that another shall take it, or who pours coal oil on a house with intent to commit arson, or who turns or seizes the knob of a door with intent to enter and steal, is in each case guilty of an attempt to commit the intended crime, though he is prevented from proceeding further or abandons his evil purpose.[43]

125. Mere Solicitation.

View That Solicitation is an Attempt.—There are some cases

[42] Reg. v. Cheeseman, 9 Cox, C. C. 100, Leigh & C. 140; Glover v. Com., 86 Va. 382, 10 S. E. 420, Beale's Cas. 133; Uhl v. Com., 6 Grat. (Va.) 706; State v. Smith, 80 Mo. 516; People v. Sullivan, 173 N. Y. 122, 65 N. E. 989.

[43] Reg. v. Bain, 9 Cox, C. C. 98; People v. Lawton, 56 Barb. (N. Y.) 126; Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691; Com. v. Kennedy, 170 Mass. 18, 48 N. E. 770.

In Reg. v. Cheeseman, 9 Cox, C. C. 100, Leigh & C. 140, the defendant had laid aside some of his employer's goods, with the intent to carry them off when he should have an opportunity, but was detected before he could do so. He was held guilty of an attempt to commit larceny.

In Reg. v. Eagleton, Dears. C. C. 515, the defendant was held guilty of an attempt to obtain money by false pretenses, where he had contracted to deliver goods, and had, by false pretenses, obtained credit for more than he had delivered, but was not paid because of discovery of the fraud.

In Rex v. Scofield, Cald. 397, setting a lighted candle under a stairway with intent to burn the house was held an attempt to commit arson. And see McDermott v. People, 5 Park. C. R. (N. Y.) 102.

It has been held that merely to point a loaded pistol or gun at another is not a sufficient act to constitute an attempt to discharge the weapon, though it is cocked, and the party has his finger on the trigger, and expresses at the time an intention to shoot. Reg. v. Lewis, 9 Car. & P. 523; Reg. v. St. George, 9 Car. & P. 483. This, however, seems to be going too far. See State v. Shepard, 10 Iowa, 126; State v. Smith, 2 Humph. (Tenn.) 457; State v. Cherry, 11 Ired. (N. C.) 475.

in which the mere solicitation of another to commit a crime has been held indictable as an attempt to commit the crime, on the theory that mere solicitation is sufficiently an act done—"a step in the direction of the crime"—to constitute an attempt.[44] Thus, it has been held that taking an impression of a key, and preparing a false key,[45] with intent to break and enter a store through the agency of another person, and sending the key to him and soliciting him to do the act, is an attempt to commit larceny from the store.[46] And it has been held that soliciting another to commit arson, and offering him a match for the purpose, is an attempt to commit arson.[47]

Prevailing Doctrine is to the Contrary.—This view, however, has been repudiated by most of the courts in which the question has arisen, and the better opinion is that solicitation to commit a crime is not an attempt. It is not an act done with intent to commit a crime, and which would apparently result in the commission of the contemplated crime, unless frustrated by extraneous circumstances. When punishable at all, it is punishable as a distinct misdemeanor.[48]

In a leading Pennsylvania case it was held that delivering poison to a person and soliciting him to give it to another was not punishable under a statute as "an attempt to administer poison," but a conviction was sustained under a count charging the solicitation as a distinct offense.[49] There are many cases to substantially the same effect.[50]

[44] See the language of the different judges in Rex v. Higgins, 2 East, 5, Mikell's Cas. 337, quoted in the opinion of the court in Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128, 129.

[45] Thus far it was clearly mere preparation. Ante, § 123.

[46] Griffin v. State, 26 Ga. 493.

[47] People v. Bush, 4 Hill (N. Y.) 135; State v. Bowers, 35 S. C. 262, 14 S. E. 488, 28 Am. St. Rep. 847.

[48] Post, § 130 et seq.

[49] Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653. See, also, Hicks v. Com., 86 Va. 223, 9 S. E. 1024.

[50] Reg. v. Williams, 1 Car. & K. 589, 1 Den. C. C. 39; McDade v. Peo-

Thus, it has been held, contrary to the case mentioned above, that soliciting another to commit arson and furnishing him with matches is not an attempt to commit arson;[51] that soliciting a child under the age of consent to submit to sexual intercourse is not an attempt to rape;[52] and that soliciting another to commit incest or adultery is not an attempt to commit incest or adultery.[53]

126. Abandonment of Purpose.

If a man makes up his mind to commit a crime, and proceeds far enough to be guilty of an attempt, within the rules above stated, he does not purge himself of guilt by voluntarily abandoning his evil purpose. For example, if a man seizes a woman with intent to rape, he is none the less guilty of an attempt to rape because he repents and voluntarily desists.[54] It is different, of course, if the evil purpose is abandoned before a sufficient act has been done to constitute an attempt.[55] And voluntary abandonment, even after such an act has been done, may be evidence tending to negative the intent charged.[56]

127. Adaptation of Means to Accomplishment of Purpose.

There has been considerable discussion in the cases as to the extent to which the means employed must be adapted to the

ple, 29 Mich. 50; State v. Harney, 101 Mo. 470, 14 S. W. 657; State v. Butler, 8 Wash. 194, 35 Pac. 1093; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782, Beale's Cas. 134; Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55. And see U. S. v. Stephens, 8 Sawy. 116, 12 Fed. 52, Beale's Cas. 130.

[51] McDade v. People, 29 Mich. 50.

[52] State v. Harney, 101 Mo. 470, 14 S. W. 657.

[53] Cox v. People, 82 Ill. 191; State v. Butler, 8 Wash. 194, 35 Pac. 1093; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686.

[54] Glover v. Com., 86 Va. 382, 10 S. E. 420, Beale's Cas. 133; Lewis v. State, 35 Ala. 380; People v. Marrs, 125 Mich. 376, 84 N. W. 284.

[55] Pinkard v. State, 30 Ga. 757, Mikell's Cas. 335.

[56] State v. Allen, 47 Conn. 121, Mikell's Cas. 483; Harrell v. State, 13 Tex. App. 374. It is otherwise where the abandonment is involuntary. Reg. v. Bain, 9 Cox, C. C. 98; Taylor v. State, 50 Ga. 79.

accomplishment of the intended crime, in order to render one guilty of an attempt. It is clear that the means must not be obviously unsuitable. Thus, a person who should make an assault upon a dummy dressed as a woman, with intent to ravish, would not be guilty of a criminal intent to rape, for the law would not take cognizance of such an act, and the bare intent would not be punishable.[57] The same is true of presenting a weapon under such circumstances that it is obvious that no injury can be done.[58] There must be at least an apparent possibility of committing the intended crime.[59]

By the overwhelming weight of authority, the means adopted need not be absolutely capable of accomplishing the intended crime. An apparent adaptation is sufficient.[60]

128. Physical Impossibility to Commit Intended Crime.

It has been said that an attempt to commit a crime can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the intended

[57] See People v. Gardiner, 73 Hun, 66, 25 N. Y. Supp. 1072, Mikell's Cas. 358, n.

[58] Tarver v. State, 43 Ala. 354.

[59] Rex v. Edwards, 6 Car. & P. 521; Allen v. State, 28 Ga. 395, 73 Am. Dec. 760; Henry v. State, 18 Ohio, 32; Tarver v. State, 43 Ala. 354; State v. Clarissa, 11 Ala. 57; Sipple v. State, 46 N. J. Law, 197. And see the cases cited in notes following.

Where the members of a county board were indicted for incurring an obligation in behalf of the county in excess of the legal limit, and the acts set out and proved were held to be insufficient to create any obligation, it was held that a conviction of an attempt was improper. Marley v. State, 58 N. J. Law, 207, 33 Atl. 208, Mikell's Cas. 352.

[60] Rex v. Phillips, 3 Camp. 73; Reg. v. Brown, 24 Q. B. Div. 357; Reg. v. Goodall, 2 Cox, C. C. 41; Com. v. McDonald, 5 Cush. (Mass.) 365, Beale's Cas. 141; Com. v. Jacobs, 9 Allen (Mass.) 274; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 165, Beale's Cas. 142; Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691; and cases cited in notes following.

crime committed;[61] and the rule has been applied in some of the cases.[62] This view, however, cannot be sustained. According to the decided weight of authority, both in England and in this country, an apparent possibility to commit the intended crime is sufficient. The fact that conditions exist which render the actual consummation of the crime impossible does not prevent the party from being guilty of an attempt, if the conditions are not known to him. Thus, it has repeatedly been held that a person who attempts to pick another's pocket is guilty of an attempt to commit larceny, though there is nothing in the pocket.[63] And the same principle has been applied in many other cases.[64]

[61] Reg. v. Collins, 9 Cox, C. C. 497, Beale's Cas. 137 (since overruled).

[62] Thus, it has been held that an attempt to discharge a gun or pistol at a person is not indictable, if, though unknown to the party making the attempt, it was not so loaded or primed that it could be discharged. Reg. v. Gamble, 10 Cox, C. C. 545.

[63] Com. v. Jacobs, 9 Allen (Mass.) 274; Com. v. McDonald, 5 Cush. (Mass.) 365, Beale's Cas. 141; State v. Wilson, 30 Conn. 500; People v. Moran, 123 N. Y. 254, 25 N. E. 412, 20 Am. St. Rep. 732; People v. Jones, 46 Mich. 441, 9 N. W. 486; Rogers v. Com., 5 Serg. & R. (Pa.) 462; People v. Bush, 4 Hill (N. Y.) 134.

The contrary was at one time held in England. Reg. v. Collins, 9 Cox, C. C. 497, Beale's Cas. 137; Reg. v. M'Pherson, Dears. & B. C. C. 197, 7 Cox, C. C. 281. But these cases have been overruled. Reg. v. Brown, 24 Q. B. Div. 357; Reg v. Ring, 66 Law Times (N. S.) 300.

[64] In Clark v. State, 86 Tenn. 511, 8 S. W. 145, Mikell's Cas. 355, a person who had opened a drawer with intent to steal therefrom was held guilty of an attempt to commit larceny, though there was nothing in the drawer.

In Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22, a conviction of attempt to rob was sustained, where the accused had assaulted another with intent to rob him, though the person assaulted had no money on his person.

In State v. Beal, 37 Ohio St. 108, a person who had broken into a house with intent to steal therefrom was held guilty of burglary, though there was nothing in the house that could be stolen.

In Reg. v. Goodall, 2 Cox, C. C. 41, and Reg. v. Goodchild, 2 Car. & K. 293, convictions of attempt to procure a miscarriage were sustained, though the attempt was made upon the body of a woman who was not

It was said by Mr. Justice Gray in a Massachusetts case: "Whenever the law makes one step towards the accomplishment of an unlawful object with the intent or purpose of accomplishing it criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance."[65]

"If the means are both absolutely and apparently inadequate, as where a man threatens another with magic, or aims at him a child's popgun, then it is plain that an attempt, in the sense of an apparent invasion of another's rights, does not exist. * * * When the means used are so preposterous that there is not even apparent danger, then an indictable attempt is not made out."[66]

pregnant. See, also, Com. v. Taylor, 132 Mass. 261; Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910.

In People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 165, Beale's Cas. 142, a conviction of assault with intent to kill was sustained, where the accused had shot at a particular spot, with intent to kill a policeman whom he supposed to be concealed there, though it appeared that the policeman was in fact at another place. See, also, State v. Mitchell, 170 Mo. 633, 71 S. W. 175, 94 Am. St. Rep. 763.

An attempt to commit the crime of extorting money by putting another in fear is committed, notwithstanding the other is not really put in fear, but gives up the money for the purpose of afterwards prosecuting the offender. People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. Rep. 741, reversing 73 Hun, 66, 25 N. Y. Supp. 1072, Mikell's Cas. 358.

In State v. Glover, 27 S. C. 602, 4 S. E. 564, a conviction of assault with intent to murder was sustained where defendant gave a child a dose of poison which she supposed was sufficient to cause death.

Conviction of an attempt to produce abortion is proper where a drug was unsuccessfully administered with that intent, and the medical witnesses state that it might produce the result under certain circumstances. Hunter v. State, 38 Tex. Cr. R. 61, 41 S. W. 602.

[65] Com. v. Jacobs, 9 Allen (Mass.) 274.

[66] 1 Whart. Crim. Law (10th Ed.) § 183, citing, among other cases,

129. Legal Impossibility to Commit Intended Crime.

By the weight of authority, if, as a matter of law, the completed act accomplished as intended would not be a crime, the attempt to commit it is not criminal, whatever may be the party's state of mind. For example, it is not a crime at common law to procure an abortion with the consent of the woman, where she is not quick with child; and therefore an attempt to procure an abortion under such circumstances is not indictable, though the party may not know that the child has not quickened.[67] So, by the weight of authority, where it is held that a boy under fourteen years of age cannot commit the crime of rape, he cannot be guilty of an attempt to rape.[68] Likewise an attempt to commit subornation of perjury is not shown when it does not appear that any proceeding was pending in which the false testimony was to be used.[68a] On the same principle it would seem clear that consent of the person against whom a crime is attempted must prevent the other party from being guilty of a criminal attempt to commit the crime, if it would prevent him from being guilty of the intended crime, but this is doubtful.[69]

Reg. v. James, 1 Car. & K. 530; Tarver v. State, 43 Ala. 354; Robinson v. State, 31 Tex. 170; Smith v. State, 32 Tex. 593.

[67] State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248.

[68] 1 Whart. Crim. Law (10th Ed.) § 184; Rex v. Eldershaw, 3 Car. & P. 396; Reg. v. Phillips, 8 Car. & P. 736; State v. Sam, 1 Winst. (N. C.) 300; State v. Handy, 4 Har. (Del.) 566; Foster v. Com., 96 Va. 306, 31 S. E. 503, Mikell's Cas. 355, n. Contra, Com. v. Green, 2 Pick. (Mass.) 380, Beale's Cas. 139. And see People v. Randolph, 2 Park. Cr. R. (N. Y.) 213; Williams v. State, 14 Ohio, 222.

[68a] Nicholson v. State, 97 Ga. 672, 25 S. E. 360.

[69] In People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072, Mikell's Cas. 358, the accused had threatened to accuse a woman of a crime unless she would give him money, and she parted with the money, not under the influence of fear, but for the purpose of prosecuting him. It was held that, since he could not, under such circumstances, be guilty of the statutory crime of extortion by putting in fear, he was not guilty of a criminal attempt to commit such crime. This decision

III. Solicitation to Commit Crime.

130. In General.—According to the better opinion, it is a misdemeanor to solicit another to commit either a felony or a misdemeanor.[70] This doctrine, however, is not recognized in all jurisdictions to the full extent.

131. Solicitation to Commit a Felony.

The decided weight of authority, both in England and in the United States, is in favor of the doctrine that it is a misdemeanor merely to solicit another to commit a crime, if the crime be a felony, though nothing further is done towards carrying out the unlawful purpose. The solicitation, without more, is regarded as a sufficient act to take the case out of the sphere of mere intent. In a leading English case an indictment was sustained for soliciting a servant to steal his master's goods. It was argued that no crime was charged because "a mere intent to commit evil is not indictable, without an act done;" but the

was reversed by the court of appeals in People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. Rep. 741, and it was held that he was guilty of an attempt, for the same reason that a man who attempts to pick an empty pocket is guilty of an attempt to steal.

Consent after an attempt does not prevent the attempt from being a crime. Thus, a man who attempts to commit rape is none the less guilty because the woman afterwards consents to intercourse, so that rape is not committed. State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519; State v. Hartigan, 32 Vt. 607, 78 Am. Dec. 609, Mikell's Cas. 72; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; People v. Marrs, 125 Mich. 376, 84 N. W. 284.

In Rex v. Edwards, 6 Car. & P. 521, it was held, in effect, that a person who forcibly compelled another to write an order for the payment of money, intending to take the order, was not guilty of an attempt to rob, as the act would not have been robbery if he had accomplished his purpose.

[70] Rex v. Higgins, 2 East, 5, Mikell's Cas. 337 (referred to in Beale's Cas. 129); Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782, Beale's Cas. 134; and cases cited in the notes following.

court held that the solicitation was sufficient to render the defendant accountable.[71] This case has repeatedly been followed both in England and in this country. Thus, in other cases it has been held an indictable offense to solicit any person to commit larceny or embezzlement,[72] or murder,[73] or arson,[74] or sodomy,[75] or adultery where by statute adultery was made a felony,[76] or to utter forged bank bills, made a felony by statute.[77] There are some statements against this doctrine, but it is supported by an overwhelming weight of authority.[78]

[71] Rex v. Higgins, 2 East, 5, Mikell's Cas. 337.

[72] Reg. v. Quail, 4 Fost. & F. 1076; Reg. v. Daniell, 6 Mod. 99.

[73] Reg. v. Williams, 1 Car. & K. 589, 1 Den. C. C. 39; Bacon's Case, 1 Sid. 230, 1 Lev. 146, Mikell's Cas. 336; Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653; Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782, Beale's Cas. 134.

[74] Com. v. Flagg, 135 Mass. 545. And see People v. Bush, 4 Hill (N. Y.) 133; State v. Bowers, 35 S. C. 262, 14 S. E. 488, 28 Am. St. Rep. 847; Com. v. Hutchinson, 42 W. N. C. (Pa.) 137, 6 Pa. Super. Ct. 405, 19 Pa. Co. Ct. 360, Mikell's Cas. 338.

[75] Rex v. Hickman, 1 Mood. C. C. 34; Reg. v. Rowed, 3 Q. B. 180, 6 Jur. 396.

[76] State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

[77] See State v. Davis, Tappan (Ohio) 171.

[78] Wharton, in discussing the question whether solicitations to commit crimes are independently indictable, says: "They certainly are * * * when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice, as where a resistance to the execution of a judicial writ is counseled; or perjury is advised; or the escape of a prisoner is encouraged; or the corruption of a public officer or a witness is sought, or invited by the officer himself. They are indictable, also, when they are in themselves offenses against public decency, as is the case with solicitations to commit sodomy; and they are indictable, also, when they constitute accessaryship before the fact. But * * * the better opinion is that, where the solicitation is not in itself a substantive offense, or (and) where there has been no progress made towards the consummation of the independent offense attempted, the question whether the solicitation is, by itself, the subject of penal prosecution, must be answered in the negative." 1 Whart. Crim. Law (10th Ed.) § 179.

This statement was approved by the supreme court of Illinois in Cox

132. Solicitation to Commit a Misdemeanor.

Whether solicitation to commit a misdemeanor is indictable is not so clear. Some of the courts have made a distinction in this respect between felonies and misdemeanors, and have held that solicitation to commit a misdemeanor is not indictable at all,[79] though they hold that it is an offense to solicit the commission of a felony.[80] There is no more reason, however, for such a distinction in the case of solicitation than there would be for holding an attempt to commit a misdemeanor not to be indictable; and there are many cases in which an indictment for solicitation to commit a misdemeanor has been sustained. Thus, indictments have been sustained for solicitation to commit embracery,[81] for soliciting a person who has been summoned as a witness for the state in a criminal prosecution to absent himself,[82] and for solicitation to accept a bribe,[83] or to pay a bribe.[84]

v. People, 81 Ill. 191. The indictment in this case, however, was for assault with intent to commit a felony (incest), and not merely for solicitation. Several other cases, sometimes cited as holding that solicitation to commit a felony is not indictable, do not so hold at all, but merely hold that solicitation is not indictable as an attempt, which, as we have seen, is very generally conceded. Ante, § 125, McDade v. People, 29 Mich. 50; State v. Harney, 101 Mo. 470, 14 S. W. 657; State v. Butler, 8 Wash. 194, 35 Pac. 1093.

[79] Thus, in Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686, it was held not to be an indictable offense to solicit a woman to commit adultery, since, by the laws of Pennsylvania, adultery was merely a misdemeanor. The court distinguished State v. Avery, 7 Conn. 266, 18 Am. Dec. 105 (supra, note 76), on the ground that, in Connecticut, adultery was a felony.

In Com. v. Willard, 22 Pick. (Mass.) 476, it was held, in effect, that solicitation to sell liquor in violation of law was not an indictable offense.

[80] See the cases cited in the notes to the section preceding.

[81] State v. Bonds, 2 Nev. 265.

[82] State v. Keyes, 8 Vt. 57.

[83] Rex v. Vaughan, 4 Burrow, 2494; Rex v. Plympton, 2 Ld. Raym. 1377; U. S. v. Worrall, 2 Dall. (Pa.) 384; post, § 432.

[84] Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; post, § 432.

133. Solicitation not Indictable as an Attempt.

As was shown in a former section, some of the cases in which solicitation to commit a crime has been held to be an indictable offense proceed on the theory that mere solicitation is sufficiently an act done—"a step in the direction of the crime"—to constitute an attempt. But this view is not supported by the weight of authority. Solicitation is not an attempt. It is not an act done with intent to commit a crime, and which would apparently result in the commission of the contemplated crime unless frustrated by extraneous circumstances. If punishable at all, it is punishable as a distinct misdemeanor.[85]

IV. Criminal Conspiracy.

134. In General.—It is a misdemeanor at common law, known as "conspiracy," for two or more persons to conspire or combine, either—

1. To accomplish a criminal or unlawful purpose;

2. Or to accomplish a purpose not in itself criminal or unlawful by criminal or unlawful means.

It is the unlawful combination or agreement that constitutes the offense, and no overt act is necessary.

As to Definition or Description of Offense.—The courts have found it difficult to frame a definition of the crime of conspiracy sufficiently accurate to include all agreements or combinations that are punishable, and at the same time avoid including some that are not punishable. Perhaps it cannot be done. The definition—or description, rather—given above has been adopted by some of the most eminent judges, and is sufficiently accurate as a definition. It was said by Chief Justice Shaw in a leading Massachusetts case: "Without attempting to review and reconcile all the cases, we are of opinion that as a general description, though perhaps not a precise and accurate defini-

[85] See ante, § 125, and cases there cited.

tion, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means."[86]

In punishing a conspiracy the law does not punish mere intention. There is something more than this. There is an unlawful agreement or combination, and this is what constitutes the offense. If, however, the contemplated crime be one of which concert or consent is a constituent part, such as fornication, adultery, bigamy, incest, and the like, the mere agreement or accord of the parties to the offense cannot be so separated from the offense itself as to support an indictment for conspiracy.[86a]

135. Overt Act Not Necessary.

The conspiring is a distinct offense, and to make it indictable nothing whatever need be done in execution of it. No overt act is necessary. If two men meet, and agree to commit a crime, they are guilty of a criminal conspiracy, and liable to indictment, though the very next moment they may change their minds and determine not to do so.[87]

[86] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821; U. S. v. Cassidy, 67 Fed. 698; Orr v. People, 63 Ill. App. 305; State v. Clark, 9 Houst. (Del.) 536, 33 Atl. 310. And see post, § 135.

[86a] Shannon v. Com., 14 Pa. 226, Mikell's Cas. 383; Miles v. State, 58 Ala. 390. But the implication of a third person will make it a conspiracy. State v. Clemenson, 123 Iowa, 524, 99 N. W. 139. The rule does not apply to a conspiracy to maliciously injure another in his business, though neither of the conspirators alone could effect the purpose. State v. Huegin, 110 Wis. 189, 85 N. W. 1046.

[87] Poulterers' Case, 9 Coke, 55b, Beale's Cas. 801; Rex v. Edwards, 8 Mod. 320, Beale's Cas. 804; Dill v. State, 35 Tex. Cr. R. 240, 33 S. W. 126, Mikell's Cas. 392; Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75, 80; People v. Mather, 4 Wend. (N. Y.) 229, 263, 21 Am. Dec. 122, 151, Mikell's Cas. 385; State v. Ripley, 31 Me. 386; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell's Cas. 358; State v. Younger, 1 Dev. (N. C.) 357, 17 Am.

136. The Conspiring or Agreement.

The term "conspiracy" imports an agreement. Unless this is shown, the crime is not made out.[88] But the agreement need not be a formal one. It need not be manifested by any formal words, written or spoken. It is sufficient if the minds of the parties meet understandingly, so as to bring about an intelligent and deliberate agreement to do the acts contemplated.[89]

Dec. 571; Com. v. McKisson, 8 Serg. & R. (Pa.) 420; State v. Straw, 42 N. H. 393; State v. Crowley, 41 Wis. 271; O'Connell v. Reg., 11 Cl. & F. 155, 1 Cox, C. C. 413; State v. Cawood, 2 Stew. (Ala.) 360; State v. Pulle, 12 Minn. 164, Mikell's Cas. 16.

The statute of New York has modified the common law in this respect by requiring that, to constitute the crime of conspiracy, there must be both an agreement and an overt act to effect the object of the agreement, except where the conspiracy is to commit some "felony upon the person of another, or to commit arson or burglary." Pen. Code, § 171. See People v. Flack, 125 N. Y. 324, 26 N. E. 267, Mikell's Cas. 138. And there are similar statutes in several other states. See U. S. v. Barrett, 65 Fed. 62; People v. Daniels, 105 Cal. 262, 38 Pac. 720; State v. Clary, 64 Me. 369; Wood v. State, 47 N. J. Law, 180.

The overt act, however, need not be criminal in itself. U. S. v. Cassidy, 67 Fed. 698.

[88] Mulchy v. Reg., L. R. 3 H. L. 306.

"Of course, a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy, unless the scheme, or some proposed scheme, is in fact assented to,—concurred in by the parties in some manner, so that their minds meet for the accomplishment of the proposed unlawful act." Per Dyer, J., in U. S. v. Goldberg, 7 Biss. 175, 180, Fed. Cas. No. 15,223.

[89] "Concurrence of sentiment and co-operative conduct in an unlawful and criminal enterprise, and not formality of speech, are the essential ingredients of criminal conspiracy." McKee v. State, 111 Ind. 378, 12 N. E. 510. And see People v. Mather, 4 Wend. (N. Y.) 229, 260, 21 Am. Dec. 122, 147, Mikell's Cas. 385; Gibson v. State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Spies v. People, 122 Ill. 170, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

"It is not necessary, to constitute a conspiracy, that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme is to be, and the details

All of the conspirators need not enter into the agreement at the same time. When a new party, with knowledge of the facts, concurs in the plans of the original conspirators, and comes in to aid in the execution of them, he is from that moment a co-conspirator. He commits the offense whenever he agrees to become a party to the transaction; and doing any act in furtherance of the original design shows his concurrence, though it is not necessary to make him guilty.[90]

The crime of conspiracy cannot be committed by less than two persons, for, in the nature of things, less than two cannot make an agreement.[91] At common law, husband and wife are regarded as but one person, so that they cannot enter into an agreement, and therefore they cannot be guilty of conspiracy; and this rule still obtains, unless the common law has been changed by statute.[92] Another result of the necessity of two persons to commit this offense is that, where two are indicted, an acquittal of one is necessarily an acquittal of the other. But the death of one conspirator will not prevent a trial and conviction of the other.[93]

of the plan, or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." Dyer, J., in U. S. v. Goldberg, 7 Biss. 175, 180, Fed. Cas. No. 15,223; U. S. v. Cassidy, 67 Fed. 698.

[90] People v. Mather, 4 Wend. (N. Y.) 229, 260, 21 Am. Dec. 122, 147, Mikell's Cas. 385; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; U. S. v. Sacia, 2 Fed. 754; U. S. v. Cassidy, 67 Fed. 698; State v. Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

[91] State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; State v. Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121.

[92] People v. Miller, 82 Cal. 107, 22 Pac. 934; State v. Covington, 4 Ala. 603; State v. Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

[93] Rex v. Niccolls, 2 Strange, 1227; People v. Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; Com. v. Edwards, 135 Pa. 474, 19 Atl. 1064; State v. Clemenson, 123 Iowa, 524, 99 N. W. 139.

137. The Unlawful Purpose—In General.

As was stated in a previous section, a conspiracy may be described generally as a combination to accomplish some criminal or unlawful purpose, or to accomplish some purpose that is not in itself criminal or unlawful by criminal or unlawful means.[94] In other words, the purpose or means may be criminal, or they may be, not criminal, but merely unlawful. The difficulty is in determining what purposes are unlawful within the meaning of the law. A conspiracy to do an act that is not unlawful by means that are not unlawful is not indictable, whatever the intent may be.[95]

In a leading case in Maryland,[96] Judge Buchanan exhaustively reviewed the early English cases, and concluded that an indictment would lie in the following cases:

1. For a conspiracy to do any act that is criminal *per se*.

2. For a conspiracy to do an act not illegal, nor punishable, if done by an individual, but immoral only.

3. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public.

4. For a conspiracy to extort money from another, or to injure his reputation, by means not indictable if practiced by an individual.

5. For a conspiracy to cheat and defraud a third person, ac-

[94] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821. And see, to the same effect, Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780, Beale's Cas. 811; Reg. v. Parnell, 14 Cox, C. C. 508; State v. Mayberry, 48 Me. 218; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828.

[95] See Com. v. Kostenbander, 17 W. N. C. (Pa.) 303, Beale's Case, where it was held (by a divided court, however), that an indictment would not lie against several persons for conspiracy to induce another to sell them liquor in violation of law, and then sue him as informers for the penalty.

[96] State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell's Cas. 358.

complished by means of an act which would not in law amount to an indictable cheat, if effected by an individual.

6. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession.

7. For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be injured thereby.

8. For a bare conspiracy to cheat and defraud a third person, though the means of effecting it may not be determined on at the time.

138. The Means to be Employed.

If the object of a conspiracy is a crime or otherwise unlawful, the means by which it is to be accomplished are altogether immaterial.[97] But if the object is not unlawful, unlawful means of accomplishing it must be contemplated.[98] This distinction is important in determining the sufficiency of indictments for conspiracy. In the first case the means need not be set out in the indictment, while in the latter they must.[99]

When the object of the conspiracy is unlawful, it is not even necessary that the means of accomplishing it shall be agreed upon at the time.[100]

139. Conspiracy to Commit Crime—In General.

Nothing is better settled in the criminal law than the doctrine

[97] Rex v. Eccles, 1 Leach, C. C. 274; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780, Beale's Cas. 811; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell's Cas. 358; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Com. v. McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630.

[98] Smith v. People, supra; People v. Richards, supra; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; State v. Crowley, 41 Wis. 271.

[99] See the cases above cited.

[100] State v. Crowley, 41 Wis. 271; Rex v. Gill, 2 Barn. & Ald. 204.

that a conspiracy to commit any crime, either as an end or as the means of accomplishing an end not criminal, is a misdemeanor at common law; and it is immaterial whether the intended crime be a felony or merely a misdemeanor, and whether it be criminal at common law or by statute only.[101] For this proposition, said Judge Buchanan in the case above referred to, "it can scarcely be necessary to offer any authority."[102] Conspiracy to obtain money or property by false pretenses is clearly indictable where there is a statute punishing the obtaining of money or property by such means.[103] The same is true of conspiracy to commit an assault and battery, or to procure the false imprisonment of another,[104] to rob or steal,[105] etc.

140. Conspiracy to Pervert or Obstruct Justice.

To willfully obstruct or pervert the course of public justice is a misdemeanor at common law, and therefore a conspiracy to effect such a purpose is clearly indictable as a conspiracy to commit a crime. Thus, it is a crime to conspire to obstruct an officer in the discharge of his official duty;[106] to fabricate or destroy evidence, as by introducing false affidavits or certificates in

[101] Reg. v. Bunn, 12 Cox, C. C. 316; Beasley, C. J., in State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; State v. Glidden, 55 Conn. 46, 8 Atl. 890.

[102] State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell's Cas. 358.

[103] Reg. v. Hudson, 8 Cox, C. C. 305, Beale's Cas. 158; Orr v. People, 63 Ill. App. 305; People v. Butler, 111 Mich. 483, 69 N. W. 734.

[104] State v. McNally, 34 Me. 210, 56 Am. Dec. 650; Com. v. Putnam, 29 Pa. 296. Conspiracy to have a sane woman declared insane, and confined in an asylum, is indictable. Com. v. Spink, 137 Pa. 255, 20 Atl. 680.

[105] People v. Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716; Miller v. Com., 78 Ky. 15, 39 Am. Rep. 194.

[106] State v. Noyes, 25 Vt. 415, 420; State v. McNally, 34 Me. 210, 56 Am. Dec. 650.

evidence, by suppressing a will, etc.,[107] or by passing a person off as the heir of a decedent to obtain a part of his estate;[108] to procure criminal process for improper purposes;[109] to enforce by legal process the payment of sums not due;[110] or to pack a jury.[111] A conspiracy between a witness and others for the former not to appear in obedience to a summons on the trial of an indictment is an indictable conspiracy.[112]

141. Conspiracy to do Immoral Acts.

A conspiracy to accomplish an object that is immoral is clearly indictable, if the act contemplated is an offense against the public morals, as an act of public indecency or immorality.[113] And even when the object of a conspiracy is not of this character, if it is immoral, it is indictable. The object need not be an indictable offense. Thus, in a leading English case,[114] an indictment was sustained for a conspiracy to place a girl, with her own consent, in the hands of a man for the purpose of prostitution, though neither seduction nor prostitution in private was indictable at common law. The immoral object made the conspiracy indictable.[115]

[107] State v. DeWitt, 2 Hill (S. C.) 282, 27 Am. Dec. 374. In Rex v. Mawbey, 6 Term R. 619, an indictment was sustained for conspiracy to pervert the course of justice by producing in evidence a false certificate by justices of the peace that a highway was repaired, to influence the judgment of the court on an indictment for failure to repair.

It is an indictable offense to conspire to cause it falsely to appear of record that a certain person is married to one of the conspirators. Com. v. Waterman, 122 Mass. 43.

[108] Rex v. Robinson, 1 Leach, C. C. 37.

[109] Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786.

[110] Reg. v. Taylor, 15 Cox, C. C. 265, 268.

[111] O'Donnell v. People, 41 Ill. App. 23.

[112] Reg. v. Hamp, 6 Cox, C. C. 167; People v. Chase, 16 Barb. (N. Y.) 495.

[113] Post, § 458 et seq.

[114] Rex v. Delaval, 3 Burrow, 1434, 1 W. Bl. 410, 439, Beale's Cas. 101.

[115] And see Rex v. Grey, 9 How. St. Tr. 127, 1 East, P. C. 460; Smith

It has also been held an indictable offense to conspire to persuade a woman and her parents that a forged license is genuine, and that one of the conspirators is a justice of the peace, and thus gain their consent to a sham marriage.[116] There may be a conspiracy to commit adultery,[116a] but not between the man and the woman themselves; concert of action in such case being a constituent part of the offense itself.[116b]

142. Conspiracy to Commit a Mere Private Wrong—In General.

There are some cases in which it has been held (by Lord Ellenborough, among others) that to render a conspiracy indictable there must be a combination to commit some act that is known as an offense at common law, or that has been declared an offense by statute, and that a conspiracy, therefore, to commit a mere private fraud or private trespass, is not criminal.[117] But the overwhelming weight of authority is against these decisions. To render a conspiracy criminal, it is not at all necessary that a criminal act shall be contemplated, either as the end or as a means. It is a misdemeanor to conspire to com-

v. People, 25 Ill. 17, 76 Am. Dec. 780, Beale's Cas. 811 (conspiracy to fraudulently procure a girl to have carnal connection with a man); Reg. v. Howell, 4 Fost. & F. 160; Reg. v. Mears, 2 Den. C. C. 79, 4 Cox, C. C. 425; State v. Powell, 121 N. C. 635, 28 S. E. 525.

[116] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. And see State v. Wilson, 121 N. C. 650, 28 S. E. 416.

[116a] State v. Clemenson, 123 Iowa, 524, 99 N. W. 139.

[116b] Shannon v. Com., 14 Pa. 226, Mikell's Cas. 383; Miles v. State, 58 Ala. 390.

[117] Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321 (but see People v. Richards, 1 Mich. 216, 51 Am. Dec. 75); Com. v. Prius, 9 Gray (Mass.) 127, Beale's Cas. 810 (but see Com. v. Warren, 6 Mass. 74); State v. Rickey, 9 N. J. Law, 293 (disapproved in State v. Norton, 23 N. J. Law, 44 and State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828); State v. Straw, 42 N. H. 393. And see Rex v. Pywell, 1 Starkie 402, Beale's Cas. 807; Rex v. Turner, 13 East, 228, Beale's Cas. 805 (disapproved in Reg. v. Rowlands, 5 Cox, C. C. 436, 490, per Lord Campbell; and in Mifflin v. Com., 5 Watts & S. (Pa.) 461, 463, per Chief Justice Gibson).

mit against another a mere private wrong, the only effect of which would be to render the wrongdoers liable to an action for damages, if acting individually. While the contemplated wrong would not be indictable, the unlawful combination to commit it, because of the increased power to injure, is regarded as so far injurious to the public at large as to require the state to interfere. Hawkins says: "There can be no doubt that all combinations whatsoever, wrongfully to prejudice a third person, are highly criminal at common law."[118] And Chitty says: "All confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character."[119]

143. Conspiracy to Commit a Trespass.

In accordance with this doctrine it is well settled that a conspiracy to commit any trespass upon the property of another, real or personal, is indictable at common law, though the intended trespass may be nothing more than a civil injury, and would not be indictable if committed.[120]

144. Conspiracy to Defraud.

The doctrine has also been frequently applied to conspiracies to perpetrate a fraud upon others. To obtain another's money or goods by mere false representations, without using false weights, measures, or tokens, is a mere private wrong at common law, and not an indictable cheat, and yet it has been held

[118] 1 Hawk, P. C. c. 72; Rex v. Edwards, 8 Mod. 320, Beale's Cas. 804.

[119] 3 Chit. Crim. Law, 1139. And see the cases cited specifically in the following notes.

An indictment has been sustained for conspiracy to effect the escape of a female infant, with a view to her marriage against her father's will, Mifflin v. Com., 5 Watts & S. (Pa.) 461, 40 Am. Dec. 527; for conspiracy to seduce a minor son and heir, "and carry him out of the custody, counsel, and government of his father," with design to marry him to a woman of ill fame, Rex v. Thorp, 5 Mod. 221.

[120] Wilson v. Com., 96 Pa. 56.

an indictable offense to conspire to defraud by such means,[121] and it is immaterial that the means employed are not successful nor calculated to deceive persons of ordinary intelligence.[121a] The same is true of any other conspiracy to defraud by means that are not criminal, but merely wrongful.[122]

Other Illustrations of Conspiracy to Defraud.—Thus, indictments have been sustained for conspiracy to falsely read a release to an illiterate man, and thereby induce him to sign it;[123] to persuade a man to bet on a race that is to be fraudulently run;[124] to deceive the general public by conducting "materializing seances" and masquerading as spirits of the dead;[124a] to get a man drunk and cheat him at cards;[125] to cheat one out of his land;[126] to obtain goods from a merchant without paying for them;[127] to induce a person, by false representations, to forego a legal claim;[128] to dispose of goods in contemplation of

[121] Reg. v. Mackarty, 2 Ld. Raym. 1179; Rex v. Wheatly, 2 Burrow, 1125, Beale's Cas. 97; Com. v. Warren, 6 Mass. 74; People v. Butler, 111 Mich. 483, 69 N. W. 734. See, also, Reg. v. Hudson, 8 Cox, C. C. 305, Beale's Cas. 158.

[121a] People v. Gilman, 121 Mich. 187, 80 N. W. 4, 80 Am. St. Rep. 490, 46 L. R. A. 218.

[122] Rex v. Edwards, 8 Mod. 320, Beale's Cas. 804; Reg. v. Warburton, L. R. 1 C. C. 274, Beale's Cas. 808; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell's Cas. 358; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; People v. Underwood, 16 Wend. (N. Y.) 546; Johnson v. People, 22 Ill. 314; Orr v. People, 63 Ill. App. 305; and cases cited in the notes following.

[123] Reg. v. Skirret, Sid. 312.

[124] Reg. v. Orbell, 6 Mod. 42.

[124a] People v. Gilman, 121 Mich. 187, 80 N. W. 4, 80 Am. St. Rep. 490, 46 L. R. A. 218.

[125] State v. Younger, 1 Dev. (N. C.) 357, 17 Am. Dec. 571.

[126] People v. Richards, 1 Mich. 216, 51 Am. Dec. 75.

[127] Reg. v. Orman, 14 Cox, C. C. 381; Com. v. Ward, 1 Mass. 473; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

[128] Reg. v. Carlisle, Dears. C. C. 337, 6 Cox, C. C. 336.

bankruptcy, with intent to defraud creditors;[129] to conduct a mock auction, or stifle competition at an auction sale.[130] And many other cases might be cited.[131]

145. Conspiracy to Slander or Extort Money.

It is also well settled that it is a misdemeanor at common law for two or more persons to conspire to slander another, or to make a false charge against him, either for the purpose of injuring his reputation, or for the purpose of extorting money from him, as in the case of blackmail, though verbal defamation and extortion of money otherwise than under color of office are not crimes at all at common law.[132]

146. Conspiracy to Injure Another in His Trade or Calling.

It is also an indictable offense at common law to maliciously conspire to injure another in his trade or calling by means

[129] Reg. v. Hall, 1 Fost. & F. 33. And see Heymann v. Reg., L. R. & Q. B. 102, 12 Cox, C. C. 383, 28 L. T. (N. S.) 162; Com. v. Goldsmith, 12 Phila. (Pa.) 632.

[130] Reg. v. Lewis, 11 Cox, C. C. 404; Levi v. Levi, 6 Car. & P. 239.

[131] See Reg. v. Brown, 7 Cox, C. C. 442; Reg. v. Kenrick, 5 Q. B. 49, 7 Jur. 848; Ellzey v. State, 57 Miss. 827; State v. Cole, 39 N. J. Law, 324.

Conspiracy between a servant and another to sell the master's goods at less than the proper price, and divide the difference, or otherwise defraud the master. Reg. v. DeKromme, 17 Cox, C. C. 492.

Conspiracy between a female servant and a man for the latter to personate her master, and marry her, with intent to defraud her master's relations out of a part of his property. Rex v. Robinson, 1 Leach, C. C. 37, 2 East, P. C. 1010.

[132] As conspiracy to falsely charge one with being the father of a bastard child. Timberley's Case, Sid. 68; Child v. North, 1 Keb. 203; Rex v. Armstrong, Vent. 304; Reg. v. Best, 2 Ld. Raym. 1167.

For other cases of conspiracy to slander or extort money, see Rex v. Kinnersley, 1 Strange, 193; Rex v. Parsons, 1 W. Bl. 392; Rex v. Ripsal, 1 W. Bl. 368, 3 Burrow, 1320; Com. v. Tibbetts, 2 Mass. 536; State v. Hickling, 41 N. J. Law, 208, 32 Am. Rep. 198; Elkin v. People, 28 N. Y. 177; People v. Dyer, 79 Mich. 480, 44 N. W. 937; State v. Jackson, 82 N. C. 565. See, also, State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am.

that are wrongful, though not criminal,[133] as to ruin a tradesman's business by bribing his servants or apprentices to make inferior goods;[134] or to hinder a tradesman from exercising his trade, or a laborer or mechanic from obtaining employment;[135] or to impoverish and ruin an actor by hissing him and driving him from the stage;[136] or to compel a master to discharge a workman.[137]

147. Conspiracy to do Acts Prejudicial to the Public Generally.

The ground upon which any act is punished as a crime is because it injures, or tends to injure, the community at large; and therefore, in this sense, all criminal conspiracies are prejudicial to the public, and are punished for this reason. In this section the expression is used in a narrower sense, to denote acts which are peculiarly prejudicial to the public generally, as distinguished from individuals. It has been laid down broadly that an indictment will lie at common law for a conspiracy to

Dec. 534, Mikell's Cas. 358, where the early cases are reviewed and discussed.

[133] Rex v. Cope, 1 Strange, 144; Rex v. Eccles, 1 Leach, C. C. 274; Rex v. Leigh, 2 Camp. 372, note; Reg. v. Druitt, 10 Cox, C. C. 592; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; Crump v. Com., 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895, Beale's Cas. 833; State v. Huegin, 110 Wis. 189, 85 N. W. 1046.

[134] Rex v. Cope, 1 Strange, 144. In this case, a prosecution was sustained for conspiracy to ruin the trade of a card maker by bribing his apprentices to put grease into the paste, so as to spoil the cards.

[135] Rex v. Eccles, 1 Leach, C. C. 274. See Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, Mikell's Cas. 367, where damages were denied a lumber dealer against members of an association of builders and dealers injuring his trade by inducing wholesalers not to sell him supplies. The association was engaged in a strike contest with mechanics and it was held that plaintiff, by acceding to the demands of the laborers and furnishing to others who had also acceded, was aiding the strikers and that the acts of defendant were justifiable in carrying on the contest; a view that carried to its logical conclusion would involve everyone in the community in every strike.

[136] Rex v. Leigh, 2 Camp. 372, note.

[137] State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; State v. Dyer, 67 Vt. 690, 32 Atl. 814.

do an act which is neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to injure the public. Thus, in a leading Massachusetts case it was held indictable to conspire to manufacture base and spurious indigo, with a fraudulent intent to sell the same to the public generally as genuine.[138] Indictments have also been sustained for conspiracies to fraudulently put valueless shares in companies on the market, or to give shares a fictitious market value,[139] and conspiracies to conduct a mock auction, with pretended bidders,[140] etc.

148. Combinations among Workmen.

There are some cases in the reports in which it has been held a crime for workmen in any particular trade or calling to combine for the purpose of raising their wages, on the ground that such combinations are injurious to trade. In an early English case journeymen tailors were indicted for a conspiracy to raise their wages by refusing to work for less than a certain sum, and the indictment was sustained, though it was conceded that it would have been perfectly lawful for either of the defendants to raise his wages if he could, and to refuse to work unless he should be paid what he demanded.[141] There have been some decisions to the same effect in this country.[142] These decisions, however, have not been generally followed. By the weight of authority it is not unlawful, either in England or in this country, for workmen to combine, by the formation

[138] Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54, Beale's Cas. 54. See, also, McKee v. State, 111 Ind. 378, 12 N. E. 510.

[139] Scott v. Brown (1892) 2 Q. B. 724. And see Reg. v. Aspinall, L. R. 2 Q. B. 48, 13 Cox, C. C. 563.

[140] Reg. v. Lewis, 11 Cox, C. C. 404.

[141] Rex v. Journeymen Tailors of Cambridge, 8 Mod. 10, Beale's Cas. 320.

[142] People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; People v. Trequier, 1 Wheeler, C. C. (N. Y.) 142.

The case of the Journeymen Cordwainers, Yates, Sel. Cas. (N. Y.) 111.

of labor unions or otherwise, for the purpose of mutual protection against oppression or unfairness on the part of employers, provided they do not resort to or contemplate unlawful means to carry out their objects.[143]

But if the agreement between workmen contemplates the use of unlawful means for accomplishing their object, they are guilty of a criminal conspiracy, though the object may be innocent. Thus, they are criminally responsible if they contemplate coercing an employer to injure a third party by withdrawing from contract relations with him,[143a] or to discharge an employe in violation of a contract, or breaking a contract into which they have entered themselves.[144] And a conspiracy to compel an employer to discharge an employe has been held indictable even where there was no contract for any fixed time.[145] Such a conspiracy is to injure a person in his trade or calling, within the principle referred to in a previous section.[146] Nor

[143] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821; Com. v. Sheriff, 15 Phila. (Pa.) 393, Mikell's Cas. 363; Reg. v. Shepherd, 11 Cox, C. C. 325. See note, 28 Am. Dec. 529.

In Reg. v. Rowlands, 2 Den. C. C. 364, 17 Q. B. 671, 5 Cox, C. C. 466, it was said: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand." And in Reg. v. Duffield, 5 Cox, C. C. 404, it was said: "With respect to the law relating to combinations of workmen, nothing can be more clearly established, in point of law, than that workmen are at liberty, while they are perfectly free from engagement, and have the option of entering into employ or not, * * * to agree among themselves to say, 'We will not go into any employ unless we can get a certain rate of wages.'"

[143a] U. S. v. Cassidy, 67 Fed. 698.

[144] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; State v. Glidden, 55 Conn. 46, 8 Atl. 890; Reg. v. Duffield, 5 Cox, C. C. 404.

[145] State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710, Mikell's Cas. 377; State v. Dyer, 67 Vt. 690, 32 Atl. 814; Reg. v. Hewitt, 5 Cox, C. C. 162; Rex v. Bykerdike, 1 Moody & R. 179, Mikell's Cas. 362. And see People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

[146] Ante, § 144.

can workmen lawfully combine, and by intimidation, blacklisting, or boycotting prevent employers from obtaining trade, or other workmen from obtaining employment.[147] The use of mere persuasion, however, without any intimidation, does not make the combination criminal.[148]

149. Combinations to Raise or Lower Prices.

In an English case it was held an indictable offense to conspire by false rumors to raise the price of the public government funds, with intent to injure such of the king's subjects as should purchase on a particular day, though it was conceded that to raise or lower the price of such funds was not a crime *per se*.[149] And so it is of a conspiracy to raise the price of flour, salt, coal, or any other commodity in general use, by "cornering" the market.[150]

V. Consent as Between Individuals.

150. In General.—Consent as between individuals is no defense on a prosecution for an act which directly injures or

[147] Reg. v. Duffield, 5 Cox, C. C. 404; Reg. v. Hewitt, 5 Cox, C. C. 162; Reg. v. Rowlands, 2 Den. C. C. 364, 17 Q. B. 671; Reg. v. Druitt, 10 Cox, C. C. 593; Reg. v. Bunn, 12 Cox, C. C. 316; State v. Glidden, 55 Conn. 46, 8 Atl. 890; State v. Dyer, 67 Vt. 690, 32 Atl. 814; Crump v. Com., 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895, Beale's Cas. 833; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710, Mikell's Cas. 377.

[148] Reg. v. Shepherd, 11 Cox, C. C. 325.

[149] Rex v. Berenger, 3 Maule & S. 68. And see dicta to this effect in People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

[150] Rex v. Norris, 2 Ld. Kenyon, 300; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159, Beale's Cas. 839. See, also, Rex v. Hilbers, 2 Chit. 163.

In a late Kentucky case it was held that it is not criminal, at common law, for insurance companies or agents to combine to maintain rates of insurance. Aetna Ins. Co. v. Com., 106 Ky. 864, 51 S. W. 624. It was so held under a statute in Texas. Queen Ins. Co. v. State, 86 Tex. 250, 24 S. W. 397. But the contrary was held under the Kansas statute. State v. Phipps, 50 Kan. 609, 31 Pac. 1097.

tends to injure the community at large, as breaches of the peace, acts tending to corrupt the public morals, homicide, mayhem, etc. But rape, perhaps assault, and, as a rule, offenses against property, are not committed where the person against whom the act is committed consents; and it can make no difference that the consent is given merely for the purpose of prosecution, and that it is not known to the other party.

When Consent is No Defense.—It has been said that the maxim *"Volenti non fit injuria,"* applies in criminal as well as in civil cases, but this is far from true. It applies very generally in a civil action, when the person injured by an alleged wrong is seeking to recover damages, and when the controversy is solely between the individuals themselves, for it is only reasonable that a man who has consented to an act, and thereby brought injury upon himself, should not be heard to complain. The reason for the rule, however, does not apply to the full extent to crimes, which are punished because of the wrong and injury to the public, and not merely because of the injury to the individual.

If an act is punished because of the injury to the community at large, rather than because of any injury to a particular individual, consent of the individual does not make it any the less a crime, nor prevent the state from punishing it. For example, a breach of the peace is punished because of the injury to the public, and, on a prosecution for an act constituting a breach of the peace, consent of the parties engaged is no defense. Prize fighting and affrays are within this principle. They are none the less crimes because the fighting is by agreement.[151] Likewise a riot is none the less a crime because the person at whom it is directed does what he can to pacify the rioters.[151a] And so it is of acts which are punished because of their tendency to corrupt public morals, or shock the sense of public de-

[151] Rex v. Billingham, 2 Car. & P. 234; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, Beale's Cas. 148.

[151a] Sanders v. State, 60 Ga. 126.

cency, etc., as open and notorious lewdness, bigamy, seduction, incest, etc.[152]

There are some offenses, directed more particularly against individuals, which constitute crimes notwithstanding the consent of the person injured. Public policy requires that the right to life and member be regarded as inalienable, and consent of the person injured is no defense on a prosecution for homicide or mayhem. Where a man, to have an excuse for begging, caused another to cut off his hand, both were indicted and convicted.[153] It is murder to kill another in a duel,[154] and a person who counsels, aids, or abets another in the commission of suicide is guilty as an accessary before the fact, or as principal in the second degree.[155]

On the same principle, a person is guilty of manslaughter if he causes another's death in a prize fight, or in an unlawful game, notwithstanding the other's consent to the fight or game.[156] The same is true of homicide in committing an abortion.[157]

Offenses in Which Want of Consent is Necessary.—There are some crimes against the persons of individuals which cannot be committed except without the consent of the person injured. Rape is such an offense. It is not committed where the woman freely consents to the intercourse, however reluctantly,[158] though subsequent consent to intercourse will not purge an assault or attempt to commit rape.[158a]

[152] Tucker v. State, 8 Lea (Tenn.) 633; State v. Martin (Iowa) 101 N. W. 637. And see post, § 458 et seq.

[153] Wright's Cas. Co. Litt. 127a, Beale's Cas. 145.

[154] Reg. v. Barronet, Dears. C. C. 51.

[155] See Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109; State v. Levelle, 34 S. C. 120, 13 S. E. 319.

[156] Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146.

[157] State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776; State v. Magnell, 3 Penn. (Del.) 307, 51 Atl. 606; post, § 263(d).

[158] Post, § 293 et seq.

[158a] State v. Hartigan, 32 Vt. 607, Mikell's Cas. 72; State v. Cross, 12

Want of consent is necessary according to the better opinion in assault and assault and battery. Some courts have held that on a charge of assault or assault and battery, consent of the person injured is no defense,[159] but this view is not sound.[160] If the assault is committed under such circumstances as to constitute a breach of the peace, as in the case of a prize fight or affray, an indictment will lie, notwithstanding the consent, but the indictment in such a case should be for the breach of the peace, and not for the assault.[161]

As a rule, offenses against property, from their very nature, can only be committed in the absence of consent on the part of the person against whom they are committed. To constitute larceny, there must be a trespass in taking the property, and this cannot be where the owner freely consents to part with the property. It can make no difference that he consents for the purpose of afterwards prosecuting the party, and that the fact that he consents is not known to the other party.[162] The same is true of extortion by putting in fear,[162a] and of robbery, to constitute which the property must be taken from the person or in the presence of another by violence, or by putting him in fear.[163] And it is true, also, of burglary, in which there must be a breaking and entry.[164]

Iowa, 66, 79 Am. Dec. 519; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; People v. Marrs, 125 Mich. 376, 84 N. W. 284.

[159] Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, Beale's Cas. 148; post, §§ 216, 217.

[160] See Reg. v. Martin, 2 Mood. C. C. 123, Beale's Cas. 146; State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190, Mikell's Cas. 68; Reg. v. Woodhurst, 12 Cox, C. C. 443; Reg. v. Day, 9 Car. & P. 722; Champer v. State, 14 Ohio St. 437, Mikell's Cas. 69.

[161] State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Champer v. State, 14 Ohio St. 437, Mikell's Cas. 69.

[162] See People v. Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238; Reg. v. Lawrance, 4 Cox, C. C. 438; post, § 318.

[162a] People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072.

[163] Connor v. People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295; McDaniel's Case, Fost. C. L. 121, Beale's Cas. 152; post, § 376.

[164] Rex v. Egginton, 2 Leach, C. C. 913; Allen v. State, 40 Ala. 334.

Statutory Offenses in Which Consent is No Defense.—There are many offenses punished by statute in which consent of the person more particularly injured is no defense. Among these may be mentioned bigamy,[165] incest,[166] seduction,[167] and carnal knowledge of girls under a certain age.[168]

151. Going beyond the Consent.

Consent can be relied upon as a defense only when the act was within the consent. Thus, when a man hands another goods, with the understanding that he may take them on paying for them, and the other runs off with them without paying, there is no such consent to part with the goods as will defeat an indictment for larceny.[169] Likewise a woman may consent to the sexual act, yet the man may treat her so roughly and in so rude and insolent a manner, and so scandalously abuse her in the performance of the act, as to commit thereby an assault and battery.[169a] There is some difficulty and conflict of opinion as to the application of this principle, as we shall see at length in treating of larceny, assault, and rape.[170]

152. Persons Incapable of Consenting.

In any case, in order that the consent of the person injured may be a defense, he or she must have been capable of consenting. Thus, though want of consent is an essential element of rape, it is rape, even at common law, to have carnal knowledge of a girl under ten years of age, whether she consents or not, for the law considers that a child of such tender years has not sufficient capacity to consent to intercourse.[171] The same is

[165] Post, § 459.
[166] Post, § 460.
[167] Post, § 464.
[168] Post, § 298.
[169] Post, § 318(c).
[169a] Richie v. State, 58 Ind. 355.
[170] Post, §§ 220, 297, 318.
[171] Post, § 298.

true of a woman who is insensible through sleep, drugs, drunkenness, or any other cause.[172] In some states, statutes punish the carnal knowledge of girls, even when they are as old as eighteen years, whether they consent or not.[173] A child of tender years is incapable of consenting to an assault and false imprisonment.[173a] Likewise abduction and kidnapping are committed notwithstanding consent of the person at whom the acts are directed, if by reason of youth, insanity, intoxication or other defect he is incapable of giving an intelligent consent.[173b]

153. Consent Induced by Duress.

Consent induced by duress so great as to be sufficient to reasonably destroy free will is only apparent consent, and is no defense. Thus, consent of a woman to sexual intercourse, or of a man to part with his property, is no defense in a prosecution for assault, rape, robbery, or larceny, if the consent was induced by threats of death or great bodily harm.[174] The degree of duress may be so slight as not to vitiate consent. The degree required will vary according to the act.[175]

154. Consent Induced by Fraud.

Whether fraud vitiates consent is not clear, and there is much conflict in the decisions. The question has arisen in prosecutions for assault, rape, and larceny, and will be considered in dealing with those crimes.[176]

[172] Post, § 295.

[173] Post, § 298.

[173a] Com. v. Nickerson, 5 Allen (87 Mass.) 519, Mikell's Cas. 75.

[173b] Kidnapping sailor, Hadden v. People, 25 N. Y. 373; child, State v. Rollins, 8 N. H. 550; State v. Farrar, 41 N. H. 53.

[174] Post, §§ 218, 296, 318(d), 370.

[175] As to rape, see post, § 293. As to robbery, see post, § 370. As to larceny, see post, § 318(d). As to assault, see post, § 218.

[176] Post, §§ 220, 297, 318. See Rex v. Rosinski, 1 Mood. C. C. 19,

VI. Recovery in a Civil Action.

155. In General.—On a criminal prosecution, it is no defense that the person injured has recovered damages or been defeated in a civil action.

If an action is brought against a wrongdoer to recover damages for the wrong, a judgment either for the plaintiff or for the defendant is a bar to any further action between the parties for the same wrong. But when a tort is also a crime, neither a recovery by the party injured nor a judgment against him in a civil action will bar a prosecution by the state for the wrong and injury to the public. Thus, on a prosecution for larceny, or a kindred crime, the fact that the property has been recovered by the owner in an action of replevin, or that its value has been recovered in trespass or trover, is no defense.[177] The same is true of prosecutions for assault and battery, libel, nuisance, etc.[178] This rule is changed to some extent by statute.[179]

VII. Settlement and Condonation.

156. In General.—In the absence of statutory provision to the contrary, a criminal prosecution is not barred by the fact of settlement with, or condonation by, the person injured.

A person against whom a tort has been committed may condone the wrong or settle with the wrongdoer, and release him from his liability. But the settlement or condonation, as between the parties, cannot, in the absence of a statute, bar a prosecution by the state to punish for the wrong and injury to the public. Unless there is some express statutory provision, noth-

Mikell's Cas. 74; Reg. v. Williams, 8 Car. & P. 286; Reg. v. Case, 4 Cox, C. C. 220.

[177] Donohoe v. State, 59 Ark. 375, 27 S. W. 226.

[178] See People v. Judges, 13 Johns. (N. Y.) 85; Foster v. Com., 8 Watts & S. (Pa.) 77; State v. Frost, 1 Brev. (S. C.) 385; State v. Stein, 1 Rich. (S. C.) 189; U. S. v. Buntin, 10 Fed. 730.

[179] See State v. Blyth, 1 Bay (S. C.) 166.

ing that is done or agreed upon between the parties after the act can take away its criminal character, or prevent the state from prosecuting and punishing the wrongdoer.[180] Thus, condonation or forgiveness by the woman does not bar a prosecution for rape or seduction.[181] An indictment for forgery will lie notwithstanding condonation or ratification by the person whose name is forged.[182] And in the case of larceny, embezzlement, and the obtaining of money or property by false pretenses, it is no defense that the property or money has been returned or repaid, or tendered back.[183]

[180] Com. v. Slattery, 147 Mass. 423, 18 N. E. 399, Beale's Cas. 151.

[181] Com. v. Slattery, 147 Mass. 423, 18 N. E. 399, Beale's Cas. 151; State v. Newcomer, 59 Kan. 668, 54 Pac. 685 (rape); Barker v. Com., 90 Va. 820, 20 S. E. 776; In re Lewis, 67 Kan. 562, 73 Pac. 77, 63 L. R. A. 281, 100 Am. St. Rep. 479 (seduction).

Anciently it was otherwise, an appeal of rape being not unfrequently the prelude to a marriage. 2 Pol. & M. Hist. Eng. Law, 489; Robert's Case, Sel. Pl. Cr., Sel. Soc. Pl. 77, Mikell's Cas. 100.

A prosecution for adultery being maintainable only on complaint of the injured spouse must be dismissed where she withdraws the complaint. People v. Dalrymple, 55 Mich. 519, 22 N. W. 20, Mikell's Cas. 102.

A husband does not, by remarrying his wife after being divorced from her with knowledge of her adultery committed during the former marriage, condone the offense so as to bar a prosecution of her partner in the adultery. State v. Smith, 108 Iowa, 440, 79 N. W. 115, Mikell's Cas. 103, n.

A contract providing for the support of a bastard is valid and enforceable, though a part of its consideration is the release of the putative father from all civil and criminal proceedings. Rohrheimer v. Winters, 126 Pa. 253, 17 Atl. 606, Mikell's Cas. 103.

[182] State v. Tull, 119 Mo. 421, 24 S. W. 1010; Countee v. State (Tex. Cr. App.) 33 S. W. 127.

[183] Fleener v. State, 58 Ark. 98, 23 S. W. 1; Donohoe v. State, 59 Ark. 375, 27 S. W. 226; State v. Frisch, 45 La. Ann. 1283, 14 So. 132; Thalheim v. State, 38 Fla. 169, 20 So. 938; State v. Pratt, 98 Mo. 482, 11 S. W. 977; State v. Noland, 111 Mo. 473, 19 S. W. 715; Dean v. State, 147 Ind. 215, 46 N. E. 528; Shultz v. State, 5 Tex. App. 390; Com. v. Brown, 167 Mass. 144, 45 N. E. 1; Robson v. State, 83 Ga. 166, 9 S. E. 610; Williams v. State, 105 Ga. 606, 31 S. E. 546, Mikell's Cas. 100; People v. De Lay, 80 Cal. 52, 22 Pac. 90.

Indeed, as we shall see in another chapter, it is a misdemeanor—compounding a felony—for a person against whom a felony has been committed to agree not to prosecute the offender.[184]

Condonation by the State.—A species of condonation by the state exists in which an offender is granted immunity in return for confession and assistance in convicting others.[184a] Promises by police officers cannot bind the state, since the immunity rests in the sound discretion of the court having final jurisdiction to sentence.[184b]

VIII. Wrong of Person Injured.

157. In General.—Since the state punishes for crime because of the wrong and injury to the public, and not to redress the private wrong to the individual, it is no defense, as a general rule, that the person against whom a crime has been committed was himself guilty of a crime or a private wrong in the same transaction.

Since the state does not punish crime for the purpose of redress to the individual, but for the protection of the public, and as an example, it would seem to follow, as a matter of course,

The defrauded party's release of the defendant from liability is no defense on a prosecution for obtaining property by false pretenses. Com. v. Brown, 167 Mass. 144, 45 N. E. 1.

Ratification by the person injured is no defense on a prosecution under a statute for selling or removing property with intent to defraud any person having a lawful claim thereto. May v. State, 115 Ala. 14, 22 So. 611.

[184] Post, § 438.

[184a] "If any felons will confess their crimes and accuse others and become approvers, let them be put out of penance, and let their confessions be presently received and enrolled by the coroner, and from that day forward let them have of the sheriffs three half pence a day for their support." Britt. 12, Mikell's Cas. 105.

[184b] Cannot be pleaded in bar. Com. v. St. John, 173 Mass. 566, 54 N. E. 254, Mikell's Cas. 105. An agreement by the prosecuting attorney to dismiss a case is not binding unless the judge consents. Tullis v. State, 41 Tex. Cr. R. 87, 52 S. W. 83.

that, if a criminal act is committed, the offender cannot escape punishment on the ground that the transaction also involved a crime or a private wrong on the part of the person injured. As was said in a Colorado case, where both the prosecutor and the defendant have violated the law, it is better that both be punished than that the crime of one be used to shield the other.[185] This principle is clear, and there are a number of cases in which it has been recognized and applied. For example, it has been held that a prosecution for obtaining property by false pretenses cannot be defeated by showing that the other party committed a crime or wrong in parting with his property;[186] or that he also intended to defraud, or that he also made false pretenses, and thereby obtained property from the accused.[187]

As was said by the Massachusetts court in such a case: "If the other party has also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment, because each deserved it equally."[188]

[185] In re Cummins, 16 Colo. 451, 27 Pac. 887, 25 Am. St. Rep. 291.

[186] Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77. In Com. v. Henry, 22 Pa. 253, the indictment alleged that the defendant falsely and fraudulently represented to the prosecutor that he had a warrant for the arrest of his daughter for a misdemeanor, and threatened to arrest her, and by such means obtained money from the prosecutor. It was held that the indictment could be maintained, notwithstanding the unlawful motive of the prosecutor in paying the money.

So, in In re Cummins, 16 Colo. 451, 27 Pac. 887, 25 Am. St. Rep. 291, it was held that one who obtained property by false pretenses was none the less liable to punishment because the prosecutor parted with the money in furtherance of an illegal purpose, to obtain, by fraud, valuable lands from the United States. See, to the same effect, People v. Henssler, 48 Mich. 49, 11 N. W. 804; People v. Watson, 75 Mich. 582, 42 N. W. 1005; People v. Martin, 102 Cal. 558, 36 Pac. 952, Mikell's Cas. 98; Gillmore v. People, 87 Ill. App. 128.

[187] Reg. v. Hudson, 8 Cox, C. C. 305, Bell, C. C. 263, Beale's Cas. 158; Com. v. Morrill, 8 Cush. (Mass.) 571, Beale's Cas. 160; People v. Watson, 75 Mich. 582, 42 N. W. 1005; People v. Shaw, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372.

On the same principle, an indictment for larceny or embezzlement cannot be defeated by showing that the person from whom the property was taken or embezzled had himself stolen it, or otherwise obtained it wrongfully or unlawfully,[189] or that he was in possession of the same, or using the same, in violation of the law,[190] or that he parted with his money for the purpose of buying counterfeit money.[190a] An indictment for uttering counterfeit money may be sustained, though it may have been given to a prostitute.[191] A prosecution for malicious trespass cannot be defended on the ground that the property destroyed was intoxicating liquors kept in violation of law.[191a]

There are a few cases in which this principle has been ignored or repudiated, but they are clearly unsound, and are not supported by authority.[192]

[188] Com. v. Morrill, 8 Cush. (Mass.) 571, Beale's Cas. 160.

[189] Rex v. Beacall, 1 Car. & P. 454; Ward v. People, 3 Hill (N. Y.) 395; Com. v. Finn, 108 Mass. 466; Com. v. Smith, 129 Mass. 104.

[190] Thus, a prosecution for larceny or embezzlement of intoxicating liquors, or the proceeds of sales thereof, may be maintained, notwithstanding the liquors were kept or sold in violation of a penal statute. Com. v. Smith, 129 Mass. 104. And see Com. v. Cooper, 130 Mass. 285.

And an indictment will lie for stealing articles used for gambling purposes in violation of law. Bales v. State, 3 W. Va. 685. See post, § 310.

In Cunningham v. State, 61 N. J. Law, 67, 38 Atl. 847, it was held that, on a prosecution for procuring money by falsely pretending to have commenced a suit for the person furnishing the money, and to have expended the money in its prosecution, it is no defense that such person knew that the suit which she employed the defendant to prosecute was for a fictitious claim.

An indictment will lie for embezzlement from a foreign corporation, though it may not have complied with law relating to foreign corporations, and may have had no right to do business in the state. State v. Pohlmeyer, 59 Ohio St. 491, 52 N. E. 1027; People v. Hawkins, 106 Mich. 479, 64 N. W. 736; State v. O'Brien, 94 Tenn. 79, 28 S. W. 311; Com. v. Shober, 3 Pa. Super. Ct. 554.

[190a] Crum v. State, 148 Ind. 401, 47 N. E. 833.

[191] Reg. v. ————, 1 Cox, C. C. 250, Beale's Cas. 158.

[191a] State v. Stark, 63 Kan. 529, 66 Pac. 243, 88 Am. St. Rep. 251.

[192] In New York, where an indictment charged an officer with ob-

IX. Contributory Negligence of Person Injured.

158. In General.—Since a crime is punished because of the wrong and injury to the public, and not to redress the individual, contributory negligence on the part of the person injured by a crime is generally no defense.

In civil actions to recover damages for personal injuries or death resulting from the wrongful act or omission of another, the general rule is that there can be no recovery if the person injured or killed was guilty of contributory negligence. This rule, however, can have little application in criminal prosecutions, where the proceeding is by the state to punish the wrongdoer for his violation of the law. On a prosecution for manslaughter by negligence, the defendant is punished because of his negligence, and to deter others, and it is no defense, therefore, that the person killed was guilty of negligence contributing to his death, even though he would not have been killed if he had used due care.[193] And on a prosecution for murder or

taining property by false pretenses, the alleged false pretenses being that he had a warrant for the arrest of the prosecutor, it was held that, as the property was voluntarily surrendered as an inducement to an officer to violate the law,—that is, to refrain from executing a warrant,—the indictment could not be sustained. McCord v. People, 46 N. Y. 470, Beale's Cas. 162, Peckham, J., dissented. See, also, People v. Stetson, 4 Barb. (N. Y.) 151.

And in a Wisconsin case, where the charge was conspiracy on the part of several defendants to defraud the prosecutor of his money, and the evidence showed that the conspiracy was in connection with an unlawful enterprise, in which the prosecutor himself was taking part, it was held that a conviction could not be sustained. State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719.

The English cases—Reg. v. Hunt, 8 Car. & P. 642, and Rex v. Stratton, 1 Camp. 549, note, Beale's Cas. 157—cited in support of this view do not support it. See the opinion of Judge Colt in Com. v. Smith, 129 Mass. 104.

An information against a magistrate, for improperly convicting relator of an offense, was denied where relator made no exculpatory affidavit showing that he was not guilty of the offense. Rex v. Webster, 3 Term R. 388, Mikell's Cas. 96.

[193] Reg. v. Longbottom, 3 Cox, C. C. 439, Mikell's Cas. 94; Reg. v.

manslaughter it is no defense that the deceased might have recovered from the injury if he had submitted to a surgical operation, or used due care.[194] So, by the weight of authority, on an indictment under a statute for obtaining property by false pretenses, it is no defense that the victim was credulous and negligent, and that he would not have been cheated if he had used due care.[195]

An act may be such, however, that public policy does not require its punishment, where the injury was due largely to the negligence of the person injured. Thus, at common law it was considered that public policy did not require the punishment of persons for obtaining property by mere false representations or lies.[196]

X. Contributory Acts or Negligence of Third Persons.

159. In General.—If an injury is caused by the act or neglect of a person under such circumstances as to render him guilty of a crime, he is none the less responsible because of the contributing act or neglect of a third person.

This rule has frequently been applied in cases of homicide. If a person's act is a direct cause of another's death, he is responsible therefor, notwithstanding the wrongful act of a third person may have contributed to cause the death. If both are guilty, both should be punished. The guilt of one cannot exempt the other.[197] The same rule applies where one's neglect of duty causes another's death. He cannot escape responsibility by showing that the death was also due to neglect of duty on

Swindall, 2 Car. & K. 230, Beale's Cas. 167; Belk v. People, 125 Ill. 584, 17 N. E. 744; Crum v. State, 64 Miss. 1, 1 So. 1, 60 Am. Rep. 44; Rex v. Waters, 6 Car. & P. 328, Mikell's Cas. 90; post, § 264.

[194] Rex v. Rew, J. Kelyng, 26, Beale's Cas. 163, Mikell's Cas. 559; Reg. v. Holland, 2 Mood. & R. 351, Beale's Cas. 164; post, § 237.

[195] Post, § 366.

[196] Post, § 351.

[197] Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167; post, § 264

the part of a third person.[198] Nor, as a rule, can a man escape responsibility for another's death by showing negligence of a physician in treating the deceased.[199]

This rule does not apply where the injury or death was not due at all to the act or neglect of the accused, but solely to the intervening act of a third person.[200] And if an injury is caused by the act of one of several persons, not acting in concert, and it cannot be shown which one of them did the act, neither can be convicted, though it is clear that one of them is guilty.[201]

XI. Entrapment.

160. In General.—That a man was entrapped in the commission of a crime is no defense—

1. **Unless the circumstances show consent on part of the person injured, and want of consent is an essential element of the crime.**
2. **Or, perhaps, unless the commission of the act was induced by active co-operation and instigation on the part of the public authorities.**

Mere Entrapment.—If a man is suspected of an intention to commit a crime, neither the individual against whom his act is to be directed nor the public authorities are bound to take steps to prevent its commission. They may set a trap for the suspect, and, if he commits the crime, and is indicted, it will ordinarily be no defense that he was entrapped.

Thus, one who steals or embezzles another's goods or money is none the less guilty because the other knew of his purpose,

[198] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; post, § 265.

[199] Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; Com. v. Hackett, 2 Allen (84 Mass.) 136; post, § 237(g)(2).

[200] Post, § 237(a).

[201] Rex v. Richardson, 1 Leach, C. C. 387, Beale's Cas. 166; People v. Woody, 45 Cal. 289.

and left the goods or money exposed, in order to entrap and prosecute him.[202] And a man cannot escape punishment for burglary because the occupant of the house suspected his intention, and, instead of locking the door, left it unlocked, and waited with an officer to arrest him when he should enter.[203] The same is true of any other offense.[204]

[202] Rex v. Headge, 2 Leach, C. C. 1033; Reg. v. Williams, 1 Car. & K. 195; Rex v. Egginton, 2 Leach, C. C. 913, 2 East, P. C. 666, Beale's Cas. 154; Reg. v. Lawrance, 4 Cox, C. C. 438; People v. Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238; State v. Covington, 2 Bailey (S. C.) 569, Mikell's Cas. 77; State v. Adams, 115 N. C. 775, 20 S. E. 722. And see Pigg v. State, 43 Tex. 108.

The same is true of the offense of obtaining property by false pretenses. Rex v. Ady, 7 Car. & P. 140.

In People v. Hanselman, supra, the accused was held guilty of larceny from the person of another, though it appeared that the other, who was a constable, disguised himself, feigned drunkenness, and lay down in an alley for the purpose of detecting thieves, and that he was conscious of the act when the accused took the money, and remained passive, with a view to afterwards arresting and prosecuting the accused.

[203] State v. Jansen, 22 Kan. 498; State v. Stickney, 53 Kan. 308, 36 Pac. 714; Thompson v. State, 18 Ind. 386; People v. Laird, 102 Mich. 135, 60 N. W. 457; State v. Sneff, 22 Neb. 481, 35 N. W. 219; State v. Abley, 109 Iowa, 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862, Mikell's Cas. 83. And see Johnson v. State, 3 Tex. App. 590.

See, also, Rex v. Bigley, 1 Craw. & D., where a householder, knowing of the purpose of a band to burglarize his house, provided a force for their reception, and on their knocking at the door in the night opened it, when they rushed in, to be overpowered.

[204] Bribery: State v. Dudoussat, 47 La. Ann. 977, 17 So. 685; People v. Liphardt, 105 Mich. 80, 62 N. W. 1022.

Train wrecking: Dalton v. State, 113 Ga. 1037, 39 S. E. 468.

Train robbery: State v. West, 157 Mo. 309, 57 S. W. 1071.

The fact that a detective or other person purchases liquor from a dealer for the purpose of prosecuting him for selling in violation of law is no defense on such a prosecution. People v. Curtis, 95 Mich. 212, 54 N. W. 767; People v. Murphy, 93 Mich. 41, 52 N. W. 1042.

The fact that a government inspector uses decoy letters to detect a person in mailing obscene matter is no defense. Price v. U. S., 165 U. S. 311. Grimm v. U. S., 156 U. S. 604. Compare U. S. v. Whittier, 5 Dill. 35, Fed. Cas. No. 16,688; U. S. v. Adams, 59 Fed. 674.

It must appear, however, that the person charged himself did everything necessary to make out a complete offense;[204a] and if there is something more than mere entrapment, it may prevent the act of the suspect from being punishable.[204b]

161. Conduct Involving Consent.

As we have seen in a previous section,[205] if the person against whom an act is directed, which, under ordinary circumstances, would be a crime, consents to the act, and want of consent is an essential ingredient of the crime, it necessarily follows that the crime is not committed. It can make no difference, in such cases, that the consent was given merely for the purpose of entrapment, and without the knowledge of the perpetrator of the act, and that he intended to commit the crime, for, as we have seen,[206] a mere criminal intention is not punishable.

It follows that, if a person who suspects another of an intention to steal his property, instead of merely lying in wait to apprehend him, voluntarily delivers the property to him, and so consents to the taking, there is no larceny, for, to constitute larceny, the property must be taken without the owner's consent.[207]

[204a] One indicted for false swearing may be convicted although it appear that the officer who administered the oath knew at the time that it was false, and made to obtain funds to which the affiant was not entitled, and such officer administered the oath for the purpose of instituting criminal proceedings. Thompson v. State, 120 Ga. 132, 47 S. E. 566.

[204b] Nothing that was done by the person present with the knowledge and consent of the victims will be imputed to the accused. Dalton v. State, 113 Ga. 1037, 39 S. E. 468; State v. Douglass, 44 Kan. 618, 26 Pac. 476; Love v. People, 160 Ill. 501, 43 N. E. 710.

[205] Ante, § 150.

[206] Ante, § 117.

[207] Reg. v. Lawrance, 4 Cox, C. C. 438; Connor v. People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295; State v. Adams, 115 N. C. 775, 20 S. E. 722; State v. Waghalter, 177 Mo. 676, 76 S. W. 1028. And see Kemp v. State, 11 Humph. (Tenn.) 329.

The same is true of robbery, which cannot be committed unless the property is taken by force or by putting in fear,[208] and of statutory offenses involving putting in fear or want of consent.[209] And, in the case of burglary, the offense is not committed where the occupant of the house or his servant, by his direction or authority, opens the door, and admits one whom he suspects of an intention to break and enter, or takes active steps to induce him to break and enter.[210]

In State v. Hull, 33 Or. 56, 54 Pac. 159, it was held that property was taken with the consent of the owner, so that there was no larceny, where a person employed by cattle owners to catch thieves, with their consent and authority, co-operated with suspected thieves in planning the taking, and in taking, the cattle, for the purpose of having them arrested while driving the cattle away.

It is no defense to a prosecution for stealing public records, that a public officer delivered them to accused for the purpose of entrapping him, since the officer had no authority to bind the public in that manner. People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131.

[208] McDaniel's Case, Fost. C. L. 121, Beale's Cas. 152; Rex v. Fuller, Russ. & R. 408; Connor v. People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295. And see Reane's Case, 2 Leach, C. C. 616.

Parting with property upon the charge of an unnatural crime (post, § 375) will not make the taking robbery, if it be parted with, not from fear of loss of character, but for the purpose of prosecuting. Rex v. Fuller, supra.

[209] In People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072, it was held that, as the statutory offense of extortion by threats and putting in fear cannot be committed unless the money or property is parted with under the influence of fear, it was not committed where the prosecutor handed over his property to the accused, under instructions from the police, and for the purpose of entrapment. This case was reversed by the court of appeals, but only on the ground that the defendant was guilty of an attempt. People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. Rep. 741.

Officers of a railroad company cannot consent to the robbery of passengers on their trains, so that one indicted for the statutory offense of train robbery can take no benefit from the knowledge and passive acquiescence of the officials. State v. West, 157 Mo. 309, 57 S. W. 1071.

[210] Rex v. Egginton, 2 Leach, C. C. 913, 2 East, P. C. 666, Beale's Cas. 154; Reg. v. Johnson, Car. & M. 218; Allen v. State, 40 Ala. 334; Love v. People, 160 Ill. 501, 43 N. E. 710; People v. McCord, 76 Mich.

In order that consent may be a defense in such cases, it must be given by some one having authority to consent to the particular act.[210a] A conspiracy to commit an offense, however, is a complete offense in itself,[210b] and it is no defense that the conspirators were entrapped into an attempt to carry out the unlawful purpose.[210c] The effect of consent thus given upon the liability of persons as accessaries or principals in the second degree, and for attempts, is elsewhere discussed.[211]

162. Instigation.

Even in the case of crimes in which want of consent is not an essential element, a person who is entrapped into committing them should not always be punished. Public sentiment, as well as the leaning of the courts, is strongly against the practice of entrapping persons into the commission of crimes by the common detective methods. The practice has frequently been condemned by the courts, and there are reported cases in which it has been held, independently of any question of consent on the part of the person injured, that a criminal act may not be punishable if the accused was induced to commit it

200, 42 N. W. 1106; Speiden v. State, 3 Tex. App. 156, 30 Am. Rep. 126, Mikell's Cas. 80; Roberts v. Ter., 8 Okl. 326, 57 Pac. 840. See, also, People v. Collins, 53 Cal. 185.

[210a] State v. Abley, 109 Iowa, 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862, Mikell's Cas. 83.

The district attorney cannot consent to the delivery of indictments to one who steals them. People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131.

Railroad officials entrapping train robbers cannot consent to robbery of passengers. State v. West, 157 Mo. 309, 57 S. W. 1071.

The offense of aiding a prisoner to escape cannot be committed where the public authorities knew of the plan and permitted the prisoner to go, he having no intent to escape. Rex v. Martin, Russ. & R. 196.

[210b] Ante, § 135.

[210c] Thompson v. State, 106 Ala. 67, 17 So. 512.

[211] Post, §§ 171, 177, 190; ante, § 129.

by active co-operation and instigation on the part of public detectives.[212]

A sound public policy requires that the courts shall condemn this practice by directing an acquittal whenever it appears that the public authorities, or private detectives, with their cognizance, have taken active steps to *lead* the accused into the commission of the act.[213] It is perfectly legitimate and proper, however, to adopt devices and traps for the purpose of detecting crime and securing evidence, provided the device is not a temptation and solicitation to commit it.[214]

The crime of bribery furnishes a good illustration of this distinction. If a public officer solicits a bribe of his own accord, the fact that a trap is laid and the bribe paid in the presence of concealed witnesses does not render him any the less guilty, nor is such an entrapment contrary to public policy.[215]

But if a public officer, without previous solicitation on his part, is induced to accept a bribe by the active efforts and instigation of persons who wish to prosecute him, with the co-

[212] Saunders v. People, 38 Mich. 218; People v. McCord, 76 Mich. 200, 42 N. W. 1106; State v. Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360; State v. Dudoussat, 47 La. Ann. 977, 17 So. 685; Love v. People, 160 Ill. 501, 43 N. E. 710. And see State v. Abley, 109 Iowa, 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862, Mikell's Cas. 83; Dalton v. State, 113 Ga. 1037, 39 S. E. 468; O'Brien v. State, 6 Tex. App. 665, 7 Tex. App. 181.

[213] As was said by Judge Marston in a Michigan case: "Human nature is frail enough at best, and requires no encouragement in wrongdoing. If we cannot assist another, and prevent him from committing crime, we should at least abstain from any active efforts in the way of leading him into temptation." Saunders v. People, 38 Mich. 218, 222. See, also, State v. Abley, 109 Iowa, 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862, Mikell's Cas. 83; U. S. v. Adams, 59 Fed. 674; People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; Connor v. People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295; State v. Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360.

[214] Ante, § 160.

[215] State v. Dudoussat, 47 La. Ann. 977, 17 So. 685; People v. Liphardt, 105 Mich. 80, 62 N. W. 1022.

operation of the public authorities, he should not be indicted or punished.[216] It must be conceded that this view is not supported by the weight of actual decision,[217] but the tendency of the courts is in its favor.

As far as actual authority goes, it is no doubt safe to say that the fact that a private person has led another into the commission of a crime is no defense if the public authorities were not concerned in it.[218]

[216] In State v. Dudoussat, supra, it was said that, on such a state of facts, the accused would be entitled to an acquittal.

And in a Texas case it was held that a person who gave an officer money to influence his conduct was not guilty of bribery, under the Texas statute, where the officer first approached him for the purpose of entrapment, and expressed a willingness to accept a bribe, and thereby instigated the giving of it. O'Brien v. State, 6 Tex. App. 665, 7 Tex. App. 181.

But see, as contra, People v. Liphardt, supra.

[217] People v. Liphardt, supra (but compare Saunders v. People, 38 Mich. 218); Pigg v. State, 43 Tex. 108; People v. McCord, 76 Mich. 200, 42 N. W. 1106; State v. Jansen, 22 Kan. 498.

In City of Evanston v. Myers, 172 Ill. 266, 50 N. E. 204, Mikell's Cas. 88, it was held that a person charged with selling intoxicating liquors in violation of law could not escape liability by showing that the public authorities furnished the purchaser with money to buy the liquor.

[218] People v. Murphy, 93 Mich. 41, 52 N. W. 1042; People v. Curtis, 95 Mich. 212, 54 N. W. 767; Pigg v. State, 43 Tex. 108; Johnson v. State, 3 Tex. App. 590. And see the cases cited ante, § 160.

An indictment for disposing of forged bank notes will lie, notwithstanding the person to whom they were uttered was the agent of the bank, and applied to purchase them for the purpose of detection and prosecution. Rex v. Holden, Russ. & R. 154.

See Slaughter v. State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242, where a private detective was convicted of larceny in inciting another to steal.

CHAPTER V.

PARTIES IN CRIME.

I. In General, §§ 163-165.
II. Principals in the First Degree, §§ 166-169.
III. Principals in the Second Degree, §§ 170-175.
IV. Accessaries before the Fact, §§ 176-180.
V. Accessaries after the Fact, §§ 181-185.
VI. Acts for Which Accomplices are Responsible, §§ 186-190.
VII. Persons Who may be Aiders and Abettors or Accessaries, § 191.
VIII. Countermand or Withdrawal, § 192.
IX. Principal and Agent, and Master and Servant, §§ 193-196.

I. In General.

163. Classification of Parties.—The parties to a felony are guilty either (1) as principals or (2) as accessaries. The distinction is not recognized in treason or in misdemeanors, but all who take part in such crimes, if punishable at all, are punishable as principals.

Principals and accessaries are either—

1. **Principals in the first degree,—those who actually commit the deed.**
2. **Principals in the second degree—those who are present, actually or constructively, aiding or abetting the commission of the deed.**
3. **Accessaries before the fact,—those who procure, counsel, or command the deed, but who are absent when it is committed.**
4. **Accessaries after the fact,—those who receive, comfort, or assist another, knowing that he has committed a felony.**

164. Offenses in Which These Distinctions are Recognized.

(*a*) *In General.*—The distinction between principals in the

first and second degree is necessarily recognized in all offenses, whether they be treason, felony, or misdemeanors. But it is in felonies only, as murder, rape, robbery, larceny, etc., that any distinction is made between principals and accessaries. All concerned are guilty and punishable as principals, if guilty at all, whether present or absent, in treason,[1] and in misdemeanors, as in assaults and assault and battery, gaming, counterfeiting, forgery and cheating at common law, false pretenses, keeping a gaming house or bawdy house, and other nuisances, betting at elections, etc.[2]

(*b*) *Statutory Offenses.*—The distinction between principals and accessaries applies to statutory felonies, as well as to felonies at common law, unless the statute shows a contrary intent.[3] And it applies to an offense which was not a felony at common law, but which has been made a felony by statute, as, in some jurisdictions, forgery, obtaining property by false pretenses, and assaults with intent to kill, to rob, to rape, etc.[4]

[1] 3 Inst. 138; 1 Hale, P. C. 612, 613; 2 Hawk. P. C. c. 29, § 2; 4 Bl. Comm. 35; Reg. v. Clayton, 1 Car. & K. 128, Beale's Cas. 388; Throgmorton's Case, 1 Dyer, 986. Cf. U. S. v. Burr, 4 Cranch (U. S.) 469.

[2] 2 Hawk. P. C. c. 29, § 2; 4 Bl. Comm. 36; 1 Hale, P. C. 613; Reg. v. Clayton, 1 Car. & K. 128, Beale's Cas. 388; Reg. v. Moland, 2 Mood. C. C. 276; Bliss v. U. S., 105 Fed. 508; Stevens v. People, 67 Ill. 587; Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; Kinnebrew v. State, 80 Ga. 232, 5 S. E. 56; State v. Lymburn, 1 Brev. (S. C.) 397, 2 Am. Dec. 669; Beck v. State, 69 Miss. 217, 13 So. 835; Williams v. State, 12 Smedes & M. (Miss.) 58; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469; Com. v. Gannett, 1 Allen (Mass.) 7, 79 Am. Dec. 693; People v. Erwin, 4 Denio (N. Y.) 129; Lowenstein v. People, 54 Barb. (N. Y.) 299; State v. Stark, 63 Kan. 529, 66 Pac. 243, 88 Am. St. Rep. 251; Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684; Howlett v. State, 5 Yerg. (Tenn.) 144; State v. Smith, 2 Yerg. 273; Wagner v. State, 43 Neb. 1, 61 N. W. 85; Sanders v. State, 18 Ark. 198.

[3] 1 Hale, P. C. 613, 614; Reg. v. Tracy, 6 Mod. 30, Mikell's Cas. 489; Stamper v. Com., 7 Bush (Ky.) 612; Com. v. Carter, 94 Ky. 527, 23 S. W. 344; Bland v. Com., 10 Bush (Ky.) 622; Meister v. People, 31 Mich. 99; Nichols v. State, 35 Wis. 308; McGowan v. State, 9 Yerg. (Tenn.) 184.

[4] Nichols v. State, 35 Wis. 308, and would apply where a felony was reduced to the grade of misdemeanor. State v. Dewer, 65 N. C. 572.

It was said in a Kentucky case that, as a general rule, where a statute creates a felony and prescribes a particular punishment therefor, or where a statute provides a punishment for a common-law felony by name, those who were present aiding and abetting in the commission of the crime are held to be included by the statute, although not mentioned. But where the punishment is imposed by the statute upon the person alone who actually commits the acts constituting the offense, and not in general terms upon those who are guilty of the offense, according to common-law rules, mere aiders and abettors will not be deemed to be within the act.[5] But this case has been overruled, and the rule established that, unless it is plain, from the nature of an offense made a felony by statute, that the provisions of the statute were intended to affect only the party actually committing the offense, aiders and abettors are punishable.[6]

(*c*) *Petit Larceny.*—In England there were no accessaries, either before or after the fact, in petit larceny,—i. e. larceny of property of the value of twelve pence or less,[7]—but all persons concerned therein, if guilty at all, were guilty as principals.[8] And this was true notwithstanding petit larceny seems to have been regarded as a felony.[9] The same is true in this country where larceny is divided into grand and petit larceny, and the latter is a misdemeanor only,[10] or where all larceny is reduced to the grade of petit larceny.[11]

[5] Stamper v. Com., 7 Bush (Ky.) 612. See, also, Bland v. Com., 10 Bush (Ky.) 622; Frey v. Com., 83 Ky. 190.

[6] Com. v. Carter, 94 Ky. 527, 23 S. W. 344.

[7] Post, § 334.

[8] 2 Inst. 183; 4 Bl. Comm. 36; 1 Hale, P. C. 530; 1 Hawk. P. C. c. 29, §§ 1, 24.

[9] 1 Hale, P. C. 530.

[10] Ward v. People, 6 Hill (N. Y.) 144; State v. Gaston, 73 N. C. 93, 21 Am. Rep. 459; Slaughter v. State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242. See Shay v. People, 22 N. Y. 317.

(*d*) *Homicide.*—It is clear that there may be accessaries before the fact in murder at common law, in murder in the first degree under the statutes, and in murder in the second degree,[12] and there may be principals in the second degree to voluntary manslaughter, as where it is committed during an affray.[12a] But there cannot be accessaries before the fact to voluntary manslaughter, for "it is committed suddenly, without reflection, in heat of passion and without malice, express or implied, and repels the supposition that the homicide was the result of premeditation, concert, or aid, all of which would be evidences of malice."[13]

There may be principals in the second degree and accessaries before the fact to involuntary manslaughter. Thus, if two men drive separate vehicles at a furious and dangerous speed along the highway, each inciting and abetting the other, and one of them drives over and kills a person, the one thus causing the death is guilty of manslaughter as principal in the first degree, and the other is guilty as principal in the second degree. And the same would be true of two persons in the

[11] In North Carolina, all larceny has been reduced by statute to the degree of petit larceny, and in that state there can be no accessaries in larceny, but all concerned are guilty as principals. State v. Gaston, 73 N. C. 93, 21 Am. Rep. 459; State v. Stroud, 95 N. C. 626.

[12] Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; State v. Maloy, 44 Iowa, 104.

[12a] State v. Coleman, 5 Port. (Ala.) 32; Martin v. State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Woolweaver v. State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667; Sneed v. State, 47 Ark. 180, 1 S. W. 68; Brown v. State, 28 Ga. 199; Goff v. Prime, 26 Ind. 196; State v. Mushrush, 97 Iowa, 444, 66 S. W. 746; State v. Gray, 116 Iowa, 231, 89 N. W. 987; State v. Putman, 18 S. C. 175, 44 Am. Rep. 569.

[13] Bibithe's Case, 4 Coke, 43b, Mikell's Cas. 492; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; Bowman v. State (Tex. Cr. App.) 20 S. W. 558. Cf. Reg. v. Gaylor, 1 Dears. & B. 288. And see 4 Bl. Comm. 36; 1 Hale, P. C. 616.

same vehicle, one driving and the other inciting and abetting him.[14] If one should incite another to so drive, and should be absent when the latter runs over and kills a person, he would be guilty of manslaughter as accessary before the fact.[15]

165. Prosecution and Punishment.

(*a*) *Principals in the Second Degree.*—The law recognizes no difference, as respects the punishment, between the offense of principals in the first and second degree, but regards them as equally guilty, and subject to the same punishment. In practice the distinction is so far immaterial that, on an indictment charging one as principal in the first degree, he may be convicted on evidence showing that he was present aiding and abetting, and *vice versa*.[16]

And at common law a principal in the second degree may be indicted and convicted before trial of the principal in the first degree, and even after he has been acquitted,[17] though the commission of the act by the principal in the first degree must be proved in order to convict one as aiding and abetting.[18]

[14] Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167; Mathis v. State (Fla.) 34 So. 287.

Where several persons went out together to shoot at a mark, and selected such a position that their shooting was negligent, and one of them accidentally killed a man, all were held guilty of manslaughter. Reg. v. Salmon, 14 Cox, C. C. 494, Beale's Cas. 189.

[15] See Reg. v. Gaylor, Dears & B. C. C. 288.

[16] 1 Archb. Crim. Pr. & Pl. 13; Fost. 350, 351; 1 Hale, P. C. 437; Com. v. Chapman, 11 Cush. (Mass.) 422; Doan v. State, 26 Ind. 495; Williams v. State, 47 Ind. 568; State v. Squaires, 2 Nev. 226.

[17] Fost. C. L. 350, 351; 1 Hale, P. C. 437; People v. Bearss, 10 Cal. 68; People v. Newberry, 20 Cal. 439; State v. Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583; State v. Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; State v. Ross, 29 Mo. 32; State v. Whitt, 113 N. C. 716, 18 S. E. 715; Williams v. State, 69 Ga. 11.

[18] Jones v. State, 64 Ga. 697; Mulligan v. Com., 84 Ky. 229, 1 S. W. 417.

To convict one as an aider and abettor only, the principal in the first degree must be indicted jointly with him, or else, if he is indicted

(*b*) *Accessaries.*—At common law an accessary before the fact is liable to the same punishment as the principal.[19] In practice, however, the distinction between the principal and the accessary is important, except where the law has been changed by statute. Thus, at common law, an indictment must charge a person correctly as principal or accessary, according to the facts. On an indictment charging one as principal there can be no conviction on evidence showing that he was merely an accessary,[20] and *vice versa*.[21]

This rule has been changed in some jurisdictions by statutes. But a statute merely declaring that an accessary before the fact shall be deemed a principal and punished as a principal does not change the rule. It has no reference to the manner of charging the offense, but only to the punishment. Notwithstanding such a statute, therefore, a person indicted as a principal cannot be convicted if the evidence shows that he was an accessary only.[22] But a statute, providing that an accessary before the fact may be indicted, tried and convicted and punished as a principal, will authorize conviction of one charged as a principal on evidence showing him to be merely an accessary.[22a]

alone, the indictment must disclose the name of the principal, and give a description of his acts. Mulligan v. Com., 84 Ky. 229, 1 S. W. 417.

When two persons are jointly indicted, one as principal in the second degree, the former may be convicted as principal in the second degree, and the latter as principal in the first degree. Benge v. Com., 92 Ky. 1, 17 S. W. 146. See, also, Travis v. Com., 96 Ky. 77, 27 S. W. 863.

[19] 4 Bl. Comm. 39; Minich v. People, 8 Colo. 440, 9 Pac. 4; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, Mikell's Cas. 385.

[20] Reg. v. Tuckwell, Car. & M. 215; Smith v. State, 37 Ark. 274; Norton v. People, 8 Cow. (N. Y.) 137; People v. Lyon, 99 N. Y. 210, 1 N. E. 673; State v. Dewer, 65 N. C. 572.

[21] Rex v. Winifred, 1 Leach, C. C. 515; Reg. v. Brown, 14 Cox, C. C. 144, Beale's Cas. 389.

[22] Smith v. State, 37 Ark. 274; People v. Campbell, 40 Cal. 129; People v. Trim, 39 Cal. 75; People v. Schwartz, 32 Cal. 160.

[22a] Campbell v. Com., 84 Pa. 187, Mikell's Cas. 492.

At common law an accessary cannot be tried, without his consent, until the guilt of the principal has been legally ascertained by a conviction or outlawry, unless they are tried together, and then the jury must be charged to inquire first as to the guilt of the principal, and, if they are satisfied of his guilt, then as to the accessary.[23] If the principal is dead, or if he is acquitted on his trial, the accessary cannot be tried.[24] In England and in most of our states, if not in all, these principles of the common law have been to some extent changed by statute.[25]

[23] Fost. C. L. 361; Whitehead v. State, 4 Humph. (Tenn.) 278; Marshe's Case, 1 Leon. 325; Stoops v. Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482; Com. v. Phillips, 16 Mass. 423, Beale's Cas. 389; Starin v. People, 45 N. Y. 333, Beale's Cas. 390; Kingsbury v. State, 37 Tex. Cr. R. 259, 39 S. W. 365; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754; State v. Groff, 1 Murph. (N. C.) 270; Holmes v. Com., 25 Pa. 221. See, also, Com. v. Woodward, Thatch. C. C. (Mass.) 63; Baron v. People, 1 Park. Cr. R. (N. Y.) 246; Com. v. Andrews, 3 Mass. 126; Smith v. State, 46 Ga. 298.

If a man is indicted as accessary to two or more, and only one has been convicted, he may be arraigned, tried, and convicted as accessary to that one, but not as accessary to all. Stoops v. Com., supra; Starin v. People, supra.

Where the principal was convicted by verdict or confessed and had his clergy before judgment, the accessary was discharged because it did not appear judicially that he was the principal. Bibithe's Case, 4 Coke, 43b, Mikell's Cas. 492.

[24] Marshe's Case, 1 Leon. 325; Com. v. Phillips, 16 Mass. 423, Beale's Cas. 389; State v. McDaniel, 41 Tex. 229.

Reversal of a judgment against the principal operates as a discharge of the accessary. Marshe's Case, 1 Leon. 325.

But the pardon of the principal does not discharge the accessary, for the very fact that the pardon is extended imports final conviction. Kingsbury v. State, 37 Tex. Cr. R. 259, 39 S. W. 365.

[25] Thus, in New York it is declared: "An accessary to a felony may be indicted, tried, and convicted, either in the county where he became an accessary, or in the county where the principal felony was committed, and whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and although

The fact that a statute allows an accessary to be tried before conviction of the principal does not allow conviction of an accessary without proving the principal's guilt, for "no man can be accessary to a crime which has never been committed."[26] And a statute authorizing the indictment and conviction of an accessary before or after the principal is indicted and convicted does not authorize the conviction of an accessary, nor a judgment and sentence after a verdict of guilty, if the principal has been tried and acquitted.[27]

II. Principals in the First Degree.

166. Definition.—A principal in the first degree is the one who actually commits the crime, either by his own hand, or by an inanimate agency, or by an innocent human agent.[28]

167. Inanimate Agency.

Though a principal in the first degree is one who himself commits the deed, it is not at all necessary that he shall do so by his own hand, nor even that he shall be actually present at the time it is committed. A person is guilty as principal in the first degree if he commits an offense by means of an inanimate agency set in motion by him, as where he leaves poison

the principal has been pardoned or otherwise discharged after conviction." Pen. Code, § 32.

See, as to the effect of the statutes, Baxter v. People, 8 Ill. 368; People v. Outeveras, 48 Cal. 19; State v. Fredericks, 85 Mo. 145; Ulmer v. State, 14 Ind. 52; State v. Ricker, 29 Me. 84; State v. York, 37 N. H. 175; Noland v. State, 19 Ohio, 131; State v. Butler, 17 Vt. 145.

[26] Buck v. Com., 107 Pa. 486. See, also, Tully v. Com., 11 Bush (Ky.) 154; Self v. State, 6 Baxt. (Tenn.) 244; Hatchett v. Com., 75 Va. 925; Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754.

A husband may be guilty as principal in the second degree or as accessary to the rape of his own wife (see post, § 191), but a guilty principal in the first degree is an absolute necessity and the husband cannot be convicted after the other man has been tried and acquitted. State v. Haines, 51 La. Ann. 731, 25 So. 372.

[27] McCarty v. State, 44 Ind. 214, 15 Am. Rep. 232. And see Benjamin v. State, 25 Fla. 675, 6 So. 433.

[28] 4 Bl. Comm. 34; Hale, P. C. c. LV, Mikell's Cas. 457.

where another may get it, or sends poison to another through the mails, or obtains money by false pretenses by using the mails.[29]

168. Innocent Human Agent.

A person is also guilty himself as the principal in the first degree, and not merely as a principal in the second degree or accessary before the fact, if he procures the commission of an offense by an innocent human agent, as by a person who is not guilty because of ignorance of fact, youth, or insanity.[30]

Thus, one who causes an innocent person to take poison, or to give poison to another, and thereby causes death, is as much the principal in the first degree in the murder as if the poison had been administered by his own hand.[31]

[29] Fost. C. L. 349; 4 Bl. Comm. 34; 3 Inst. 138; Hale, P. C. c. LV, Mikell's Cas. 457; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932.

[30] 4 Bl. Comm. 35; 1 East, P. C. p. 228; 1 Hale, P. C. 617; Hale, P. C. c. LV, Mikell's Cas. 457; Reg. v. Bannen, 2 Mood. C. C. 309, Beale's Cas. 379; Reg. v. Bleasdale, 2 Car. & K. 765; People v. Adams, 3 Denio (N. Y.) 190, 45 Am. Dec. 468; Adams v. People, 1 N. Y. 173; Com. v. Hill, 11 Mass. 136; People v. McMurray, 4 Park. Cr. R. (N. Y.) 234; Smith v. State, 21 Tex. App. 107, 130, 17 S. W. 552. And see Berry v. State, 10 Ga. 511.

Larceny or receiving stolen goods by means of innocent agent. People v. McMurray, supra; Rice v. State, 118 Ga. 48, 44 S. E. 805, 98 Am. St. Rep. 99.

Obtaining money or property by false pretenses. Adams v. People, 1 N. Y. 173. In this case, a man in Ohio sent a letter to a person in New York, and had it presented there by an innocent agent, and thus obtained money by false pretenses. It was held that he was guilty as principal in New York, and not merely as principal or accessary in Ohio.

One who frees a lunatic's hand so he may shoot the officer attempting to arrest him is responsible for the homicide. Johnson v. State (Ala.) 38 So. 182.

[31] Gore's Case, 9 Coke, 81a, Beale's Cas. 209, Mikell's Cas. 557; Mem., J. Kelyng, 52, Beale's Cas. 377; Brunson v. State, 12 Ala. 37, 27 So. 410.

In Reg. v. Michael, 9 Car. & P. 356, 2 Mood. C. C. 120, a woman was indicted for the murder of her infant child by poison. It appeared

The same is true of one who delivers counterfeit money or a forged instrument to a child of tender years, or to an innocent adult, with instructions to utter the same, which is done,[32] and of one who procures an innocent person to sign another's name to a note by falsely representing that the person whose name is signed has authorized it.[33] This cannot be the case, however, if the person by whose hand the deed is done is himself a guilty agent.[34] Though one who incites a woman to produce a miscarriage on herself in his absence resulting in death may be convicted as a principal.[34a]

169. Several Persons Committing Offense.

When several persons combine to commit an offense, and each actually performs some act constituting a part of the offense, all are guilty as principals, though neither may be pres-

that she purchased a bottle of laudanum, and directed the person who had the care of the child to give it a teaspoonful every night. That person did not do so, but put the bottle on the mantel piece, where another little child found it, and gave part of the contents to the prisoner's child, who soon after died. It was held that the administering of the laudanum by the child was, under all the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had herself actually administered it with her own hand. See, also, Rex v. Harley, 4 Car. & P. 369.

[32] Com. v. Hill, 11 Mass. 136; Rex v. Palmer, 2 Leach, C. C. 978; Rex v. Giles, 1 Mood. C. C. 166; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774.

[33] Reg. v. Clifford, 2 Car. & K. 202; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774.

[34] Mem., J. Kelyng, 52, Beale's Cas. 377; Reg. v. Manley, 1 Cox, C. C. 104, Mikell's Cas. 457; Reg. v. Jeffries, 3 Cox, C. C. 85, Mikell's Cas. 464; Able v. Com., 5 Bush (68 Ky.) 698; Wixson v. People, 5 Park. Cr. R. (N. Y.) 119; People v. Lyon, 99 N. Y. 210, 1 N. E. 673; People v. McMurray, 4 Park. Cr. R. (N. Y.) 234; Rex v. Soares, Russ. & R. 25.

See Reg. v. Flatman, 14 Cox, C. C. 396, where one was convicted of larceny in procuring the owner's wife to carry away furniture for the purpose of furnishing lodgings in which prisoner and the wife lived in adultery.

[34a] Seifert v. State, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340.

ent when the others perform their part. Thus, if several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, in pursuance of the common plan, they are all guilty of the forgery as principals, though they may not be together when the forgery is completed by one of them adding the signature.[35]

III. Principals in the Second Degree.

170. Definition.—A principal in the second degree is one who is present when a felony is committed by another, and who aids or abets in its commission.[36] To constitute one a principal in the second degree—

1. **There must be a guilty principal in the first degree.**
2. **The principal in the second degree must be present when the offense is committed. But his presence may be constructive.**
3. **He must aid or abet the commission of the offense. Some participation is necessary, though it need not necessarily be active. Mere knowledge of the offense and mental approval is not enough.**

171. Guilty Principal in the First Degree.

There cannot be a principal in the second degree unless there is a *guilty* principal in the first degree. As we have seen, one who procures the commission of a crime by an innocent agent is himself guilty as the principal in the first degree.[37]

On the trial of a person indicted as a principal in the second degree, it is necessary to show the guilt of the principal in the first degree.[38]

[35] Rex v. Bingley, Russ. & R. 446, Beale's Cas. 381; Rex v. Dade, 1 Mood. C. C. 307, Mikell's Cas. 461. See Hammack v. State, 52 Ga. 397.

[36] 4 Bl. Comm. 34; 1 Hale, P. C. 615; Crown at Salop, 1 Plowd. 97, Mikell's Cas. 467; Banson v. Ossley, 3 Mod. 121, Mikell's Cas. 467. See State v. Brown, 104 Mo. 365, 16 S. W. 406.

[37] Ante, § 168.

[38] Jones v. State, 64 Ga. 697; Mulligan v. Com., 84 Ky. 229, 1 S. W. 417.

172. Presence When the Offense is Committed.

Presence, actual or constructive, at the time the offense is committed, is necessary to render one a principal in the second degree.[38a] If a person procures or counsels the commission of a crime by another, and is absent when it is committed, he is merely an accessary,[39] and at common law he cannot be convicted under an indictment charging him as a principal. Thus, where a servant let a person into his master's house on an afternoon, and concealed him there all night, in order that he might commit a larceny in the house, but left the house early the next morning, and was absent when the larceny was committed, it was held that he was not a principal in the second degree, but an accessary before the fact.[40]

173. Constructive Presence.

It is not necessary, however, in order to charge one as a principal in the second degree, as distinguished from an accessary before the fact, that there shall be a strict, actual, and immediate presence at the time and place of the commission of the offense. Nor is it necessary that he shall be an eye or ear witness of the criminal act. A person is constructively present, and therefore guilty as a principal, if he is acting with the person who actually commits the deed in pursuance of a common design, and is aiding his associate, either by keeping watch or otherwise, or is so situated as to be able to aid him, with a view, known to the other, to insure success in the accomplishment of the common enterprise.[41]

[38a] Reg. v. McPhane, Car. & M. 212, Mikell's Cas. 465; Able v. Com., 68 Ky. (5 Bush) 698.

[39] Reg. v. Tuckwell, Car. & M. 215; Rex v. Soares, Russ. & R. 25; Rex v. Stewart, Russ. & R. 363; Reg. v. Jeffries, 3 Cox, C. C. 85, Mikell's Cas. 464; Norton v. People, 8 Cow. (N. Y.) 137; Com. v. Knapp, 9 Pick. (Mass.) 496, 516, 20 Am. Dec. 491, 503, Beale's Cas. 383; Smith v. State, 37 Ark. 274; Able v. Com., 5 Bush (Ky.) 698.

[40] Reg. v. Tuckwell, Car. & M. 215; Reg. v. Jeffries, 3 Cox, C. C. 85, Mikell's Cas. 464. Compare Rex v. Jordan, 7 Car. & P. 432.

[41] 1 Hale, P. C. 439, 462, 537; Fost. C. L. 349, 350; Rex v. Standley,

Thus a person who watches near by to prevent surprise or interference while a confederate breaks and enters a house with felonious intent, or robs a man, or sets fire to a building, or commits a larceny, is guilty as a principal in the second de-

Russ. & R. 305; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340, Beale's Cas. 386; McCarty v. State, 26 Miss. 299; State v. Squaires, 2 Nev. 226; State v. Hamilton, 13 Nev. 386; McCarney v. People, 83 N. Y. 408, 38 Am. Rep. 456, Mikell's Cas. 468; Mitchell v. Com., 33 Grat. (Va.) 845, 868; Com. v. Lucas, 2 Allen (Mass.) 170; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491, Beale's Cas. 383; Com. v. Clune, 162 Mass. 206, 38 N. E. 435; Tate v. State, 6 Blackf. (Ind.) 110; Doan v. State, 26 Ind. 495; State v. Poynier, 36 La. Ann. 572, Mikell's Cas. 470; Earp v. State (Tex. App.) 13 S. W. 888; Dull v. Com., 25 Grat. (Va.) 965.

"If several unite in one common design to do some unlawful act, and each takes the part assigned him, though all are not actually, yet all are present in the eye of the law." Per Wright, J., in Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767.

In Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340, Beale's Cas, 386, it was held that, where two or more persons conspire to break into a store in the nighttime, and steal therein, and it is agreed between them that, in order to facilitate the burglary, and lessen the danger of detection, one of them shall entice the owner of the store to a house a mile distant from the store, and detain him there, while the others break into the store, and remove the goods, and the parties perform their respective parts of the agreement, the person who thus entices the owner away, and detains him, is constructively present at the burglary, and guilty as a principal in the second degree.

If several 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 entices him away, so that the one who has the goods may carry them away, all are guilty of the larceny. Rex v. Standley, Russ. & R. 305.

Where a person, in pursuance of a preconcerted plan, devised by himself, remains downstairs in his own house while his confederate above steals money from a lodger, and brings it down, and delivers it to him, he is a principal in the larceny. Com. v. Lucas, 2 Allen (Mass.) 170.

One of several persons acting in concert, who leads a girl's escort away, while his confederates rape the girl, is a principal in the second degree, though not actually present at the time of the rape. People v. Batterson, 50 Hun (N. Y.) 44, 2 N. Y. Supp. 376.

gree, though he may not be near enough to see the other commit the offense.[42] And where a servant, whose duty it is to watch over goods, purposely absents himself to facilitate their theft, he is guilty as a principal.[42a]

A person may be constructively present, even though actually at a considerable distance. In a case in Nevada, A. and B. were convicted in Nye county of an assault with intent to rob a stage, which was alleged to have been committed in that county, when the evidence tended to show that A., B., and C. had entered into a conspiracy to commit the robbery, that the attempt to commit the same was actually made by B. and C. in Nye county, and that A. was at the time in Eureka county, and not within forty miles of the scene of the attempt. It appeared, however, that, acting in pursuance of the common plan, he had given the others notice of the departure of the stage from Eureka county, by building a fire on the mountain in Eureka county. Under these circumstances it was held that A. was constructively present in Nye county at the time of the attempt, and that he was guilty as a principal in the second degree in that county, and not merely as an accessary before the fact in Eureka county.[43]

Must be Near Enough to be Able to Assist.—To be constructively present within this principle, one must at least be in such a situation that he might render assistance in some manner, not necessarily physical, in the commission of the offense.[44]

[42] Rex v. Passey, 7 Car. & P. 282; Rex v. Gogerly, Russ. & R. 343; Mitchell v. Com., 33 Grat. (Va.) 845, 868; Doan v. State, 26 Ind. 495; McCarney v. People, 83 N. Y. 408, 38 Am. Rep. 456, Mikell's Cas. 468; State v. Squaires, 2 Nev. 226; Tate v. State, 6 Blackf. (Ind.) 110; State v. Valwell, 66 Vt. 558, 29 Atl. 1018; and other cases cited in note 48, infra.

[42a] State v. Poynier, 36 La. Ann. 572, Mikell's Cas. 470.

[43] State v. Hamilton, 13 Nev. 386.

[44] Rex v. Kelly, Russ. & R. 421, Mikell's Cas. 488; Rex v. Stewart, Russ. & R. 363; Com. v. Knapp, 9 Pick. (Mass.) 496, 516, 20 Am. Dec.

174. Participation in the Offense.

To render one guilty as principal in the second degree, he must in some way participate in the commission of the offense, by aiding or abetting the actual perpetrator of the deed. Mere presence at the time the offense is committed, and acquiescence or failure to make any effort to prevent its commission, or to apprehend the offender, is not enough.[45]

"If he be present," said Sir Matthew Hale, "and not aiding or abetting to the felony, he is neither principal nor accessary. If A. and B. be fighting, and C., a man of full age, comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide, as principal in the second de-

491, 503, Beale's Cas. 383; Norton v. People, 8 Cow. (N. Y.) 137; State v. Valwell, 66 Vt. 558, 29 Atl. 1018.

In Norton v. People, supra, the defendant had sent his servant to another place to steal certain property, and the servant, acting in pursuance of such directions, but in the absence of the accused, secretly removed the property. Afterwards the accused personally aided the servant in secreting the property. It was held that he could not be convicted under an indictment charging him as a principal in the larceny, since, having been absent at the time the larceny was committed by the servant, he was merely an accessary.

In the case of Rex v. Kelly, supra, it was decided that going towards a place where a larceny was to be committed, in order to assist in carrying off the property, and assisting accordingly, did not make the prisoner a principal, where he was at such a distance at the time of the felonious taking as not to be able to assist in it. In this case, the prisoner went with one W. to steal horses, but stayed at a place about half a mile from where the theft was committed. W. stole two horses, and brought them to where the prisoner stood, when the two rode away with them. The prisoner was held to be an accessary, only, and not a principal.

[45] 1 Hale, P. C. 439; 2 Hawk. P. C. c. 29, § 10; Lord Mohun's Case, 12 How. St. Tr. 949; Rex v. Young, 8 Car. & P. 644; Reg. v. Coney, 8 Q. B. Div. 534; Connaughty v. State, 1 Wis. 159, 60 Am. Dec. 370; People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176; Butler v. Com., 2 Duv. (Ky.) 435; Plummer v. Com., 1 Bush (Ky.) 76; State v. Cox, 65 Mo. 29, Mikell's Cas. 483; People v. Ah Ping, 27 Cal. 489; White v. People, 81 Ill. 333; State v. Maloy, 44 Iowa, 104; State v. Hildreth, 9 Ired. (N. C.) 440, 51 Am. Dec. 369; Burrell v. State, 18 Tex. 713;

gree, but it is a misprision, for which he shall be fined, unless he use means to apprehend the felon."[46] Mere mental approval is not enough to render one an aider and abettor.[47]

It is not necessary, however, that actual physical aid shall be given. It is enough to make one a principal in the second degree if he is present in concert with the actual perpetrator of the offense, for the purpose of assisting if necessary, or of watching and preventing interference or detection, or for the purpose of encouragement.[48]

175. Criminal Intent.

To be guilty as a principal in the second degree, a criminal intent is necessary. Thus, a person who enters into communi-

Chapman v. State, 43 Tex. Cr. R. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Lawrence v. State, 68 Ga. 289; Kemp v. Com., 80 Va. 443.

[46] 1 Hale, P. C. 439.

In 2 Hawk. P. C. c. 29, § 10, it is said: "Those who, by accident, are barely present when a felony is committed, and are merely passive, and neither in any way encourage it, nor endeavor to hinder it, nor to apprehend the offenders, shall neither be adjudged principals nor accessaries; yet, if they be of full age, they are highly punishable by fine and imprisonment for their negligence, both in not endeavoring to prevent the felony, and in not endeavoring to apprehend the offender."

[47] State v. Cox, 65 Mo. 29, Mikell's Cas. 483, n; Clem v. State, 33 Ind. 418; True v. Com., 90 Ky. 651, 14 S. W. 684; Omer v. Com., 95 Ky. 353, 25 S. W. 594.

[48] 2 Hawk. P. C. c. 29, §§ 7-10; Reg. v. Young, 8 Car. & P. 644; Rex v. Passey, 7 Car. & P. 282; Brennan v. People, 15 Ill. 511; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491, Beale's Cas. 383; McCarty v. State, 26 Miss. 299; Cooper v. Johnson, 81 Mo. 483; State v. Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; McCarney v. People, 83 N. Y. 408, 38 Am. Rep. 456, Mikell's Cas. 468; State v. Hess, 65 N. J. Law, 544, 47 Atl. 806; Green v. State, 13 Mo. 382; People v. Boujet, 2 Park. Cr. R. (N. Y.) 11; Mitchell v. Com., 33 Grat. (Va.) 845, 868; Dull v. Com., 25 Grat. (Va.) 965; Doan v. State, 26 Ind. 495; State v. Squaires, 2 Nev. 226; Wilkerson v. State, 73 Ga. 799; State v. Nash, 7 Iowa, 347; Dixon v. State, 46 Neb. 298, 64 N. W. 961; and other cases cited in note 42, supra.

cation with one who is suspected of criminal acts, and apparently aids or abets him in the commission of an act, is not a principal in the second degree, if he did so, not with a criminal intent, but for the purpose of detecting the other party, and disclosing his guilt for the benefit of the public. And it can make no difference in such a case whether he was a public officer or merely a private person.[49]

Specific Intent.—When a specific intent is necessary to constitute a particular crime, one cannot be a principal in the second degree to that particular offense unless he entertains such an intent, or knows that the party actually doing the act entertains such intent.[50]

IV. Accessaries Before the Fact.

176. Definition.—An accessary before the fact is one who procures, commands, or counsels the commission of a felony by another, but who is not present, either actually or constructively, when the felony is committed.[51] To constitute one an accessary before the fact—

[49] State v. McKean, 36 Iowa, 343, 14 Am. Rep. 530; Wright v. State, 7 Tex. App. 545, 32 Am. Rep. 599; People v. Farrell, 30 Cal. 316; Price v. People, 109 Ill. 109; Com. v. Downing, 4 Gray (Mass.) 29; People v. Noelke, 29 Hun (N. Y.) 461. And see Rex v. Despard, 28 How. St. Tr. 346.

But see Slaughter v. State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242, where a private detective was convicted of larceny in instigating prosecutor's servant to steal, though he did it for the purpose of detection.

[50] In order to convict a person of murder in the first degree, as an aider and abetter, it must be shown that he knew or believed that the person who committed the homicide intended to kill, or that he himself acted with such intent. Savage v. State, 18 Fla. 909, Mikell's Cas. 475. And see, as to assault with intent to kill, State v. Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54; Reg. v. Cruse, 8 Car. & P. 541. Mayhem: State v. Absence, 4 Port. (Ala.) 397; State v. Taylor, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648.

See, also, Rountree v. State, 10 Tex. App. 110.

[51] 1 Hale, P. C. 615, 616, Mikell's Cas. 487; 4 Bl. Comm. 36; Fost. C. L. 125; 2 Hawk. P. C. c. 29, § 16; Rex v. Kelly, Russ. & R. 421, Mik-

1. **There must be a guilty principal in the first degree.**
2. **The accessary must be neither actually nor constructively present when the offense is committed.**
3. **There must be some participation by way of procurement, command, or counsel. Mere knowledge that the offense is to be committed, or even mental approval, is not enough.**

177. Guilty Principal in the First Degree.

The person actually committing the deed must be a guilty party, and not an innocent agent, for, as we have seen, one who procures the commission of a felony through the instrumentality of an innocent agent is himself the principal in the first degree.[52] And of course a person who commands or counsels another to commit a felony cannot be an accessary, if the other does not actually commit the felony.[53]

178. Absence When the Offense is Committed.

To be an accessary before the fact a party must be absent at the time the deed is done.[54] As was explained in a previous section, actual or constructive presence makes one a principal in the second degree, as distinguished from an accessary.[55]

179. The Procurement, Command, or Counsel.

To render one an accessary he must have procured, commanded, or counseled the commission of the act. "And there-

ell's Cas. 488; People v. Lyon, 99 N. Y. 210, 1 N. E. 673; Able v. Com., 5 Bush (Ky.) 698; Keithler v. State, 10 Smedes & M. (Miss.) 192.

[52] Ante, § 168.

[53] See Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754.

[54] 1 Hale, P. C. 616; 4 Bl. Comm. 36; Reg. v. Brown, 14 Cox, C. C. 144, Beale's Cas. 389; Reg. v. Tuckwell, Car. & M. 215; Norton v. People, 8 Cow. (N. Y.) 137; Williams v. State, 47 Ind. 568.

[55] Ante, § 172, and cases there cited.

fore," says Sir Matthew Hale, "words that sound in bare permission make not an accessary; as, if A. says he will kill J. S., and B. says, 'You may do your pleasure for me,' this makes not B. accessary."[56] The procurement, however, need not be direct. It is sufficient if it be through the agency of another; and it may be by approbation or consent to an expressed felonious design.[57]

Approbation and consent are something more than "words sounding in bare permission," of which Hale speaks in the above quotation. Bare nondisclosure or concealment of the intention of another to commit a felony is not enough.[58]

180. Criminal Intent.

To render one guilty of a crime as an accessary he must have a criminal intent. Thus, one who joins a conspiracy to commit a robbery merely for the purpose of exposing it, and honestly carries out the plan, is not an accessary before the fact to the robbery when committed by the others.[59]

V. Accessaries after the Fact.

181. Definition.—An accessary after the fact is one who receives, relieves, comforts, or assists another personally, with

[56] 1 Hale, P. C. 616.

[57] Fost. C. L. 127; 2 Hawk. P. C. c. 29, § 11; Rex v. Somerset, 2 How. St. Tr. 966, cited in McDaniel's Case, 19 How. St. Tr. 804; Rex v. Cooper, 5 Car. & P. 535, Mikell's Cas. 488; Norton v. People, 8 Cow. (N. Y.) 137.

A detective who in order to get a reward induces, through an agent, an employe of a merchant to steal from his employer, is guilty of larceny. Slaughter v. State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242.

[58] 2 Hawk. P. C. c. 29, § 23; Rucker v. State, 7 Tex. App. 549.

[59] Com. v. Hollister, 157 Pa. 13, 27 Atl. 386.

If a specific intent is necessary to constitute the particular offense, a person, to be an accessary, must entertain, or know that the principal entertains, that specific intent. See State v. Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54.

knowledge that he has committed a felony.[60] To constitute one an accessary after the fact—

1. **A felony must have been committed, and it must have been complete at the time of the relief or assistance.**
2. **The accused must know that the felony has been committed by the person received, relieved, or assisted.**
3. **The assistance must be rendered to the felon personally.**

182. The Commission of the Felony.

To render one an accessary after the fact to a felony, it is clear that the person relieved or assisted must have committed a felony. It is also necessary that the felony shall have been *completed* at the time the relief or assistance was given. Thus, a person cannot be convicted as an accessary after the fact to a murder because he assisted the murderer to escape, where the assistance was rendered after the mortal wound was given, but before death ensued, as a murder is not complete until the death results.[61] In such a case, however, there may be a conviction as accessary after the fact to the offense of assault with intent to murder, if this is made a felony by statute.[62]

A felony must have been actually committed by the person received or assisted. It is not enough to show that he was accused of a felony.[63]

183. Knowledge of Commission of the Felony.

It is also necessary to show that the accused knew that the felony had been committed, and that it had been committed by the person received or assisted.[64]

[60] 4 Bl. Comm. 37; 1 Hale, P. C. 618, Mikell's Cas. 487; Wren v. Com., 26 Grat. (Va.) 952; Loyd v. State, 42 Ga. 221; Tully v. Com., 11 Bush (Ky.) 154.

[61] 4 Bl. Comm. 38; 1 Hale, P. C. 622; Harrel v. State, 39 Miss. 702, 80 Am. Dec. 95. See, also, Wren v. Com., 26 Grat. (Va.) 952.

[62] Harrel v. State, supra.

[63] Poston v. State, 12 Tex. App. 408.

[64] 2 Hawk. P. C. c. 29, § 32; State v. Davis, 14 R. I. 281, Mikell's Cas.

"There can be no accessary in receipt of a felon, unless he know him to have committed a felony."[65]

184. The Relief or Assistance.

To render one an accessary after the fact, some relief or assistance must be given the felon. Mere failure to disclose the commission of a felony or to apprehend the felon, or mere approval of the felony, is not enough.[66]

It is also necessary that the relief or assistance shall be given to the felon *personally*. For this reason receiving stolen goods from the thief, or aiding in the concealment of stolen goods, knowing that they have been stolen, does not render one an accessary after the fact to the larceny, though it is in itself an offense, for this is merely dealing with the goods, and not assisting the thief personally.[67]

Generally speaking, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the person assisting an accessary, as furnishing him with a horse to escape his pursuers, money or food to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him.[68]

To convey instruments to a felon to enable him to break jail,

496; Wren v. Com., 26 Grat. (Va.) 952; Loyd v. State, 42 Ga. 221; Robbins v. State, 33 Tex. Cr. R. 573, 28 S. W. 473.

[65] 1 Hale, P. C. 622. See Tully v. Com., 13 Bush (Ky.) 142.

[66] 1 Hale, P. C. 618; Wren v. Com., 26 Grat. (Va.) 952; Carroll v. State, 45 Ark. 539; State v. Hann, 40 N. J. Law, 228; Cooper v. Johnson, 81 Mo. 483.

[67] 4 Bl. Comm. 38; 1 Hale, P. C. 619, 620; Loyd v. State, 42 Ga. 221; Wren v. Com., 26 Grat. (Va.) 952; post, § 380. He is not an accessary because "he receives the goods only, and not the felon." 4 Bl. Comm. 38. See, also, Reg. v. Chapple, 9 Car. & P. 355.

But to assist the robber by procuring change for a bank note, knowing it to be a part of the proceeds of the robbery, is punishable. Reg. v. Butterfield, 1 Cox, C. C. 39, Mikell's Cas. 499.

[68] 4 Bl. Comm. 37; 2 Hawk. P. C. c. 29, §§ 26, 27, 34, 35; 1 Hale, P. C. 619; Wren v. Com., 26 Grat. (Va.) 952; Rex v. Lee, 6 Car. & P. 536.

or to bribe the jailer to let him escape, will make one an accessary.[69] "But to relieve a felon in jail with clothes or other necessaries is no offense; for the crime imputable to this species of accessary is the hindrance of public justice, by assisting the felon to escape."[70]

Compounding a felony,—agreeing to conceal a felony, or not to prosecute therefor, or to withhold evidence,—without rendering any assistance to the felon, as explained above, does not render one an accessary.[71]

The act of relief may be culpable, though done through an agent or servant.[71a]

185. Persons Occupying Particular Relations.

"So strict is the law," says Blackstone, "that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who may have any of them committed a felony, the receivers become accessaries."[72] But a *feme covert* cannot become an accessary by the receipt and concealment of her husband, "for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord."[73]

[69] 4 Bl. Comm. 38; 1 Hale, P. C. 621; Wren v. Com., 26 Grat. (Va.) 952.

[70] 4 Bl. Comm. 38. And see 1 Hale, P. C. 620.

[71] Wren v. Com., 26 Grat. (Va.) 952; Robert's Case, 3 Coke, Inst. 138, Mikell's Cas. 495.

[71a] Rex v. Jarvis, 2 Moody & R. 40, Mikell's Cas. 499, n.

[72] 4 Bl. Comm. 38; 3 Inst. 108; 2 Hawk. P. C. 320; 1 Hale, P. C. 621; People v. Dunn, 7 N. Y. Cr. R. 187. In several states this has been changed by statute.

[73] 4 Bl. Comm. 39; 1 Hale, P. C. 621.

VI. Acts for Which Accomplices are Responsible.

186. In General.—As a general rule, no one can be punished as an aider or abettor, or as an accessary before the fact, for a crime, to the commission of which he has never expressly or impliedly given his consent.

But if a person joins in an attempt to commit one crime, by aiding, abetting, counseling, or commanding its commission, he is to be considered as assenting to any crime which is committed by his associates in the attempt to execute the common purpose, and which is a natural or probable consequence of such attempt.

To render one guilty of a crime as a principal in the second degree or accessary before the fact, the act must constitute a crime on the part of the person committing it. There must be a guilty principal in the first degree.

187. Acts for Which Accomplice is not Responsible.

As stated above, it may be laid down as an undoubted general proposition that no man can be properly convicted of a crime as principal in the second degree or accessary before the fact if he never expressly or impliedly consented to the commission of the crime.[74]

It is not always enough to show that he counseled, commanded, or consented to some other crime. If several persons combine or conspire to commit one crime, and one of them goes outside of the common purpose and commits another crime, which

[74] Per Mulkey, J., in Lamb v. People, 96 Ill. 73, 82. And see State v. Maloy, 44 Iowa, 104; Rex v. Plummer, J. Kelyng, 109; White v. People, 139 Ill. 143, 28 N. E. 1083, Mikell's Cas. 480; Leslie v. State, 42 Tex. Cr. R. 65, 57 S. W. 659.

Persons who attend one on a lawful expedition, during which he alone commits a crime are liable therefor only on proof of a conspiracy, or of their intention to aid him in any unlawful act he might do. Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392.

is not a natural or probable consequence of carrying out the common purpose, the others are not responsible.[75]

"If A. command or counsel B. to commit felony of one kind, and B. commits a felony of another kind, A. is not accessary; as, if A. command B. to steal a plate, and B. commits burglary to steal a plate, A. is accessary to the theft, but not to the burglary."[76]

[75] State v. Lucas, 55 Iowa, 321, 7 N. W. 583, Beale's Cas. 396; Lamb v. People, 96 Ill. 73; People v. Knapp, 26 Mich. 112; Jordan v. State, 81 Ala. 20, 1 So. 577; Fraunk v. State, 27 Ala. 37; Mercersmith v. State, 8 Tex. App. 211, Mikell's Cas. 477; Watts v. State, 5 W. Va. 532; People v. Leith, 52 Cal. 251; State v. Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54; Alston v. State, 109 Ala. 51, 20 So. 81; Woolweaver v. State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667; State v. May, 142 Mo. 135, 43 S. W. 637; Powers v. Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245.

Where two brothers were jointly indicted and tried for murder, and it was shown that one fired the fatal shot, while the other cut the deceased with a knife, while running by him towards the one who had the pistol, it was held that the one who cut with the knife could not be convicted as aiding and abetting his brother, unless there was preconcert of purpose between them, or unless he aided and abetted his brother, having knowledge of the other's purpose. Jordan v. State, 81 Ala. 20, 1 So. 577.

"The rule of criminal responsibility, in cases of conspiracy or combination, seems to be that each is responsible for everything done by his confederates which follows incidentally in the execution of the common design, as one of the probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design. Nor must it have been committed by one of the confederates after the explosion of the plot, or the abandonment of the common design, or from causes having no connection with the common object of the conspirators." Williams v. State, 81 Ala. 1, 1 So. 179. See, also, McLeroy v. State, 120 Ala. 274, 25 So. 247.

[76] 1 Hale, P. C. 616, 617. "If A. commands B. to take C., and B. takes C., and robs him, A. is not accessary to the robbery." 1 Hale, P. C. 617.

Where poachers set upon a game keeper and beat him until he was

If several combine to steal from a safe in a building, and one of them, in the absence of the others, robs a watchman in the building, the others are not accessaries to the robbery.[77]

188. Acts for Which Accomplice is Responsible.

It is not always necessary, however, to render one guilty of a crime as a principal in the second degree or accessary before the fact, that he shall have *contemplated* or *expressly* assented to the commission of the particular crime. The general rule is that, if several persons combine or conspire to commit a crime, or if persons command or counsel a crime, or aid and abet in an attempt to commit a crime, or if several engage in an unlawful enterprise, each is responsible as principal in the second degree or accessary before the fact, according to the circumstances, for all acts committed by the others in the execution of the common purpose, if such acts are a natural or probable consequence of the unlawful combination or undertaking.[78]

senseless and afterwards one of them robbed him, the others were not guilty of the robbery. Rex v. Hawkins, 3 Car. & P. 392. See Reg. v. Barnett, 3 Cox, C. C. 432.

[77] State v. Lucas, 55 Iowa, 321, 7 N. W. 583, Beale's Cas. 396.

[78] Fost. C. L. 370; 1 Hale, P. C. 441; Ashton's Case, 12 Mod. 256, Beale's Cas. 392; Ruloff v. People, 45 N. Y. 213, Beale's Cas. 392; Reg. v. Caton, 12 Cox, C. C. 624; Saunder's Case, 2 Plowd. 473, Mikell's Cas. 490; State v. Allen, 47 Conn. 121, Beale's Cas. 394, Mikell's Cas. 483; Peden v. State, 61 Miss. 268; Williams v. State, 81 Ala. 1, 1 So. 179; Gibson v. State, 89 Ala. 121, 8 So. 98; Brennan v. People, 15 Ill. 511; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898 (The Anarchist Case); Miller v. State, 25 Wis. 384; State v. Shelledy, 8 Iowa, 478; Miller v. State, 15 Tex. App. 125; English v. State, 34 Tex. Cr. R. 190, 30 S. W. 233; Ferguson v. State, 32 Ga. 658; State v. Johnson, 7 Or. 210; Weston v. Com., 111 Pa. 251, 2 Atl. 191; State v. Cannon, 49 S. C. 550, 27 S. E. 526; U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196; U. S. v. Sweeney, 95 Fed. 434.

"The general rule is familiar, that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates, committed

Thus, it is said by Foster that "if A. adviseth B. to rob C., and he doth rob him, and in doing so, either upon resistance made or to conceal the fact, or upon any other motive operating at the time of the robbery, he killed him, A. is accessary to the murder."[79]

On the same principle, if several persons combine to commit a burglary, and one of them murders the owner of the house in order to accomplish the common purpose, all are guilty of murder.[80] The same is true where a homicide is committed by one of several persons who combine to beat another.[81] And

in furtherance or in prosecution of the common design for which they combine." Williams v. State, 81 Ala. 1, 1 So. 179.

Where respondent interfered in a fight between two others, knocking one of them down whereupon the other immediately kicked him so that he died, respondent was responsible for the death (People v. Carter, 96 Mich. 583, 56 N. W. 79); but where respondent and another were fighting and respondent knocked his adversary down whereupon a third person kicked him to death, respondent was not responsible. People v. Elder, 100 Mich. 515, 59 N. W. 237.

[79] Fost. C. L. 370; Saunders' Case, 2 Plowd. 473, Mikell's Cas. 490. And see Miller v. State, 25 Wis. 384; State v. Davis, 87 N. C. 514; State v. Barrett, 40 Minn. 77, 41 N. W. 463; State v. King, 24 Utah, 482, 68 Pac. 418, 91 Am. St. Rep. 808.

[80] Mitchell v. Com., 33 Grat. (Va.) 845. And see Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Ruloff v. People, 45 N. Y. 213, Beale's Cas. 392.

[81] State v. Maloy, 44 Iowa, 104; Saunder's Case, 2 Plowd. 473, Mikell's Cas. 490.

Where five or six persons conspired together to invade a man's household, and went there armed with deadly weapons for the purpose of attacking and beating him, and, in furtherance of this common design, one of them got into a difficulty with him, and killed him, the others being present, or near at hand, it was held that all were guilty of murder, although they did not intend to kill. Williams v. State, 81 Ala. 1, 1 So. 179. See, also, Peden v. State, 61 Miss. 268.

In Miller v. State, 25 Wis. 384, the wife of the defendant, without fear or compulsion from him, agreed with him to go to the store of the deceased, and to rob it, the husband telling her, and she believing, that he did not intend to kill the deceased, but only to knock him down, so as to stun him, in order to consummate the robbery. They

"if A. commands B. to beat C., and B. beats C. so that he dies, A. is accessary, because it may be a probable consequence of his beating."[82]

If a person commands or counsels another to steal from a certain person or to steal a certain article, and the other steals from some other person, or steals some other thing, the person commanding or counseling is not accessary to the larceny; but it is otherwise if one commands or counsels another to steal generally.[83]

The fact that a homicide is committed by different means from those counseled or commanded does not prevent the person counseling or commanding from being an accessary.[84] But if a man commands or counsels another to kill one person, and the other kills a different person, he is not an accessary to the murder.[85]

189. Homicide or Assault in Order to Escape.

Where several persons combine to commit an offense, and a homicide or assault is committed by one of them in order to effect his escape, the others cannot be held responsible for the homicide or assault unless they consented and were privy in fact thereto;[86] or had the common purpose of resisting with ex-

went together, and the husband, in carrying out the plan, gave the deceased a fatal blow, the wife giving no intentional assistance. A charge was sustained which justified the jury, under this state of facts, in finding her guilty of murder.

[82] 1 Hale, P. C. 617; Reg. v. Caton, 12 Cox, C. C. 624. But one who merely encourages another to tie a person is not an accessary to murder committed by the latter in doing so. People v. Keefer, 65 Cal. 232, 3 Pac. 818.

[83] 1 Hale, P. C. 617.

[84] 1 Hale, P. C. 617; Griffith v. State, 90 Ala. 583, 8 So. 812; Saunder's Case, 2 Plowd. 473, n., Mikell's Cas. 490. Compare Reg. v. Caton, 12 Cox, C. C. 624.

[85] 1 Hale, P. C. 617; Saunders' Case, 2 Plowd. 473, n., Mikell's Cas. 490.

[86] People v. Knapp, 26 Mich. 112; Mercersmith v. State, 8 Tex. App. 211, Mikell's Cas. 477.

treme violence any person who might attempt to apprehend them.[86a] There are, however, decisions to the contrary.[87] But certainly, if the parties contemplate and intend the doing of everything necessary to effect an escape,—and this may be inferred from the fact that all of them arm themselves, etc.,—all will be responsible for a homicide or assault committed by one, either in effecting his own escape or in rescuing a comrade.[88]

190. Acts not Criminal on the Part of the Person Committing Them.

When a person aids or abets in the commission of an act by another, or counsels or commands an act, he cannot be punished as a principal in the second degree or accessary before the fact if the other, because of the absence of a criminal intent, or for any other reason, is not guilty of any crime. And it can make no difference that he thought the other was committing a crime, for the law, as we have seen, does not punish a mere criminal intent.[89]

Cases of Entrapment.—It sometimes happens that when a person is suspected of an intention to commit a crime, a detective, or an employe of the person against whom it is thought the crime will be committed, enters into co-operation with the suspect, and commits the act himself, with a view to prosecuting him as a principal in the second degree. In such a case, if the person actually doing the act is not guilty of a crime, either

Where one uses violence in an attempt to prevent recapture after the other has escaped, the other is not guilty of the violence. Reg. v. Harvey, 1 Cox, C. C. 21.

[86a] Rex v. Collison, 4 Car. & P. 565.

[87] Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396.

[88] Ruloff v. People, 45 N. Y. 213, Beale's Cas. 392.

[89] Ante, § 116; State v. Douglass, 44 Kan. 618, 26 Pac. 476; State v. Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360.

If a homicide is in self-defense one aiding and assisting the slayer is entitled to the defense, though he wrongfully participated. McMahon v. State (Tex. Cr. App.) 81 S. W. 296.

because of the absence of a criminal intent on his part, or because of the consent of his employer,[90] or for any other reason, it necessarily follows that the suspect is not guilty, whatever his intent may have been.[91]

VII. Persons Who may be Aiders and Abettors or Accessaries.

191. In General.—Any person who is capable of committing a crime may be guilty as a principal in the second degree or accessary before or after the fact; and it can make no difference that, by reason of age, sex, condition, or class, he or she

[90] Ante, § 161.

[91] In State v. Douglass, 44 Kan. 618, 26 Pac. 476, a railroad detective, suspecting the defendant of a purpose to place obstructions on the tracks, pretended to join him in the commission of the offense, and placed the obstructions on the track himself, while the defendant stood by and abetted the act. It was held that the defendant was not guilty, under a statute punishing the willful and felonious placing of an obstruction on a railroad track, though he did not know the detective's character, and believed he was committing the offense.

In State v. Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360, an employe of the owner of a building, suspecting the defendant of a purpose to burglarize it, entered into co-operation with him, with the owner's consent, and opened the window of the building himself, and entered, while the defendant remained on the outside, and received goods handed out to him. It was held that the defendant was not guilty of burglary. As there was no breaking and entry by the employe with felonious intent, no such breaking and entry could be imputed to the defendant.

In a California case, one P. informed the sheriff that the defendant had requested him to enter a house in the nighttime, and steal therefrom a sum of money which he knew to be concealed there, the money to be divided between them. By advice of the sheriff, P. agreed to do so, for the purpose of entrapping the defendant, and accordingly entered the house, secured the money, marked it so that it could be identified, and, after delivering it to the defendant gave a signal, and the sheriff arrested the defendant with the money in his possession. It was held that, inasmuch as P. alone entered the building, and did so without felonious intent, there was no burglary committed, and therefore the defendant could not have been privy to a burglary. People v. Collins, 53 Cal. 185.

is incompetent to commit the particular crime as principal in the first degree.[92]

Illustrations.—One of the best illustrations of this rule is in the case of rape. A boy under fourteen years of age (at common law), or a woman, cannot commit rape themselves, but either may be guilty of rape as accessary before the fact or as a principal in the second degree, according to the circumstances, by counseling, aiding, or abetting in the commission of the crime by another.[93] In like manner a husband, though he cannot himself commit rape upon his wife, may counsel, aid or assist another to do so, and thus be guilty as principal in the second degree or accessary.[94]

The same is true of other offenses. Thus, a person may be guilty as a principal in the second degree by aiding and abetting a bankrupt to violate the bankruptcy laws,[95] a postmaster to make a false return,[96] a public officer to embezzle public money,[96a] or an election officer to violate the election law.[96b]

An unmarried man may be guilty of aiding and abetting a married man in the commission of bigamy.[97]

[92] U. S. v. Snyder, 14 Fed. 554.

[93] Reg. v. Philips, 8 Car. & P. 736; State v. Jones, 83 N. C. 605, 35 Am. Rep. 586. And see Law v. Com., 75 Va. 885, 40 Am. Rep. 750.

[94] Lord Audley's Case, 3 How. St. Tr. 401, 12 Mod. 384, 1 Strange, 633; State v. Comstock, 46 Iowa, 265; People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; State v. Dowell, 106 N. C. 722, 11 S. E. 525, 19 Am. St. Rep. 568, 8 L. R. A. 297. And see Com. v. Fogerty, 8 Gray (Mass.) 489, 491, 69 Am. Dec. 264; Com. v. Murphy, 2 Allen (Mass.) 163, 165.

The principal being acquitted the husband must be also in the absense of any force or intimidation used by him against the principal. State v. Haines, 51 La. Ann. 731, 25 So. 372, Mikell's Cas. 550.

[95] U. S. v. Bayer, 4 Dill. 407, Fed. Cas. No. 15,547.

[96] U. S. v. Snyder, 14 Fed. 554.

[96a] State v. Rowe, 104 Iowa, 323, 73 N. W. 833.

Bank officer: Bishop v. State, 118 Ga. 799, 45 S. E. 614.

[96b] People v. McKane, 143 N. Y. 455, 38 N. E. 950.

[97] Boggus v. State, 34 Ga. 275.

A man may be guilty of aiding and abetting a woman in concealing the death of her bastard child, though, under the statute, no one could be guilty as principal in the first degree except the mother.[98] And a woman has been held guilty for aiding and abetting a man who falsely personated a sailor who was entitled to an allowance of money.[99]

VIII. Countermand or Withdrawal.

192. In General.—A person is not guilty of a crime as accessary or principal in the second degree because of counseling or consenting, if he repented and countermanded the other party, or withdrew, to the knowledge of the other, before the crime was committed.[100]

This rule as applied to accessaries before the fact is thus stated by Sir Matthew Hale: "If A. commands B. to kill C., but before the execution thereof A. repents, and countermands B., and yet B. proceeds in the execution thereof, A. is not accessary, for his consent continues not, and he gave timely countermand to B. But if A. had repented, yet if B. had not been actually countermanded before the fact committed, A. had been accessary."[101]

If several prisoners conspire to escape from prison, and to kill any watchman who may oppose them, and in making the attempt one of them kills a watchman, all are guilty of murder. One of them is none the less guilty because he abandons the attempt and returns to his cell before the killing, if he does

[98] State v. Sprague, 4 R. I. 257. But see Frey v. Com., 83 Ky. 190.

[99] Rex v. Potts, Russ. & R. 353.

[100] 1 Hale, P. C. 617, 618; Rex v. Richardson, 1 Leach, C. C. 387, Beale's Cas. 166; Saunder's Case, 2 Plowd. 473, n., Mikell's Cas. 490; State v. Allen, 47 Conn. 121, Beale's Cas. 394, Mikell's Cas. 483; Pinkard v. State, 30 Ga. 757, Mikell's Cas. 335; People v. Schoedde, 126 Cal. 373, 58 Pac. 859.

[101] 1 Hale, P. C. 617, 618.

nothing by word or deed to inform his confederates of his change of purpose.[102] If his act of withdrawal is known to his confederates, however, and is such as should naturally inform them of his intention to abandon the attempt, he is not responsible merely because they misconstrue his act, and suppose that he is still acting with them.[103]

IX. Principal and Agent and Master and Servant.

193. In General.—A principal or master is criminally responsible for criminal acts of his agent or servant expressly or impliedly authorized by him. But, unless made so by statute, as is sometimes the case, he is not responsible for unauthorized acts. Mere ratification of an authorized act does not relate back so as to render him responsible.

An agent or servant is himself responsible for criminal acts committed in the course of his employment, though directed or commanded by his principal or master.

194. Responsibility of Principal or Master.

(*a*) *Acts Directed or Authorized.*—If a principal or master directs or authorizes the commission of a felony by his agent or servant, and the latter is not an innocent agent, the principal or master is an accessary before the fact, if absent when the act is committed, or, if present, as a principal in the second degree, in accordance with the rules stated in preceding sections.[104] If the agent or servant is innocent by reason of youth, insanity, or ignorance of fact, the principal or master is guilty as principal in the first degree, whether present or absent.[105] If the offense is a misdemeanor, and the agent or servant is

[102] State v. Allen, supra; Wilson v. U. S. (Ind. T.) 82 S. W. 824.

[103] State v. Allen, supra.

[104] Ante, §§ 170 et seq., 176 et seq.; Hately v. State, 15 Ga. 346; Clark & Skyles, Agency, 1138.

[105] Ante, § 168.

a guilty agent, the principal or master is liable as a principal in the second degree, whether present or absent.[106] And he is the principal in the first degree if the agent or servant is innocent.[107]

(*b*) *Acts Impliedly Authorized—Consent or Acquiescence.*—If a principal or master knows that his agent or servant intends to commit an offense, or is committing an offense, in the course of his employment, and acquiesces, or fails to make any effort to prevent it, he is criminally responsible for the offense to the same extent as if he had expressly commanded or authorized it.[108]

Thus, he is responsible if he knowingly permits his agent or servant to violate a statute prohibiting and punishing any person who shall keep for sale or sell intoxicating liquors, or who shall sell to minors or drunkards, or who shall keep a bawdy house, or a gaming house, or permit gaming, etc.[109] The same is true where a bookseller knowingly permits his servant to sell libelous or obscene publications.[110]

[106] Ante, § 164; Rex v. Almon, 5 Burrow, 2686; Com. v. Nichols, 10 Metc. (Mass.) 259; Stevens v. People, 67 Ill. 587 (keeping gaming house); Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684; Webster v. State, 110 Tenn. 491, 75 S. W. 1020 (selling liquor); Atkins v. State, 95 Tenn. 474, 32 S. W. 391 (operating a gaming device); Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475 (selling lottery tickets).

[107] Ante, § 168.

If a husband directs his wife to sell intoxicating liquors in violation of a statute, he is guilty of selling, as principal. Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684.

[108] Rex v. Almon, 5 Burrow, 2686; Com. v. Nichols, 10 Metc. (Mass.) 259; Com. v. Stevens, 155 Mass. 291, 29 N. E. 508, Mikell's Cas. 502; State v. Mueller, 38 Minn. 497, 38 N. W. 691.

In Britain v. State, 3 Humph. (Tenn.) 203, it was held that a master who caused or permitted his slave to go about in public indecently naked was guilty of lewdness, and indictable therefor, and that knowledge and consent might be inferred from the circumstances.

[109] Com. v. Nichols, 10 Metc. (Mass.) 259; Com. v. Stevens, 155 Mass. 291, 29 N. E. 508, Mikell's Cas. 502; Kinnebrew v. State, 80 Ga. 232, 5 S. E. 56; U. S. v. Birch, 1 Cranch, C. C. 571, Fed. Cas. No. 14,595; State v. Wiggin, 20 N. H. 449.

[110] Rex v. Almon, 5 Burrow, 2686.

(c) *Unauthorized Acts.*—In a civil action, a principal or master is liable for the wrongful acts of his agents or servants in the course of their employment, even when done without his authority and contrary to his orders; but this is not generally the case when it is sought to hold a man criminally responsible for the act of his agent or servant. Certainly at common law, and generally under statutes as well, a man is not indictable for the criminal act of his agent or servant, though committed in the course of his employment, unless the act was committed by his direction, or unless he knew of it and acquiesced in it, for, as we have seen, the general rule is that a criminal intent is necessary to render one guilty of a crime.[111] A jailer would be responsible for the death of a prisoner caused by his knowingly confining him, against his will, in an unwholesome and dangerous room; and his responsibility would be the same if he should consent to his deputy's so confining a prisoner.[112] But he would not be responsible for such an act of the deputy without his consent or knowledge, at least in the absence of negligence.[113] The same principle would govern where a sheriff is indicted for a negligent escape,[113a] and it has been applied by most courts, though not by all, to statutory offenses by an agent or servant, as the unlawful sale or keeping for sale of intoxicating

[111] Rex v. Huggins, 2 Ld. Raym. 1574; Somerset v. Hart, 12 Q. B. Div. 360; Hardcastle v. Bielby [1892] 1 Q. B. 709; U. S. v. Beaty, Hempst. 487, Fed. Cas. No. 14,555; Clark & Skyles, Agency, 1140; People v. Parks, 49 Mich. 333, 13 N. W. 618, Beale's Cas. 376; State v. Bacon, 40 Vt. 456; Com. v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; Com. v. Briant, 142 Mass. 463, 8 N. E. 338; Com. v. Stevens, 153 Mass. 421, 26 N. E. 992, Mikell's Cas. 502; State v. Dawson, 2 Bay (S. C.) 360; State v. Smith, 10 R. I. 258; Mitchell v. Mims, 8 Tex. 6; Com. v. Junkin, 170 Pa. 195, 32 Atl. 617; and other cases specifically cited in the notes following.

[112] Rex v. Huggins, 2 Ld. Raym. 1574.

[113] Rex v. Huggins, supra.

[113a] Nall v. State, 34 Ala. 262; Com. v. Lewis, 4 Leigh (31 Va.) 664.

liquors or adulterated milk or food, etc.,[114] and the purchase of corn, etc., from a slave not having a ticket or permit to deal therein.[115] It has been held that a coal dealer who sends an experienced teamster to deliver a load of coal is not criminally responsible if the latter, without his knowledge, consent, or authority drives upon and obstructs a sidewalk.[116]

Dissent or prohibition by a principal or master must be *bona fide*, in order to constitute a defense, when it is sought to hold him responsible for the acts of his agent or servant. If it is merely colorable, it can have no effect whatever, however publicly or frequently repeated. The question of authority or consent is to be determined by the real understanding between them, and is a question of fact for the jury.[117]

[114] People v. Parks, 49 Mich. 333, 13 N. W. 618, Beale's Cas. 376; Com. v. Nichols, 10 Metc. (Mass.) 259; Com. v. Putnam, 4 Gray (Mass.) 16; Com. v. Wachendorf, 141 Mass. 270, 4 N. E. 817; Com. v. Stevens, 155 Mass. 291, 29 N. E. 508, Mikell's Cas. 502; Com. v. Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449; Com. v. Stevens, 153 Mass. 421, 26 N. E. 992; Com. v. Hayes, 145 Mass. 289, 14 N. E. 151; Hipp v. State, 5 Blackf. (Ind.) 149; Lauer v. State, 24 Ind. 131; Hanson v. State, 43 Ind. 550; O'Leary v. State, 44 Ind. 91; Thompson v. State, 45 Ind. 495; Rosenbaum v. State, 24 Ind. App. 510, 57 N. E. 156; State v. Baker, 71 Mo. 475; State v. Heckler, 81 Mo. 417; State v. Shortell, 93 Mo. 123, 5 S. W. 691; State v. McCance, 110 Mo. 398, 19 S. W. 648 (overruling State v. McGinnis, 38 Mo. App. 15); Anderson v. State, 22 Ohio St. 305; Com. v. Johnston, 2 Pa. Super. Ct. 317; Ellison v. Com., 24 Ky. L. R. 657, 69 S. W. 765; State v. Smith, 10 R. I. 258; Barnes v. State, 19 Conn. 398; State v. Wentworth, 65 Me. 234; State v. Hayes, 67 Iowa, 27, 24 N. W. 575; State v. Galocchio, 9 Tex. App. 387. For cases in which the contrary has been held, see note 127, infra.

In an early case in Indiana it was held that a husband was not liable for an unlawful sale of liquor by his wife in his absence, without his knowledge or consent. Pennybaker v. State, 2 Blackf. (Ind.) 484. See, also, Seibert v. State, 40 Ala. 60.

[115] State v. Dawson, 2 Bay (S. C.) 360.

[116] State v. Bacon, 40 Vt. 456.

[117] Com. v. Nichols, 10 Metc. (Mass.) 259; Anderson v. State, 22

(*d*) *Negligence of Principal or Master.*—When it is said that a principal is not generally indictable for the acts of his agent done without his authority or consent, it is assumed that he has used due care. He will be liable for his agent's acts to the same extent as if they were authorized by him, if they are due to want of proper care and oversight on his part, or other negligence in reference to the business which he has intrusted to the agent, for moral guilt or delinquency is imputable to him in case he fails to use proper care.[118]

(*e*) *Libel.*—Where a libelous publication was sold in a bookseller's shop, or a libel published in a newspaper, by a servant of the proprietor, it was held by the earlier English cases that the proprietor was *prima facie* responsible, but he was permitted to show that he was not privy nor assenting to nor encouraging the publication, and thus escape responsibility.[119] Afterwards evidence of the publication by the servant was held conclusive upon the master, and he was not allowed to show his innocence, upon the ground that this was necessary to prevent the escape of the real offender behind an irresponsible party.[120] A statute, however, has since been enacted permitting the master to show that the publication was without his authority,

Ohio St. 305; State v. Wentworth, 65 Me. 234; Com. v. Johnston, 2 Pa. Super. Ct. 317; Redgate v. Haynes, 1 Q. B. Div. 89.

[118] Com. v. Morgan, 107 Mass. 199. And see Reg. v. Holbrook, 3 Q. B. Div. 60, 4 Q. B. Div. 42.

In Rex v. Dixon, 3 Maule & S. 11, 4 Camp. 12, Mikell's Cas. 137, the defendant was convicted of selling unwholesome bread, upon proof that his foreman had, by mistake, put too much alum in it. There was no evidence that the master knew of the quantity used in this instance. But Bayley, J., said: "If a person employed a servant to use alum, or any other ingredient, the unrestricted use of which was noxious, and did not restrain him in the use of it, such person would be answerable if the servant used it to excess, because he did not apply the proper precaution against its misuse."

[119] Rex v. Almon, 5 Burrow, 2686.

[120] Rex v. Gutch, Mood. & M. 433; Rex v. Walter, 3 Esp. 21.

consent, or knowledge, and was not due to want of due care and caution on his part.[121]

In this country it has been held, independently of any statute, that the master is not responsible for the publication, unless he authorized it or knew of it, or unless it was due to want of proper care and oversight, or other negligence, in reference to the business intrusted to the servant, in which case he is responsible.[122]

(*f*) *Nuisance.*—An exception to the general rule has been made in the case of nuisance. It seems that the proprietor of works carried on for his profit by agents is liable to indictment for a public nuisance caused by acts of his agents in carrying on the works, though done by them, not only without his knowledge, but contrary to his general orders.[123]

(*g*) *Statutes Dispensing with Authority or Knowledge.*—As was shown in a previous chapter, the legislature may, on grounds of public policy, dispense with the necessity for a criminal intent, and punish a man for acts done or permitted by him without regard to his mental attitude.[124] And there are statutes in some states which have been construed by the courts as intended to render a principal or master liable criminally for his agent's or servant's commission of the offense prohibited and punished, though the agent or servant may have acted not only without his authority or knowledge, but even contrary to his orders.[125]

[121] See, as to this statute, Reg. v. Holbrook, 3 Q. B. Div. 60, 4 Q. B. Div. 42.

[122] Com. v. Morgan, 107 Mass. 199.

[123] Reg. v. Stephens, L. R. 1 Q. B. 702; Rex v. Medley, 6 Car. & P. 292. Smoke Nuisance, Barnes v. Akrora, L. R. 7 Q. B. 474.

But see Chisholm v. Doulton, 22 Q. B. Div. 736, where a conviction under the smoke nuisance act was denied, the master having provided proper equipment and his stoker being negligent.

[124] Ante, §§ 56, 70.

[125] People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; Rex v. Dixon, 3 Maule & S. 11, 4 Camp. 12, Mikell's Cas. 137; Attorney

Some courts, for example, have thus construed statutes requiring saloonkeepers to keep their saloons closed on Sundays,[126] statutes prohibiting and punishing the sale of intoxicating liquors, or their sale to minors or drunkards,[127] prohibiting screens or curtains in licensed places,[127a] and statutes prohibiting the sale of adulterated food products.[127b]

(*h*) *Presumption of Authority.*—In most jurisdictions, perhaps, in which it is held that a principal or master is not answerable for the criminal acts of his agent or servant in the course of his employment, it is held—at least if the act is of such a character that, if not criminal, it would be within the scope of the agent's or servant's authority, as in the case of a sale of a libelous publication in a bookseller's shop, or an un-

General v. Siddon, 1 Cromp. & J. 220; State v. Baltimore & S. Steam Co., 13 Md. 181; Clark & Skyles, Agency, 1142.

Under a penal statute in Illinois "to prevent trespassing by cutting timber," the object of which is to punish the wrongdoer as well as compensate the injured party, it is held that in order to punish the principal for the act of his agent, it must appear from the evidence that the agent committed the act under the express directions of his principal, or at least that from the nature of his employment authority to do the act was necessarily implied. Cushing v. Dill, 3 Ill. 460; Satterfield v. Western Union Tel. Co., 23 Ill. App. 446; Cushman v. Oliver, 81 Ill. 444.

[126] People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; Banks v. City of Sullivan, 78 Ill. App. 298; People v. Blake, 52 Mich. 566, 18 N. W. 360.

[127] Police Com'rs v. Cartman [1896] 1 Q. B. 655; Noecker v. People, 91 Ill. 494; McCutcheon v. People, 69 Ill. 601; George v. Gobey, 128 Mass. 289; Whitton v. State, 37 Miss. 379; Robinson v. State, 38 Ark. 641; Edgar v. State, 45 Ark. 356; Mogler v. State, 47 Ark. 109, 14 S. W. 473; Carroll v. State, 63 Md. 551, 3 Atl. 29; State v. Denoon, 31 W. Va. 122, 5 S. E. 315; State v. Dow, 21 Vt. 484; State v. Kittelle, 110 N. C. 560, 15 S. E. 103, 28 Am. St. Rep. 698, 15 L. R. A. 694 (reviewing many cases); Riley v. State, 43 Miss. 397; Lehman v. D. C., 19 App. D. C. 217; Loeb v. State, 75 Ga. 258; Snider v. State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350. For decisions to the contrary, see note 114, supra.

[127a] Com. v. Kelley, 140 Mass. 441, 5 N. E. 834.

[127b] Brown v. Foot, 66 Law T. (N. S.) 649.

lawful sale of liquors in a saloon—that the state makes out a *prima facie* case against the principal or master by proof of the agent's or servant's act, and it is for the former to rebut the presumption of authority by proof that the act was without his authority or knowledge.[128] This rule was laid down in the earlier Massachusetts cases,[129] but has since been repudiated.[129a] In a late case it was held that there is no presumption of authority or consent, but that the jury *may* infer authority or consent, from the agent's or servant's act.[130] Neither of these views is sound. The proper rule is that the manner in which the business is conducted and other circumstances may be such as to justify the jury in finding that the principal or master acquiesced or authorized the agent's or servant's act, but that, in order to convict, there must be some other evidence than mere proof of the relation of principal and agent or master and servant.[131] The presumption of innocence is entitled to more weight than any presumption of authority from the mere fact of agency.

(*i*) *Ratification of Unauthorized Act.*—A principal or master does not become criminally responsible for the act of his

[128] Rex v. Almon, 5 Burrow, 2686; Anderson v. State, 22 Ohio St. 305; State v. Wentworth, 65 Me. 234; State v. McCance, 110 Mo. 398, 19 S. W. 648; State v. Heckler, 81 Mo. 417; Fullwood v. State, 67 Miss. 554, 7 So. 432.

[129] Com. v. Nichols, 10 Metc. (Mass.) 259.

[129a] Com. v. Stevenson, 142 Mass. 466, 8 N. E. 341.

[130] Com. v. Briant, 142 Mass. 463, 8 N. E. 338. And see Com. v. Holmes, 119 Mass. 195; Com. v. Locke, 145 Mass. 401, 14 N. E. 621; Com. v. McNeese, 156 Mass. 232, 30 N. E. 1021; Com. v. Hurley, 160 Mass. 10, 35 N. E. 89; Com. v. Houle, 147 Mass. 380, 17 N. E. 896; Com. v. Perry, 148 Mass. 160, 19 N. E. 212. The question is not for the court, but for the jury. Com. v. Hayes, 145 Mass. 289, 14 N. E. 151.

[131] See State v. Smith, 10 R. I. 258; State v. Burke, 15 R. I. 324, 4 Atl. 761; Thompson v. State, 45 Ind. 495.

A single unlawful sale will not raise a presumption of authority to make unlawful sales of the same nature (State v. Mahoney, 23 Minn. 181; Parker v. State, 4 Ohio St. 563); neither will a ratification of previous unlawful sales. Patterson v. State, 21 Ala. 571.

agent or servant, committed without his knowledge or authority, by subsequently ratifying the same. He must be liable, if at all, at the time the act is done.[132]

"In the law of contracts, a posterior recognition, in many cases, is equivalent to a precedent command; but it is not so in respect of crimes. The defendant is responsible for his own acts, and for the acts of others done by his express or implied command, but to crimes the maxim, "*Omnis ratihabitio retrotrahitur et mandato equiparatur,*" is inapplicable.[133]

195. Responsibility of Agent or Servant.

It is well settled that, if an agent or servant knowingly commits a crime in the course of his employment, he is criminally responsible therefor. In the absence of mistake of fact, the fact that the act was done by authority, direction or command of his principal or master is no defense whatever, for no man can authorize another to do what he cannot lawfully do himself.[134] Thus, a person who obtains money or property from another by false pretenses, with intent to defraud, cannot escape

[132] Morse v. State, 6 Conn. 9, Beale's Cas. 223.

But see Reg. v. Woodward, 9 Cox, C. C. 95, where a husband was convicted of receiving stolen property first left with his wife on the theory that the receipt was not complete until he had bargained with the thief as to the price.

[133] Hosmer, C. J., in Morse v. State, supra. In this case it was held that where an employe gave credit to a minor student of Yale College for suppers, wine, and other liquors, in violation of a statute, the employer did not become responsible criminally by reason of his subsequent ratification of the employe's act.

[134] Ante, § 83; Com. v. Hadley, 11 Metc. (Mass.) 66, Beale's Cas. 372; State v. Bell, 5 Port. (Ala.) 365; Atkins v. State, 95 Tenn. 474, 32 S. W. 391; Sanders v. State, 31 Tex. Cr. R. 525, 21 S. W. 258; Smith v. District of Columbia, 12 App. D. C. 33; Douglass v. State, 18 Ind. App. 289, 48 N. E. 9; 2 Clark & Skyles, Agency, 1321.

No individual can authorize another to violate a public law. State v. Matthis, 1 Hill (S. C.) 37.

responsibility on the ground that he was acting as the mere agent or servant of another.[135]

The same is true where an agent or servant keeps for sale or sells intoxicating liquors in violation of law,[136] or maintains a nuisance,[136a] or keeps without license a business requiring a license,[136b] or keeps a bawdy house or gaming house, operates a gaming device, or permits gaming,[137] or takes usury,[137a] or obstructs a highway.[138]

[135] State v. Chingren, 105 Iowa, 169, 74 N. W. 946.

[136] Com. v. Hadley, 11 Metc. (Mass.) 66, Beale's Cas. 372; Witherspoon v. State, 39 Tex. Cr. R. 65, 44 S. W. 164, 1096; State v. Wadsworth, 30 Conn. 55; Menken v. City of Atlanta, 78 Ga. 668, 2 S. E. 559; Baird v. State, 52 Ark. 326, 12 S. W. 566; Abel v. State, 90 Ala. 631, 8 So. 760; Hays v. State, 13 Mo. 246; Schmidt v. State, 14 Mo. 137; State v. Morton, 42 Mo. App. 64; State v. Chastain, 19 Or. 176, 23 Pac. 963; French v. People, 3 Park. Cr. R. (N. Y.) 114; State v. Matthis, 1 Hill (S. C.) 37.

It is immaterial that the servant is a mere volunteer and receives and expects no compensation (State v. Herselus, 86 Iowa, 214, 53 N. W. 105; State v. Finan, 10 Iowa, 19; Beck v. State, 69 Miss. 217, 13 So. 835; State v. Bugbee, 22 Vt. 32), or is the minor child of the owner being in fact of years of discretion. Cagle v. State, 87 Ala. 38, 93, 6 So. 300.

In Com. v. Williams, 4 Allen (86 Mass.) 587, a distinction is made between one assuming without authority to act as the agent of another, and one who is a mere messenger or go-between; the former being guilty and the latter not.

A servant cannot be convicted of "keeping" where the master is personally present and directing the business (Com. v. Galligan, 144 Mass. 171, 10 N. E. 788; Com. v. Churchill, 136 Mass. 148; State v. Gravelin, 16 R. I. 407, 16 Atl. 914); but if he sells in the master's absence, he may. Com. v. Brady, 147 Mass. 583, 18 N. E. 568; Com. v. Kimball, 105 Mass. 465; Com. v. Merriam, 148 Mass. 425, 19 N. E. 405. See, also, State v. Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838.

[136a] Allyn v. State, 21 Neb. 593, 33 N. W. 212.

[136b] Eating house: Winter v. State, 30 Ala. 22.

[137] Stevens v. People, 67 Ill. 587; Atkins v. State, 95 Tenn. 474, 32 S. W. 391; Com. v. Drew, 3 Cush. (57 Mass.) 279.

[137a] People v. Dunlap, 32 Misc. (N. Y.) 390, 66 N. Y. Supp. 161.

[138] Sanders v. State, 31 Tex. Cr. R. 525, 21 S. W. 258; Smith v. District of Columbia, 12 App. D. C. 33.

Of course if the servant or agent were mistaken as to facts, the existence of which would render his act lawful, he would be guilty of no crime, notwithstanding the guilt of the master.[138a] And if, in a liquor selling case, it appears that the defendant was in fact the agent of the buyer and not of the seller, no liability attaches.[138b]

196. Partners.

Partners are agents for each other in the conduct of the partnership business, and what has been said, therefore, in the preceding sections, applies where it is sought to hold one partner criminally responsible for the act of his copartner.[139]

[138a] Ante, § 68 et seq., 168.

[138b] Clark & Skyles, Agency, 1321; Maples v. State, 130 Ala. 121, 30 So. 428; Anderson v. State, 32 Fla. 242, 13 So. 435; Black v. State, 112 Ga. 29, 37 S. E. 108; Skidmore v. Com., 22 Ky. L. R. 409, 57 S. W. 468; State v. Taylor, 89 N. C. 577; Treue v. State (Tex. Cr. App.) 44 S. W. 829. Purchase for minor, Bryant v. State, 82 Ala. 51, 2 So. 670. But see Foster v. State, 45 Ark. 361.

[139] See Robinson v. State, 38 Ark. 641; Waller v. State, 38 Ark. 656; Whitton v. State, 37 Miss. 379.

CHAPTER VI.

OFFENSES AGAINST THE PERSONS OF INDIVIDUALS.

I. Assaults and Assault and Battery, §§ 197-220.
II. Mayhem, §§ 221-223.
III. False Imprisonment, §§ 224-227.
IV. Kidnapping, §§ 228-229.
V. Abduction, §§ 230-232.
VI. Homicide, §§ 233-288.
- A. The Homicide, §§ 233-238.
- B. Murder at Common Law, §§ 239-249.
- D. Statutory Degrees of Murder, §§ 251-254.
- E. Manslaughter, §§ 255-265.
- C. Suicide, § 250.
- F. Justifiable and Excusable Homicide, §§ 266-288.

VII. Abortion, §§ 289-292.
VIII. Rape, §§ 293-302.

I. Assaults and Assault and Battery.

197. In General.—All assaults and assault and battery are misdemeanors at common law. In some jurisdictions aggravated assaults are made felonies.

1. **An assault is an attempt or offer, with unlawful force or violence, to do a corporal hurt to another.**
2. **A battery is the actual doing of any unlawful corporal hurt, however slight, to another.**
3. **Aggravated assaults, as distinguished from common or simple assault, are assaults accompanied by aggravating circumstances, as assaults with intent to kill, to do great bodily harm, to rape, to rob, etc., and assault with a deadly weapon.**

To constitute an assault there must be an attempt or offer, with force and violence, to inflict unlawful corporal injury. And therefore—

1. **There must be an act, and not mere menace, which, if not interrupted or diverted, will apparently result in injury.**
2. **There must be an actual or apparent intention to inflict injury.**
3. **The intent must be to inflict a corporal injury.**
4. **In some jurisdictions there must be a present ability to inflict the injury, while in others an apparent ability is sufficient.**
5. **Consent of the person against or upon whom the violence is attempted or done is a defense, if the consent is real, and if the injury is one to which he may consent, but not otherwise.**
6. **The violence or force attempted or done must be unlawful. And therefore it is not an assault nor an assault and battery if the force is justifiable, as where it is applied in pursuance of lawful public or domestic authority, as where an officer makes a lawful arrest or lawfully detains or controls a person in his custody, or a parent or teacher moderately corrects his child or pupil, or where it is applied in necessary and reasonable defense of one's person or property.**

198. The Act Constituting an Assault.

"An assault," says Hawkins, "is an attempt or offer, with force and violence, to do a corporal hurt to another; as, by striking at him with or without a weapon, or presenting a gun at him at such a distance, to which the gun will carry, or pointing a pitchfork at him standing within reach of it, or by holding up one's fist at him, or by any other such-like act done in an angry, threatening manner."[1]

[1] 1 Hawk. P. C. c. 15, § 1, Beale's Cas. 420, Mikell's Cas. 505; State v. Davis, 1 Ired. (N. C.) 125, 35 Am. Dec. 735. And see Tarver v. State, 43 Ala. 354; People v. Lilley, 43 Mich. 521, 5 N. W. 982; Hays v. People, 1 Hill (N. Y.) 351.

In other words, an assault is an *attempt* to commit a battery. As we have seen, to constitute an attempt, there must be something more than mere intention or preparation. There must be some overt *act* done in pursuance of the intent.[2]

It is well settled, therefore, that no mere threatening or abusive language can of itself amount to an assault. "Notwithstanding many ancient opinions to the contrary, it seems agreed at this day that no words whatsoever can amount to an assault."[3] Neither will an insulting gesture of itself constitute an assault.[3a]

In practice it is very difficult to draw the line between violence merely menaced and an assault, and the decisions cannot all be reconciled. It was said by the North Carolina court that where an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted, and there is an assault.[4] And it is safe to say that any act which will come within this statement is an assault.[5] Mere preparation is not enough, as the drawing of a

[2] Ante, §§ 122, 123.

[3] 1 Hawk. P. C. c. 15, § 1, Beale's Cas. 420, Mikell's Cas. 505; People v. Yslas, 27 Cal. 630; Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42; State v. Mooney, Phil. (N. C.) 434; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496; People v. Lilley, 43 Mich. 521, 5 N. W. 982; Berkeley v. Com., 88 Va. 1017, 14 S. E. 916; Smith v. State, 39 Miss. 521.

This rule does not prevent the indictment as a principal of one who, by words only, incites another to commit an assault and battery. State v. Lymburn, 1 Brev. (S. C.) 397, 2 Am. Dec. 669.

[3a] Making "kissing sign" at a woman. Fuller v. State, 44 Tex. Cr. R. 463, 72 S. W. 184, 100 Am. St. Rep. 871.

[4] State v. Davis, 1 Ired. (N. C.) 125, 35 Am. Dec. 735; State v. Reavis, 113 N. C. 677, 18 S. E. 388.

[5] State v. Sims, 3 Strob. (S. C.) 137, Mikell's Cas. 509; State v. Vannoy, 65 N. C. 532; State v. Dooley, 121 Mo. 591, 26 S. W. 558.

It is an assault to fire a gun over the heads of a congregation of people. Malone v. State, 77 Miss. 812, 26 So. 968.

weapon, without presenting it or making any offer or attempt to use it.[6] It is otherwise if the weapon is presented.[7] It is not necessary, in order to constitute an assault, that the assailant shall get near enough to inflict a battery. Thus, intentionally riding after a person in such a way as to compel him to retreat and seek shelter so as to avoid injury is an assault.[8] And it is an assault for a person to advance upon another in a menacing manner, with intent to strike him, though, before he is near enough to strike, he may be knocked down or stopped by the other or by a third person, or though the other may go away to escape.[9]

199. Battery.

Any unlawful injury whatsoever, however slight, actually done to the person of another, directly or indirectly, in an angry, revengeful, rude, or insolent manner, is a battery.[10] Every battery includes an assault, so that on an indictment for assault and battery one may be convicted of an assault only.[11]

[6] Lawson v. State, 30 Ala. 14. But see People v. McMakin, 8 Cal. 547.

[7] State v. Dooley, 121 Mo. 591, 26 S. W. 558; Hariston v. State, 54 Miss. 689, 28 Am. Rep. 392.

Picking up a stone at a distance of twenty yards from a person, without making any offer or attempt to throw it, is not an assault. Brown v. State, 95 Ga. 481, 20 S. E. 495.

[8] Mortin v. Shoppee, 3 Car. & P. 373.

[9] Stephens v. Myers, 4 Car. & P. 349; People v. Yslas, 27 Cal. 630; State v. Davis, 1 Ired. (N. C.) 125, 35 Am. Dec. 735; State v. Rawles, 65 N. C. 334; State v. Vannoy, 65 N. C. 532; State v. Shipman, 81 N. C. 513; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; Thomas v. State, 99 Ga. 38, 26 S. E. 748.

In State v. Rawles, supra, where a person was at a place where he had a right to be, and four other persons, with a pitchfork, gun, etc., by following him, and using threatening and insulting language, put him in fear, and induced him to go home sooner than he would otherwise have gone, and in a different way, it was held that they were guilty of an assault.

[10] 1 Hawk. P. C. c. 15, § 2, Beale's Cas. 420, Mikell's Cas. 505.

[11] Id.

To strike another with the fist, or with a stick or stone, to cut him with a knife, or to shoot him, are clear cases of battery. It is not necessary, however, that the injury shall be so serious as this. The least touching of another in anger, or in a rude or insolent manner, is enough, as by spitting upon him, or in any way touching him in anger, or with rudeness, even with the open hand, or jostling him out of the way, or cutting his clothes while they are on his person, etc.[12]

An assault and battery may be committed by taking indecent liberties with a girl or woman without her consent,[13] or by administering poison or any other deleterious drug.[14]

The force or injury need not be applied or inflicted directly.[15]

An assault and battery may be committed by exposing an infant or other helpless person to the inclemency of the weather;[16] or, as was just stated, by inducing another to take poison

[12] 1 Hawk. P. C. c. 15, § 2, Beale's Cas. 420, Mikell's Cas. 505; Reg. v. Cotesworth, 6 Mod. 172, Mikell's Cas. 526; Reg. v. Day, 1 Cox, C. C. 207; Com. v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410; State v. Baker, 65 N. C. 332; Ridout v. State, 6 Tex. App. 249.

[13] Ridout v. State, 6 Tex. App. 249; Goodrum v. State, 60 Ga. 509.

[14] Reg. v. Button, 8 Car. & P. 660; Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350, Beale's Cas. 451; Johnson v. State, 92 Ga. 36, 17 S. E. 974; Carr v. State, 135 Ind. 1, 34 N. E. 533. Contra, Reg. v. Dilworth, 2 Moody & R. 531; Reg. v. Hanson, 2 Car. & K. 912; Garnet v. State, 1 Tex. App. 605, 28 Am. Rep. 425.

[15] See People v. Moore, 50 Hun, 356, 3 N. Y. Supp. 159, Beale's Cas. 453, where an assault was committed by stopping and turning a sleigh driven by the prosecutor.

In State v. Davis, 1 Hill (S. C.) 46, Mikell's Cas. 527, it was held that to take a negro out of prosecutor's possession and presence with violence, breaking the chain and cutting the rope by which he was secured, was an assault.

[16] Reg. v. March, 1 Car. & K. 496, Mikell's Cas. 507. In this case, the defendants told the mother of an infant that they were going to take it to an institution to be cared for, but, instead of doing so, they put it in a bag and hung it on the fence at the side of the road, and left it there. It was held that this was an assault on the child.

In Reg. v. Renshaw, 2 Cox, C. C. 285, Beale's Cas. 434, it was held that an indictment for assault can be sustained only "when the person

or any other harmful substance in ignorance of its nature;[17] or by offering violence, and thereby causing another to jump from a window.[18]

200. Intention to Commit a Battery.

To constitute an attempt to inflict a battery, or an assault, there must be a present intent, or at least an apparent intent, to inflict a battery.[19]

Menacing acts can never amount to an assault, if it appears from accompanying words or conduct that there is no present intention to injure. For this reason it was held in an old case that a man who laid his hand on his sword and said to another, "If it were not assize time, I would not take such language from you," did not thereby commit an assault, as his words showed that there was no present intention to injure.[20] There are many other decisions to the same effect.[21]

exposed suffers a hurt or injury of some kind or other from the exposure."

In Pallis v. State, 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106, a conviction of assault with intent to kill was sustained where defendant abandoned her new born babe in a sand pit without clothing or other covering except straw and leaves. See, also, Ter. v. Manton, 8 Mont. 95, 19 Pac. 381.

[17] Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350, Beale's Cas. 451. It was said by Wells, J., in this case: "Although force and violence are included in all definitions of assault or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts."

[18] Reg. v. Halliday, 61 L. T. (N. S.) 701, Beale's Cas. 427.

[19] See ante, § 121; Rex v. Gill, 1 Strange, 190; Com. v. Eyre, 1 Serg. & R. (Pa.) 347; State v. Crow, 1 Ired. (N. C.) 376; Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615; Com. v. Mann, 116 Mass. 58.

[20] Tuberville v. Savage, 1 Mod. 3, Mikell's Cas. 505.

[21] See Com. v. Eyre, 1 Serg. & R. (Pa.) 347, where the defendant raised his hand within striking distance of the prosecutor, and said, "If it were not for your gray hairs, I would tear your heart out;" and State v. Crow, 1 Ired. (N. C.) 376, where the defendant raised his

201. Apparent Intention.

It is a controverted question whether, to constitute a criminal assault, there must be an actual present intention to inflict a battery, or whether an apparent intention is sufficient. The early English cases and authorities required an actual intention;[22] and this rule has been recognized by some of the English judges in later cases, and by some of the courts in this country.[23] They hold that a menacing act is not a criminal assault, if done without any intention to proceed to a battery, though the act may apparently be accompanied by such an intent, and though it may be calculated to terrify the other party and put him on the defensive, and may in fact have such effect. They do not consider the fact that the act puts the other party in fear, and tends to cause a breach of the peace, sufficient to render it criminal.

The better opinion, however, is against this view, and to the effect that if a person presents a gun at another, or threatens him with a stick or other weapon, and thereby reasonably puts him in fear and causes him to act on the defensive, or to retreat, there is an assault, whether there is any actual intention to injure or not.[24]

In a comparatively late Massachusetts case it was held that a man who pointed an unloaded gun at another was guilty of an assault, although he may have known it was not loaded, and may have had no intention to injure. "It is not the secret intent of the assaulting party," said the court, "nor the un-

cane within striking distance, shook it at the prosecutor, and said, "If you were not an old man, I would knock you down."

[22] See 1 Russ. Crimes, 1019.

[23] State v. Blackwell, 9 Ala. 79; Tarver v. State, 43 Ala. 354; Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42, Mikell's Cas. 511; White v. State, 29 Tex. App. 530, 16 S. W. 340.

[24] Com. v. White, 110 Mass. 407, Beale's Cas. 450. And see Kunkle v. State, 32 Ind. 220; State v. Rawles, 65 N. C. 334; State v. Sims, 3 Strob. (S. C.) 137, Mikell's Cas. 509; State v. Triplett, 52 Kan. 678, 35 Pac. 815.

disclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."[25]

202. Conditional Offer of Violence.

An act done towards the infliction of injury is not the less an assault because it is accompanied by a conditional threat. It is an assault to raise a stick within striking distance of another, or point a gun within shooting distance, and threaten to strike or shoot unless the other complies with a certain demand, or forbears to do something which he has a right to do.[26] Thus, indictments for assault were sustained where a man doubled up his fist at another, and said, "If you say so again, I will knock you down;"[27] where one presented a cocked pistol at another, saying, "If you do not pay me my money I'll have your life;"[27a] and where a man who was unlawfully driving away the prosecutor's cow, faced the prosecutor with a cocked gun in his hand, and said that if any one laid his hands on the cow he would blow his brains out.[28] These cases are clearly distinguishable from those heretofore referred to, in which language is used showing no intention to injure at all.

[25] Com. v. White, supra.

[26] U. S. v. Myers, 1 Cranch, C. C. 310, Fed. Cas. No. 15,845, Mikell's Cas. 506; State v. Morgan, 3 Ired. (N. C.) 186, 38 Am. Dec. 714, Mikell's Cas. 447; State v. Horne, 92 N. C. 805, 53 Am. Rep. 442; State v. Reavis, 113 N. C. 677, 18 S. E. 388; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392.

[27] U. S. v. Myers, 1 Cranch, C. C. 310, Fed. Cas. No. 15,845, Mikell's Cas. 506.

[27a] Keefe v. State, 19 Ark. 190.

[28] State v. Horne, 92 N. C. 805, 53 Am. Rep. 442.

203. Accident.

To render one guilty of criminal assault and battery, a criminal intent, or what is equivalent thereto, is necessary. If an injury is inflicted upon another by accident in the doing of a lawful act without culpable negligence, an indictment for assault and battery will not lie.[29]

204. Negligence.

A person who inflicts corporal injury upon another by culpable negligence in doing a lawful act may certainly be guilty of assault and battery for the purpose of a civil action to recover damages. It has been said that he is not liable to indictment,[30] but this is very doubtful.

While there is very little authority on the question, there seems to be no good reason to doubt that a person may be guilty of criminal assault and battery if he intentionally does an act which, by reason of its wanton and grossly negligent character, exposes another to personal injury, and does in fact cause such injury.[31] Throwing a stone in sport and striking another is an assault and battery.[32]

205. Unintentional Injury in Doing Unlawful Act.

If a personal injury is unintentionally done another by one who is engaged in an unlawful act, he is not necessarily excused on the ground of accident. If the act is a crime and *malum in se,* and the injury is a natural or probable consequence of the act, he is guilty of assault and battery. Thus,

[29] Rex v. Gill, 1 Strange, 190, Mikell's Cas. 526. See Brown v. Kendall, 6 Cush. (Mass.) 292; Talmage v. Smith, 101 Mich. 370, 59 N. W. 656; Vincent v. Stinehour, 7 Vt. 62, 29 Am. Dec. 145.

[30] 2 Am. & Eng. Enc. Law (2d Ed.) 989.

[31] Com. v. Hawkins, 157 Mass. 551, 32 N. E. 862. And see the cases cited under the section following.

[32] Hill v. State, 63 Ga. 578, 36 Am. Rep. 120.

if one strikes at one person and unintentionally injures another, he is guilty of assault and battery upon the person injured.[33] It is not even necessary that there shall be an intent to injure any particular person. If one throws a firecracker or shoots into a crowd, and injures any one of the crowd, it is an assault and battery.[34]

The act must be *malum in se*, and not merely *malum prohibitum*. Therefore, one who drives over another unintentionally is not guilty of a criminal assault and battery, apart from any question of negligence, merely because he is driving at a speed prohibited by a city ordinance.[35]

206. Ability to Commit a Battery.

Whether, to constitute a criminal assault, there must be an actual present ability to inflict a battery, or whether an apparent ability is sufficient, is a question upon which the courts have differed. The cases cannot possibly be reconciled. In England some of the judges have held that a present actual ability to inflict a battery is necessary to render an assault criminal, though an apparent ability may give rise to an action for damages.[36] And this doctrine has been recognized by some of the courts in this country.[37]

[33] McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209; Callahan v. State, 21 Ohio St. 306.

[34] Scott v. Shepherd, 2 W. Bl. 892, 3 Wils. 403 (the famous squib case, where a squib was thrown in the market place, and being thrown off by various persons, finally struck a person in the eye); Conway v. Reed, 66 Mo. 346, 27 Am. Rep. 354; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; Vandermark v. People, 47 Ill. 122; State v. Meadows, 18 W. Va. 658; Callahan v. State, 21 Ohio St. 306.

[35] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204, Mikell's Cas. 160.

[36] Blake v. Barnard, 9 Car. & P. 626; Reg. v. James, 1 Car. & K. 530.

[37] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42; Lawson v. State, 30 Ala. 14; State v. Sears, 86 Mo. 169; State v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830; State v. Napper, 6 Nev. 113. Compare

Thus, it has been held that aiming an unloaded gun at another, who believes it to be loaded, within the distance the gun would carry if loaded, and in such a manner as to terrify the other, is not a criminal assault.[38]

This doctrine, however, has been repudiated by some of the English judges, and by most of the courts and commentators in this country, and it may be regarded as settled in most jurisdictions that a present *apparent* ability to inflict a battery is sufficient to render an assault criminal, and that actual ability is not necessary.[39]

According to this view it is an assault to present a gun or pistol at another within shooting distance, though it may not be loaded, or may be loaded with powder only.[40]

In Texas it was formerly held that an actual present ability

Balkum v. State, 40 Ala. 671; Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691.

[38] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42; Klein v. State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354; and other cases above cited.

[39] Reg. v. St. George, 9 Car. & P. 483; Com. v. White, 110 Mass. 407, Beale's Cas. 450; Kunkle v. State, 32 Ind. 220; Crumbley v. State, 61 Ga. 582; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; State v. Shepard, 10 Iowa, 126; Keefe v. State, 19 Ark. 190; State v. Smith, 2 Humph. (Tenn.) 457; State v. Sears, 86 Mo. 169; People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 165, Beale's Cas. 142; ante, §§ 127, 128.

For a person to shoot at a place in the roof of a house where he supposes a policeman is concealed and watching him is an assault with intent to kill, though the policeman may be at another place on the roof. People v. Lee Kong, supra.

If there be such a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person at whom it is directed reasonably to fear the injury unless he retreat to secure his safety, and under such circumstances he is compelled to retreat to avoid an impending danger, the assault is complete, though the assailant may never have been within actual striking distance of the person assailed. Thomas v. State, 99 Ga. 38, 26 S. E. 748.

[40] State v. Archer, 8 Kan. App. 737, 54 Pac. 927, and cases cited in the two notes preceding.

to inflict the injury was necessary,[41] but this is no longer the case.[42]

The cases requiring actual ability seem to proceed upon the theory that an act does not become criminal merely because it puts another in fear, or because it tends to cause a breach of the peace;[43] but it is well settled at common law that any unjustifiable and inexcusable act is indictable if it tends directly to cause a breach of the public peace.[43a] It is on this principle that acts of malicious mischief and libels on private individuals are punished as misdemeanors at common law.[44]

In some states the statutes defining and punishing assaults set the question at rest by expressly requiring actual ability to inflict a battery, and an apparent ability is not enough.[45]

In all jurisdictions there must at least be an apparent present ability to inflict the injury. To raise a stick or present a pistol at another at such a distance that it clearly could not injure would not be an assault.[46]

207. Aggravated Assaults—In General.

An assault with intent to kill, to do great bodily harm, to rape, to rob, etc., is called an aggravated assault, as distinguished from a common assault, because the assault is aggravated by the concurrence of the felonious intent with which it is made. At common law aggravated assaults were punished more severely than common assault, but they were not recognized as distinct technical offenses. All assaults were merely

[41] Robinson v. State, 31 Tex. 170; McKay v. State, 44 Tex. 43.

[42] Kief v. State, 10 Tex. App. 286; Atterberry v. State, 33 Tex. Cr. R. 88, 25 S. W. 125.

[43] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42.

[43a] Post, § 417.

[44] Ante, § 25; post, §§ 428-429.

[45] Pratt v. State, 49 Ark. 179, 4 S. W. 785.

[46] See Reg. v. St. George, 9 Car. & P. 483; Tarver v. State, 43 Ala. 354; Howard v. State, 67 Ind. 401; Jarnigan v. State, 6 Tex. App. 465; People v. McMakin, 8 Cal. 547; ante, §§ 127, 128.

misdemeanors. In most jurisdictions statutes have been enacted specifically punishing aggravated assaults, and in many jurisdictions they are made felonies.[47]

208. Specific Intent.

To constitute an assault with intent to murder, to kill, to rob, to rape, to do great bodily harm, etc., the specific intent is essential. A person is not guilty of assault with intent to kill, for instance, unless he actually intends to kill.[48] The fact that the killing would be murder is not enough, for there may be murder without any intent to kill.[49] To constitute an assault with intent to murder the specific intent is necessary.[50] The circumstances must be such that, if death should result, the homicide would be murder,[51] and, in addition to this, there must be the specific intent to murder.[52]

[47] See Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; Norton v. State, 14 Tex. 387; Bowden v. State, 2 Tex. App. 56.

[48] State v. Reed, 40 Vt. 603; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Rex v. Duffin, Russ. & R. 365, Mikell's Cas. 167, and cases cited in the notes following.

It is not necessary to show that the killing would be murder. It is sufficient if it would be voluntary manslaughter. State v. Reed, supra; Hall v. State, 9 Fla. 203, 76 Am. Dec. 617; Ex parte Brown, 40 Fed. 81.

[49] Post, § 242 et seq.

[50] Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; Ogletree v. State, 28 Ala. 693; State v. White, 41 Iowa, 316, 20 Am. Rep. 602; Slatterly v. People, 58 N. Y. 354; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Hayes v. State, 14 Tex. App. 330; Roberts v. People, 19 Mich. 401.

[51] Meredith v. State, 60 Ala. 441; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; McCormack v. State, 102 Ala. 156, 15 So. 438; State v. Connor, 59 Iowa, 357, 13 N. W. 327, 44 Am. Rep. 686; Slatterly v. People, 58 N. Y. 354; Rumsey v. People, 19 N. Y. 41; Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8; People v. Scott, 6 Mich. 287; People v. Prague, 72 Mich. 178, 40 N. W. 243; Hopkinson v. People, 18 Ill. 264; Beckwith v. People, 26 Ill. 500; Hamilton v. People, 113 Ill. 34, 55

An assault is not assault with intent to murder if the actual killing would be manslaughter only.[53] To support an indictment for maliciously shooting at another with intent to kill him, the proof must show the intent to kill the person shot at.[53a] A specific intent to rape is essential to an assault with intent to rape. To constitute rape the intercourse must, as a rule, be by force and against the will of the woman,[54] and therefore a man is not guilty of assault with intent to rape unless he intends to have connection by force and against her will.[55]

In some states the statute specifically punishes assault with intent to maim, or disable, or do great or grievous bodily harm, etc. Here, also, the specific intent is essential. In an Eng-

Am. Rep. 396; Elliott v. State, 46 Ga. 159; Hayes v. State, 14 Tex. App. 330; Wilson v. State, 4 Tex. App. 637; State v. Nichols, 8 Conn. 496.

Sending infernal machine held an assault with intent to murder. State v. Hoot, 120 Iowa, 238, 94 N. W. 564, 98 Am. St. Rep. 352.

[52] Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; People v. Mize, 80 Cal. 41, 22 Pac. 80.

One who points a pistol within shooting distance at another, who is attempting to stop his team, and threatens to shoot if he does not desist, is guilty of an assault, but not of assault with intent to murder. Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392.

[53] Beckwith v. People, 26 Ill. 500; State v. Connor, 59 Iowa, 357, 13 N. W. 327, 44 Am. Rep. 686; People v. Prague, 72 Mich. 178, 40 N. W. 243; Wilson v. State, 4 Tex. App. 637; and other cases cited in note 51, supra.

[53a] Where defendant mistook the person shot at for another, whom he intended to kill, the offense is not made out. Rex v. Holt, 7 Car. & P. 518, Mikell's Cas. 169. Cf. Reg. v. Ryan, 2 Moody & R. 213 (laying poison taken up by person not intended); and Reg. v. Stopford, 11 Cox, C. C. 643. See ante, p. 94, n. 64a.

[54] Post, § 293.

[55] Rex v. Lloyd, 7 Car. & P. 318; Com. v. Fields, 4 Leigh (Va.) 648; Com. v. Merrill, 14 Gray (Mass.) 415, 77 Am. Dec. 336; State v. Kendall, 73 Iowa, 255, 34 N. W. 843, 5 Am. St. Rep. 679; Jones v. State, 90 Ala. 628, 8 So. 383, 24 Am. St. Rep. 850; Taylor v. State, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656; Shields v. State, 32 Tex. Cr. R. 498, 23 S. W. 893; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; People v. Manchego, 80 Cal. 306, 22 Pac. 223.

lish case a burglar was indicted under a statute for feloniously cutting and maiming a man with intent to maim and disable him. The jury found that he struck a watchman with a crowbar, and inflicted serious injuries, but that he did so with intent to produce a temporary disability until he could escape, and not a permanent disability. It was held that he could not properly be convicted.[56]

209. Assault with a Deadly Weapon.

In many states the statutes expressly punish as an aggravated assault an assault with a deadly or dangerous weapon.[57] A deadly weapon is any weapon or instrument which is likely to cause death, when used as it is used in the particular case.[58] A weapon capable of causing death is not necessarily deadly.[59] When a weapon is clearly of such a character, or used in such a way, as to be likely to cause death, the court will take judicial notice that it is a deadly weapon, as in the case of a loaded pistol or gun,[60] an axe,[61] a hoe,[62] brass knuckles,[63] a club,[64] a sledge hammer,[65] etc. When the weapon is not clearly

[56] Rex v. Boyce, 1 Mood. C. C. 29, Beale's Cas. 182. But see Rex v. Hunt, 1 Mood. C. C. 93, Mikell's Cas. 152.

An indictment under the statute, 6 Geo. I. c. 23, for a felonious assault with intent to spoil, cut, and deface the garments of the person assaulted is not supported where it appears the intent was to wound the person assaulted. Rex v. Williams, 1 Leach, C. C. 529, Mikell's Cas. 211.

[57] See 2 Am. & Eng. Enc. Law (2d Ed.) 970 et seq., where the cases are collected.

[58] Pittman v. State, 25 Fla. 648, 6 So. 437; People v. Rodrigo, 69 Cal. 601, 11 Pac. 481.

[59] Pittman v. State, supra. But see People v. Rodrigo, supra.

[60] U. S. v. Williams, 2 Fed. 61; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396.

[61] State v. Shields, 110 N. C. 497, 14 S. E. 779.

[62] Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396.

[63] Wilks v. State, 3 Tex. App. 34.

[64] State v. Phillips, 104 N. C. 786, 10 S. E. 463.

of such a character, whether or not it was deadly under the particular circumstances must be left to the jury as a question of fact. Thus, it has been held to be for the jury to say whether the statute applied to an assault with a stone,[66] a stick,[67] a horseshoe,[68] a chain,[69] a pistol used as a club,[70] a pocket-knife,[71] a glass tumbler,[72] etc.

210. Ability to Commit Intended Crime.

What has been said in a previous section as to the necessity for present ability to inflict the intended injury in order to constitute an assault, and the sufficiency of present apparent ability, is applicable to aggravated assaults as well as to common assaults.[73]

The question has also been considered in treating of attempts. We have seen that, by the weight of authority, a man may be guilty of an attempt to murder, or rob, etc., if there is an apparent physical ability to commit the intended murder or robbery, etc., but that it is otherwise if, as a matter of law, the commission of the act as intended and attempted would not constitute a crime. Assaults with intent to murder, to rape, or to rob are attempts to commit such crimes, and therefore what has been said on this point under the head of attempts applies to such assaults.[74]

211. Lawful Force—Justification.

To constitute an assault and battery, the force threatened or applied must be unlawful. Public authority is a complete justi-

[65] Philpot v. Com., 86 Ky. 595, 6 S. W. 455.
[66] State v. Jarrott, 1 Ired. (N. C.) 76.
[67] State v. Dineen, 10 Minn. 407.
[68] People v. Cavanagh, 62 How. Pr. (N. Y.) 187.
[69] Kouns v. State, 3 Tex. App. 13.
[70] Prior v. State, 41 Ga. 155.
[71] Hilliard v. State, 17 Tex. App. 210; Sylvester v. State, 71 Ala. 17.
[72] Coney v. State, 2 Tex. App. 62.
[73] Ante, § 206.
[74] Ante, §§ 127-129.

fication, provided it is not exceeded. Thus, an officer or a private individual is not guilty of an assault and battery in making a lawful arrest in a lawful manner, or in detaining a person who is lawfully in his custody, or in suppressing a riot or affray or preventing a felony.[75] He is guilty, however, if an arrest is made, or a person detained, without lawful authority, or if excessive force is employed.[76]

The same is true of domestic authority. A parent, teacher, or master is not guilty of assault and battery in moderately correcting his child, pupil, or apprentice;[77] but it is otherwise if the correction is immoderate.[78] Except in the case of master and apprentice, a master has no right to chastise his servant.[79]

[75] Post, §§ 268-271; Com. v. Presby, 14 Gray (80 Mass.) 65, Mikell's Cas. 244; People v. Adler, 3 Park. Cr. R. (N. Y.) 249; Patterson v. State, 91 Ala. 58, 8 So. 756; Spicer v. People, 11 Ill. App. 294; State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44; State v. Belk, 76 N. C. 10; Mitchell v. State, 12 Ark. 50, 54 Am. Dec. 253.

[76] Com. v. Ruggles, 6 Allen (Mass.) 588; State v. Parker, 75 N. C. 249, 22 Am. Rep. 669; State v. Belk, 76 N. C. 10; State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44.

[77] Rex v. Keller, 2 Show. 289; Com. v. Seed, 5 Clark (Pa.) 78, Mikell's Cas. 402; Fletcher v. People, 52 Ill. 395; Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; State v. Pendergrass, 2 Dev. & B. (N. C.) 365, 31 Am. Dec. 416; State v. Jones, 95 N. C. 588, 59 Am. Rep. 282; State v. Alford, 68 N. C. 322; State v. Dickerson, 98 N. C. 708, 3 S. E. 687; Boyd v. State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Danenhoffer v. State, 69 Ind. 295, 35 Am. Rep. 216; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; Com. v. Baird, 1 Ashm. (Pa.) 267; State v. Mizner, 45 Iowa, 248, 24 Am. Rep. 769; Snowden v. State, 12 Tex. App. 105, 41 Am. Rep. 667; Hutton v. State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776; Dean v. State, 89 Ala. 46, 8 So. 38; Cooper v. State, 8 Baxt. (Tenn.) 324, 35 Am. Rep. 704.

A master cannot delegate authority to correct his apprentice. People v. Phillips, 1 Wheeler, C. C. (N. Y.) 155.

[78] See the cases above cited. And see, particularly, Reg. v. Griffin, 11 Cox, C. C. 402; Neal v. State, 54 Ga. 281; State v. Pendergrass, 2 Dev. & B. (N. C.) 365, 31 Am. Dec. 416; Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471; Dowlen v. State, 14 Tex. App. 61.

[79] Cooper v. State, 8 Baxt. (Tenn.) 324, 35 Am. Rep. 704; Davis v. State, 6 Tex. App. 133.

A husband might formerly correct his wife without being guilty of assault and battery,[80] but, as a rule, this is no longer the case.[81] He may still, no doubt, use necessary force to restrain her from committing crimes or torts for which he might be liable, or from adulterous intercourse, etc.[82]

For the purpose of discipline, the superintendent of a poorhouse or reformatory may, if necessary, inflict corporal punishment or otherwise employ force, upon a pauper or prisoner, unless prevented by statute.[83]

And in like manner, at common law, corporal punishment may, under some circumstances, be inflicted upon soldiers or seamen by army or naval officers,[84] or by the captain of a vessel.[85] In this country, flogging in the army and navy and on merchant vessels is expressly prohibited by act of congress.

212. Self-Defense.

When a man is assaulted, but not in such a way as to endanger his life or threaten great bodily harm, he has a right

[80] 1 Bl. Comm. 444; Bradley against His Wife, 1 Keble, 637, Mikell's Cas. 399; State v. Black, 1 Winst. (N. C.) 266. See, also, State v. Rhodes, Phil. (N. C.) 453, 98 Am. Dec. 78.

[81] Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383; Owen v. State, 7 Tex. App. 329; Gorman v. State, 42 Tex. 221; State v. Buckley, 2 Har. (Del.) 552; Fulgham v. State, 46 Ala. 143; State v. Oliver, 70 N. C. 60, Mikell's Cas. 399; People v. Winters, 2 Park. Cr. R. (N. Y.) 10.

[82] See Bradley v. State, Walk. (Miss.) 156; People v. Winters, 2 Park. Cr. R. (N. Y.) 10.

"It is a sickly sensibility which holds that a man may not lay hands on his wife, even rudely, if necessary, to prevent the commission of some unlawful or criminal purpose." Armstrong, J., in Richards v. Richards, 1 Grant's Cas. (Pa.) 389, Mikell's Cas. 400, n.

[83] See State v. Neff, 58 Ind. 516; State v. Hull, 34 Conn. 132.

Generally, a jailor has no right to inflict corporal punishment upon a prisoner, though he has the right to use all necessary force to detain him in custody. See Prewitt v. State, 51 Ala. 33.

[84] See Wilkes v. Dinsman, 7 How. (U. S.) 89.

[85] U. S. v. Ruggles, 5 Mason, 192, Fed. Cas. No. 16,205; U. S. v. Wickham, 1 Wash. C. C. 316, Fed. Cas. No. 16,689.

to defend himself, and, in doing so, to use any necessary force short of taking his assailant's life or inflicting great bodily harm; and, unless the force employed is clearly excessive, he is not guilty of assault and battery.[86]

As will be shown in a subsequent section, if he is assaulted in such a way as to put him in danger of death or great bodily harm, he may take his assailant's life, if necessary in order to save himself.[87] The danger need not be real. A reasonably apparent danger is sufficient.[88] There must, however, be at least a reasonable apprehension of danger.[89]

The force employed in repelling an assault must not be clearly out of all proportion to the assault. One who repels a simple assault by force that is clearly excessive, and out of all proportion to the assault, is himself guilty of assault and battery.[90]

As was explained in a previous section, mere threatening or

[86] State v. Sherman, 16 R. I. 631, 18 Atl. 1040; Evers v. People, 3 Hun, 716, 63 N. Y. 625; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, Mikell's Cas. 345; Agee v. State, 64 Ind. 340; Leonard v. State, 27 Tex. App. 186, 11 S. W. 112; State v. McNamara, 100 Mo. 100, 13 S. W. 938. See, also, State v. Blodgett, 50 Vt. 142; State v. Burwell, 63 N. C. 661.

For a man to spit in another's face does not justify the use by the other of a dangerous weapon. Com. v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410.

One unlawfully assaulted may, in defense, repel force by force, the degree of which depends on the character of the assault. State v. Goering, 106 Iowa, 636, 77 N. W. 327.

[87] Post, § 275 et seq.

[88] Post, § 279; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Evers v. People, 3 Hun, 716, 63 N. Y. 625; State v. Nash, 88 N. C. 618; Christian v. State, 96 Ala. 89, 11 So. 338; People v. Lennon, 71 Mich. 298, 38 N. W. 871, 15 Am. St. Rep. 259; People v. Anderson, 44 Cal. 65.

[89] Post, § 279; Lawlor v. People, 74 Ill. 228; State v. Nash, 88 N. C. 618.

[90] Floyd v. State, 36 Ga. 91, 91 Am. Dec. 760, Mikell's Cas. 412; State v. Quin, 3 Brev. (S. C.) 515; Com. v. Ford, 5 Gray (Mass.) 475; Gallagher v. State, 3 Minn. 270; People v. Douglass, 87 Cal. 281, 25 Pac. 417.

abusive language does not amount to an assault,[91] and it will not justify or excuse an assault and battery in return.[92]

One who is assaulted by another, without fault on his part, is not bound to retreat before resorting to measures of self-defense short of taking life or inflicting great bodily harm.[93] Nor is he obliged to wait until he is struck. He may prevent a battery by striking first.[94]

One who is himself the aggressor, or who intentionally provokes an assault, as by the use of abusive language, cannot escape criminal responsibility for blows given him in the course of the difficulty on the ground that they were in self-defense.[95]

213. Resisting Unlawful Arrest.

An unlawful arrest is an assault and battery, and may be resisted by any necessary force short of taking life or inflicting great bodily harm. If such force only as is apparently necessary is employed, the person resisting is not guilty of assault and battery.[96] It is otherwise if the force used is clearly excessive.[97]

[91] Ante, § 198.

[92] State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; Keiser v. State, 71 Ala. 481, 46 Am. Rep. 342; State v. Herrington, 21 Ark. 195; Nash v. State, 2 Tex. App. 362; Crosby v. People, 137 Ill. 325, 27 N. E. 49; Steffy v. People, 130 Ill. 98, 22 N. E. 861; Rauck v. State, 110 Ind. 384, 11 N. E. 450; People v. Wright, 45 Cal. 260; State v. Rider, 90 Mo. 54, 1 S. W. 825.

It is otherwise by statute in some states. See Brown v. State, 74 Ala. 42; Spigner v. State, 103 Ala. 30, 15 So. 892; Mitchell v. State, 41 Ga. 527; Wood v. State, 64 Miss. 761, 2 So. 247.

[93] State v. Sherman, 16 R. I. 631, 18 Atl. 1040, Beale's Cas. 341; Gallagher v. State, 3 Minn. 270; post, § 281.

[94] State v. McDonald, 67 Mo. 13; Gallagher v. State, 3 Minn. 270.

[95] Brown v. State, 74 Ala. 42; State v. Shields, 110 N. C. 497, 14 S. E. 779; People v. Miller, 49 Mich. 23, 12 N. W. 895; State v. Maguire, 69 Mo. 197; State v. Bryson, 2 Winst. (N. C.) 86; post, § 281.

[96] Alford v. State, 8 Tex. App. 545; People v. Denby, 108 Cal. 54, 40 Pac. 1051; State v. Belk, 76 N. C. 10; State v. Hooker, 17 Vt. 658; post, § 277.

[97] Galvin v. State, 6 Cold. (Tenn.) 283. And see Com. v. Cooley, 6 Gray (Mass.) 350.

214. Defense of Property.

While a person cannot take another's life or inflict great bodily harm in defense of his property, except when it is necessary to prevent a felony attempted by violence or surprise,[98] he may use any force short of this that may reasonably seem to be necessary in defense of his property, real or personal.[99] If unnecessary force is used, it is an assault and battery.[100]

By the weight of authority, if a person is in peaceable possession of another's property, though his possession may be wrongful, the owner cannot resort to violence in order to regain possession, but he must resort to the machinery of the law. A man, however, may use necessary force to regain *momentarily* interrupted possession of his property, as where another wrongfully takes it in his presence, and refuses to give it back.[101]

A person may lawfully eject another from his premises, after requesting him to leave, if he has no right to remain, and he may use such force in doing so as may be reasonably necessary without being guilty of an assault and battery.[102] But he is guilty if he uses unnecessary force.[103]

[98] Post, § 286.

[99] People v. Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151; Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, Beale's Cas. 353; Roach v. People, 77 Ill. 25; People v. Flanagan, 60 Cal. 2, 44 Am. Rep. 52; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143; State v. Austin, 123 N. C. 749, 31 S. E. 731.

[100] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; State v. Morgan, 3 Ired. (25 N. C.) 186, Mikell's Cas. 447; Montgomery v. Com., 98 Va. 840, 36 S. E. 371; Com. v. Goodwin, 3 Cush. (Mass.) 154; State v. Kennedy, 20 Iowa, 569; Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, Beale's Cas. 353.

[101] Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, Beale's Cas. 353. And see Rex v. Milton, Mood. & M. 107; State v. Dooley, 121 Mo. 591, 26 S. W. 558; Com. v. Lynn, 123 Mass. 218; Com. v. Kennard, 8 Pick. (Mass.) 133; State v. Elliot, 11 N. H. 540; Anderson v. State, 6 Baxt. (Tenn.) 608, Mikell's Cas. 449.

[102] Com. v. Clark, 2 Metc. (Mass.) 23; Long v. People, 102 Ill. 331; People v. Foss, 80 Mich. 559, 45 N. W. 480, 20 Am. St. Rep. 532.

[103] Thus, it is an assault and battery to kick a person in ejecting him from a house. Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347.

Employes of railroad companies and other carriers are not guilty of assault and battery in ejecting trespassers, or persons violating reasonable regulations, from the cars or stations, if no unnecessary force is used.[104] The same is true of innkeepers,[105] and of a sexton ejecting a person from church.[106] If a person has entered by force, or resorts to force after entering, no request to leave is necessary before ejecting him, but it is otherwise if the entry was peaceable.[107]

An assault with intent to kill is not justifiable in defense of property merely. The law in this respect must be the same as in homicide.[108]

215. Defense of Others.

It is well settled that a parent has the right to use necessary force in defense of his child, and *vice versa*.[109] The same is true of husband and wife,[110] brothers and sisters,[111] and master and servant.[112] The circumstances, however, must be such that

See, also, Long v. People, 102 Ill. 331; Com. v. Dougherty, 107 Mass. 250; Montgomery v. Com., 98 Va. 840, 36 S. E. 371.

[104] Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; State v. Overton, 24 N. J. Law, 435, 61 Am. Dec. 671; People v. Jillson, 3 Park. Cr. R. (N. Y.) 234; State v. Goold, 53 Me. 279.

[105] State v. Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573.

[106] Com. v. Dougherty, 107 Mass. 247.

[107] State v. Burke, 82 N. C. 551; State v. Woodward, 50 N. H. 527.

[108] State v. Gilman, 69 Me. 163, 31 Am. Rep. 257; State v. Morgan, 3 Ired. (25 N. C.) 186, Mikell's Cas. 447; Reg. v. Sullivan, Car. & M. 209. See post, § 286.

[109] Campbell v. Com., 88 Ky. 402, 11 S. W. 290, 21 Am. St. Rep. 348; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173, Mikell's Cas. 433; Crowder v. State, 8 Lea (Tenn.) 669; Com. v. Malone, 114 Mass. 295; post, § 288.

A father may defend his daughter against an assault by her husband. Campbell v. Com., supra.

[110] Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630.

[111] State v. Melton, 102 Mo. 683, 15 S. W. 139.

[112] Pond v. People, 8 Mich. 150; Orton v. State, 4 G. Greene (Iowa) 140.

the person defended would have a right to use the force in his own defense. For example, he must not be the aggressor.[113] The right to defend others is further considered in treating of homicide.[114]

216. Effect of Consent in General.

An act does not constitute an assault, or an assault and battery, if the person on or against whom it is committed freely consents to the act, provided he or she is capable of consenting, and the act is one to which consent may be given, and the consent is not obtained by fraud.[115] Thus, it has been held that a person who whips another with a switch, at his request or with his consent, is not guilty of an assault and battery.[116] The same is true of injuries received in friendly boxing matches, foot ball, and other lawful games and sports.[117] An attempt to procure an abortion by the use of instruments or drugs is not an assault upon the woman, if she consents.[118]

217. Fighting and Breaches of the Peace.

By the decided weight of authority, a person cannot consent to a breach of the peace or to a beating which may result in

[113] State v. Melton, 102 Mo. 683, 15 S. W. 139; Crowder v. State, 8 Lea (Tenn.) 669.

[114] Post, § 288. Strangers may interfere to prevent an assault or an unlawful arrest or detention. Reg. v. Tooley, 2 Ld. Raym. 1296.

[115] Reg. v. Wollaston, 12 Cox, C. C. 180; Reg. v. Clarence, 16 Cox, C. C. 511, 22 Q. B. Div. 23, Beale's Cas. 438; Reg. v. Coney, 8 Q. B. Div. 534, Mikell's Cas. 70; State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190, Mikell's Cas. 68; Champer v. State, 14 Ohio St. 437, Mikell's Cas. 69; Duncan v. Com., 6 Dana (Ky.) 295.

[116] State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190, Mikell's Cas. 68.

[117] Fost. C. L. 260; Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, Beale's Cas. 148.

[118] State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248.

serious injury. And it has been held, therefore, both in England and in this country, that if persons engage in a fight by agreement, whether a prize fight or not, their consent does not prevent each from being guilty of an assault and battery upon the other.[119]

"The principle as to consent," said Stephen, J., in an English case, "seems to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defense to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public, as well as to the person injured. The injuries given and received in prize fights are injurious to the public, both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because prize fights are disorderly exhibitions, mischievous on many grounds. Therefore, the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults."[120]

While this view is now well established, it does not seem sound, and there is at least one decision to the contrary.[121] The proper view would seem to be that the parties in such a case are not guilty of assault and battery, but merely of a breach of the peace, if of any offense, and the indictment should be for the breach of the peace.[122]

[119] Reg. v. Coney, 8 Q. B. Div. 534, 15 Cox, C. C. 46, Mikell's Cas. 70; Reg. v. Lewis, 1 Car. & K. 419; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, Beale's Cas. 148; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630; State v. Newland, 27 Kan. 764; King v. State, 4 Tex. App. 54, 30 Am. Rep. 160.

[120] Reg. v. Coney, 8 Q. B. Div. 534, 15 Cox, C. C. 46, Mikell's Cas. 70.

[121] Champer v. State, 14 Ohio St. 437, Mikell's Cas. 69. And see the dictum in State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190, Mikell's Cas. 68.

[122] See Rex v. Billingham, 2 Car. & P. 234; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Champer v. State, supra.

218. Submission through Fear.

Consent must be distinguished from mere submission. Submission to an act through fear is not consent. Thus, even if it is not an assault to attempt to have connection with a child of tender years with her consent, it is otherwise if she submits under the influence of fear, or because she feels herself in the power of the man.[123]

219. Persons Incapable of Consenting.

In England it has been held that an attempt to have connection with a girl of tender years with her consent is not an assault, even though she may be too young to understand the nature of the act, and though her consent would be no defense on an indictment for rape.[124]

In this country, however, the decisions are to the contrary. A child under ten years of age, or in some states under the age of twelve, or even more, is not capable of consenting to sexual intercourse, and consent is no defense on a charge of assault with intent to rape.[125] It has even been held that, where a statute punishes as rape carnal knowledge of a female under the age

[123] Reg. v. Woodhurst, 12 Cox, C. C. 443; Reg. v. Day, 9 Car. & P. 722.

[124] Reg. v. Read, 2 Car. & K. 957; 1 Den. C. C. 377 (where the child was under nine); Reg. v. Woodhurst, 12 Cox, C. C. 443; Reg. v. Day, 9 Car. & P. 722; Reg. v. Martin, 9 Car. & P. 213; Reg. v. Johnson, Leigh & C. 632, 10 Cox, C. C. 114.

[125] People v. McDonald, 9 Mich. 150; Com. v. Nickerson, 5 Allen (Mass.) 518, Mikell's Cas. 75; People v. Stewart, 85 Cal. 174, 24 Pac. 722; State v. Miller, 42 La. Ann. 1186, 8 So. 309, 21 Am. St. Rep. 418; Lawrence v. Com., 30 Grat. (Va.) 845; People v. Stewart, 85 Cal. 174, 24 Pac. 722; Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747; Singer v. People, 13 Hun (N. Y.) 418.

In Com. v. Nickerson, 5 Allen (Mass.) 518, Mikell's Cas. 75, it was held that a child of nine years was not competent to consent to a forcible transfer of him to a stranger from the custody of his father, and that such consent was no defense on a prosecution for assault and battery upon him in making the transfer.

of sixteen or eighteen with her consent, consent is no defense to a charge of assault with intent to rape.[126] To attempt to have intercourse with a woman who is asleep, or who is insensible through drunkenness or drugs, is an assault.[127]

220. Consent Induced by Fraud.

Whether consent to an act of force will prevent it from being an assault and battery, when the consent is induced by fraud, is not clear, and the decisions are conflicting. It is no doubt safe to say that if a man or woman consents to an act, understanding its nature, the consent will prevent the act from being an assault and battery, notwithstanding it is induced by fraud.[128] But where a person is induced to consent to an act of a particular nature, and the act done is of a different nature, the consent is no defense.[129]

Thus, where a young woman, though of an age to be competent to consent to sexual intercourse, submitted to intercourse with a physician by whom she was being treated, but was ignorant of the nature of the act, believing in good faith, as he represented, that he was treating her professionally, it was held that he was guilty of an assault. Wilde, J., said that what the girl consented to "was something wholly different from that which was done, and therefore, that which was done was done without her consent."[130]

[126] State v. Rollins, 8 N. H. 550; Hadden v. People, 25 N. Y. 373; Murphy v. State, 120 Ind. 115, 22 N. E. 106; People v. Goulette, 82 Mich. 36, 45 N. W. 1124.

[127] Reg. v. Camplin, 1 Den. C. C. 89, 1 Cox, C. C. 220. See post, § 295.

[128] Reg. v. Clarence, 16 Cox, C. C. 511, 22 Q. B. Div. 23, Beale's Cas. 438.

[129] Reg. v. Case, 4 Cox, C. C. 220, Beale's Cas. 435. And see Richie v. State, 58 Ind. 355, where the sexual act was performed in so brutal a manner as to amount to an assault and battery, though the woman consented.

[130] Reg. v. Case, 4 Cox, C. C. 220, Beale's Cas. 435.

If a person by fraud induces another to take a poisonous or otherwise deleterious drug, in ignorance of its nature, and injury results, the consent does not bar an indictment for assault and battery.[131]

There has been a difference of opinion as to whether a man who has intercourse with a woman with her consent, and communicates a venereal disease, is guilty of an assault because of her ignorance of the fact that he is diseased.[132]

By the weight of authority, a man who has intercourse with a woman with her consent by fraudulently personating her husband is not guilty of rape,[133] and, where this is the case, one who attempts to do so is not guilty of an assault with intent to rape.[134]

II. Mayhem.

221. Definition.—Mayhem at common law is "the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary."[135] The offense has been extended by statute so as to include other injuries.

So, in Rex v. Rosinski, 1 Mood. C. C. 19, Mikell's Cas. 74, and Bartell v. State, 106 Wis. 342, 82 N. W. 142, it was held that, for a physician to make a female patient strip naked, by pretending that he could not otherwise judge of her illness, and taking off her clothes himself, was an assault.

In Rex v. Nichol, Russ. & R. 130, a schoolmaster who took indecent liberties with a female scholar, without her consent, though she did not resist, was held guilty of an assault. See, also, Reg. v. Lock, L. R. 2 C. C. 10.

[131] Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350, Beale's Cas. 451; State v. Monroe, 121 N. C. 677, 28 S. E. 547.

[132] That it was an assault was held in Reg. v. Bennett, 4 Fost. & F. 1105, and in Reg. v. Sinclair, 13 Cox, C. C. 28. But in a later case the contrary was held, in the case of husband and wife, by nine judges out of thirteen. Reg. v. Clarence, 16 Cox, C. C. 511, 22 Q. B. Div. 23, Beale's Cas. 438, Mikell's Cas. 514.

[133] Post, § 297.

[134] Wyatt v. State, 2 Swan (Tenn.) 394; State v. Brooks, 76 N. C. 1.

[135] 4 Bl. Comm. 205. "Such hurt of any part of a man's body, where-

222. Nature of the Offense.

As this definition shows, whether or not an injury was mayhem at common law did not depend so much upon whether the injury was a serious one or not, as upon the character of the member injured. Cutting off or disabling or weakening a man's hand, or finger, or foot, or striking out his eye or a fore tooth, were mayhems at common law, but it was not mayhem to cut off his ear or nose, as this did not weaken, but merely disfigured him.[136] Castration is mayhem at common law.[137] In most states this offense has been extended by statute to include injuries merely disfiguring a person.[138] Consent of the person maimed is no defense. If a man procures another to cut off his hand, both are guilty.[139]

223. Intent—Malice.

Both at common law and under the statutes, the injury must be done willfully and maliciously;[140] but it is not necessary that it shall be premeditated. It may be inflicted in a sudden affray.[141] To injure another, however, in necessary self-defense

by he is rendered less able, in fighting, to defend himself, or to annoy his adversary." 1 Hawk. P. C. c. 15, § 1, Beale's Cas. 419.

[136] 4 Bl. Comm. 205; 1 East, P. C. 393; Reg. v. Hagan, 8 Car. & P. 167; Com. v. Newell, 7 Mass. 245; State v. Johnson, 58 Ohio St. 417, 51 N. E. 40.

[137] 4 Bl. Comm. 206; People v. Schoedde, 126 Cal. 373, 58 Pac. 859.

[138] See State v. Girkin, 1 Ired. (N. C.) 121; Foster v. People, 50 N. Y. 598, Mikell's Cas. 529; Godfrey v. People, 63 N. Y. 207; State v. Skidmore, 87 N. C. 509; State v. Jones, 70 Iowa, 505, 30 N. W. 750.

To put out an eye by throwing acid is mayhem. State v. Holmes, 4 Pen. (Del.) 196, 55 Atl. 343. The private parts of females are protected. Kitchens v. State, 80 Ga. 810, 7 S. E. 209; Moore v. State, 4 Chand. (Wis.) 168, 3 Pin. 373.

[139] Wright's Case, Co. Litt. 127a, Beale's Cas. 145.

[140] State v. Girkin, 1 Ired. (N. C.) 121; Molette v. State, 49 Ala. 18; Werley v. State, 11 Humph. (Tenn.) 172; Terrell v. State, 86 Tenn. 523, 8 S. W. 212.

[141] State v. Simmons, 3 Ala. 497; State v. Girkin, 1 Ired. (N. C.) 121;

against an attempt to kill or do great bodily harm, is not mayhem.[142]

Some of the statutes expressly require an intent to inflict the particular injury,[143] and some require lying in wait, or some other act showing premeditation and deliberation.[144]

III. False Imprisonment.

224. Definition.—False imprisonment is the unlawful detention of a person. Like an assault, which it generally includes, it is punishable as a misdemeanor at common law.[145] In most states it is expressly punished by statute.

225. The Detention.

Both at common law, and generally under the statutes, every confinement of a person is an imprisonment, whether, as was said by Blackstone, it be in the common prison, or in a private house, or in the stocks, or by forcibly detaining one in the public streets.[146]

State v. Jones, 70 Iowa, 505, 30 N. W. 750; State v. Bloedow, 45 Wis. 279; Terrell v. State, 86 Tenn. 523, 8 S. W. 212; People v. Wright, 93 Cal. 564, 29 Pac. 240.

[142] State v. Danforth, 3 Conn. 112.

[143] See State v. Evans, 1 Hayw. (N. C.) 325; State v. Simmons, 3 Ala. 497; Mollette v. State, 49 Ala. 18; Carpenter v. People, 81 Colo. 284, 72 Pac. 1072; Slattery v. State, 41 Tex. 619; Davis v. State, 22 Tex. App. 45, 2 S. W. 630.

The intent is to be presumed from the act of maiming unless the contrary appears. State v. Hair, 37 Minn. 351, 34 N. W. 893; U. S. v. Gunther, 5 Dak. 234, 38 N. W. 79; People v. Wright, 93 Cal. 564, 29 Pac. 240.

[144] See Godfrey v. People, 63 N. Y. 207; State v. Holmes, 4 Pen. (Del.) 196, 55 Atl. 343.

[145] 3 Bl. Comm. 127; 4 Bl. Comm. 218; 1 East, P. C., c. IX, pp. 428, 429, Mikell's Cas. 534; Com. v. Blodgett, 12 Metc. (Mass.) 56; Campbell v. State, 48 Ga. 353.

[146] 3 Bl. Comm. 127; 2 Inst. 589; State v. Lunsford, 81 N. C. 528; People v. Wheeler, 73 Cal. 252, 14 Pac. 796.

Usually a false imprisonment includes an assault or assault and battery, but this is not necessarily the case. There may be an imprisonment by words alone, as where an officer tells a person that he is under arrest, and the person submits;[147] but words alone are not sufficient to constitute an assault and battery, or even an assault.[148]

To constitute a false imprisonment, the means of detention are not material. There need be no actual force, nor even a touching of the person. As stated above, if an officer tells a person that he arrests him, and the person submits, there is a detention, and, if the arrest is unlawful, a false imprisonment.[149] When there is no actual force, the party must reasonably apprehend force in case he does not submit.[150] And he must submit.[151] It is also necessary that the officer or other person shall intend a detention or restraint, and that the other party shall so understand.[152] There can be no imprisonment unless it is against the will of the party imprisoned.[153]

The place of imprisonment is not material. As was stated above, it may be in a prison, or in a private house. Or it may be by merely detaining a person against his will in the street, or in a field, or in any other place whatever.[154]

[147] Pike v. Hanson, 9 N. H. 493; Grainger v. Hill, 4 Bing. N. C. 212; note 149, infra.

[148] Ante, § 198.

[149] Pike v. Hanson, 9 N. H. 493; Grainger v. Hill, 4 Bing. N. C. 212; Smith v. State, 7 Humph. (Tenn.) 43, Mikell's Cas. 534. And see State v. Lunsford, 81 N. C. 528; Jones v. State, 8 Tex. App. 365.

[150] Smith v. State, 7 Humph. (Tenn.) 43, Mikell's Cas. 534; McClure v. State, 26 Tex. App. 102, 9 S. W. 353.

[151] Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089; Hill v. Taylor, 50 Mich. 549, 15 N. W. 899.

[152] Limbeck v. Gerry, 15 Misc. (N. Y.) 663, 39 N. Y. Supp. 95.

[153] Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; State v. Lunsford, 81 N. C. 528.

[154] 3 Bl. Comm. 127; People v. Wheeler, 73 Cal. 252, 14 Pac. 796; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250.

226. Unlawfulness of Detention.

To constitute a *false* imprisonment, the detention must be unlawful. In other words, it must be without sufficient lawful authority.[155]

There is no false imprisonment where an officer or private individual makes a lawful arrest, or where a jailer detains a prisoner lawfully committed to his custody. If, however, an arrest is made without a warrant when a warrant is necessary, the arrest and detention are unlawful, and constitute a false imprisonment.[156]

The same is true if a warrant or commitment is void on its face, either because it was issued by a person having no authority, or because it is not in the form required by law, for a warrant or commitment that is void on its face is no protection.[157]

False imprisonment may also arise by executing a lawful warrant or process at an unlawful time, as on Sunday, when a statute prohibits its execution on that day.[158]

A parent or teacher, or one in *loco parentis,* is not guilty of false imprisonment in restraining his child or pupil, if the restraint is not clearly unreasonable and immoderate,[159] but it may be so clearly immoderate and cruel as to render him guilty.[160]

Abuse of authority, or of process that is valid, may render an officer guilty of a false imprisonment, as where he detains the person arrested for an unreasonable time before presenting him for examination or trial as required by law,[161] or wrong-

[155] 3 Bl. Comm. 127; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; Sewell v. State, 61 Ga. 496; Barber v. State, 13 Fla. 675; Cargill v. State, 8 Tex. App. 431; Beville v. State, 16 Tex. App. 70.

[156] State v. Hunter, 106 N. C. 796, 11 S. E. 366.

[157] Winchester v. Everett, 80 Me. 535, 15 Atl. 596, 6 Am. St. Rep. 228.

[158] 3 Bl. Comm. 127.

[159] Johnson v. State, 2 Humph. (Tenn.) 283; Com. v. Randall, 4 Gray (Mass.) 36.

[160] Fletcher v. People, 52 Ill. 395; Com. v. Randall, 4 Gray (Mass.) 36.

[161] Anderson v. Beck, 64 Miss. 113, 8 So. 167; Twilley v. Perkins, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408.

fully refuses to take bail, or to allow the prisoner to obtain his release on bail,[162] or unlawfully detains a prisoner after he has become entitled to be discharged.[163]

227. Intent—Malice.

All persons are chargeable with a knowledge of the law, and, if a person unlawfully arrests or detains another with full knowledge of the facts, he is guilty of a false imprisonment, without regard to his motive. He must, of course, intend a detention, but his motive is entirely immaterial. Malice is not at all essential. Thus, a police officer or jailer is indictable for false imprisonment if he arrests or detains another under a warrant or commitment that is void on its face, though he may act in good faith, and in the belief that it is valid.[164]

IV. Kidnapping.

228. Definition.—Kidnapping, at common law, is the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another.[165] Statutory definitions are somewhat different.

229. Nature of the Offense.

Both by the Jewish law and by the civil law, kidnapping was punished by death, but by the English common law it was merely a misdemeanor punishable by fine, imprisonment, and pillory.[166]

The offense is very generally punished by statute in this country, but it is not necessary under the statutes that the per-

[162] Manning v. Mitchell, 73 Ga. 660. Compare Cargill v. State, 8 Tex. App. 431.

[163] Bath v. Metcalf, 145 Mass. 274, 14 N. E. 133, 1 Am. St. Rep. 455.

[164] See 12 Am. & Eng. Enc. Law (2d Ed.) 726.

[165] 4 Bl. Comm. 219; 1 East, P. C., c. IX, § 3, Mikell's Cas. 534.

[166] 4 Bl. Comm. 219; Designy's Case, T. Raym. 474, Mikell's Cas. 535.

son kidnapped shall be taken into another country,[167] nor is it necessary that the person kidnapped be a resident, for all purposes, of the place from which he is taken.[167a] While the element of force is required by the definition, actual force is not always necessary. Fraud or intimidation may suffice.[168] There is no kidnapping if the person taken freely consents to the taking, provided he or she is capable of consenting, and there is no fraud.[169] But a child of very tender years is not competent to give a valid consent.[170] The same is true of a person who is too drunk to consent.[171] Consent induced by fraud, or by intimidation and duress, is not a valid consent, and is therefore no defense.[172] A parent may be guilty if he have no right to the child's custody,[172a] but a parent having lawful custody of his minor child cannot be guilty of kidnapping her.[172b]

[167] See State v. Rollins, 8 N. H. 550.

[167a] A person may be kidnapped from any place where he has a right to be. Wallace v. State, 147 Ind. 621, 47 N. E. 13.

[168] See Moody v. People, 20 Ill. 315; Payson v. Macomber, 3 Allen (Mass.) 69; People v. De Leon, 109 N. Y. 226, 16 N. E. 46; Hadden v. People, 25 N. Y. 372; Schnicker v. People, 88 N. Y. 192.

To get a sailor intoxicated for the purpose of getting him on board a vessel without his consent, and taking him on board while in that condition, is kidnapping, under the New York statute. Hadden v. People, supra.

[169] 1 Whart. Crim. Law, § 590; Eberling v. State, 136 Ind. 117, 35 N. E. 1023.

So where the parent entitled to the custody of a child of tender years consents. John v. State, 6 Wyo. 203, 44 Pac. 51.

[170] State v. Rollins, 8 N. H. 550; State v. Farrar, 41 N. H. 53.

[171] Hadden v. People, 25 N. Y. 372.

[172] Moody v. People, 20 Ill. 315; People v. De Leon, 109 N. Y. 226, 16 N. E. 46; note 168, supra.

[172a] State v. Farrar, 41 N. H. 53; Com. v. Nickerson, 5 Allen (87 Mass.) 518; In re Peck, 66 Kan. 693, 72 Pac. 265. Contra, Burns v. Com., 129 Pa. 138, 18 Atl. 756.

[172b] In re Marceau, 32 Misc. 217, 65 N. Y. Supp. 717; John v. State, 6 Wyo. 203, 44 Pac. 51.

V. Abduction.

230. Definition.—In England and in this country, statutes have been enacted punishing as abduction the taking or detaining of women against their will, with intent to marry or defile them, or to cause them to be married or defiled, or the alluring, taking away, or detaining of girls under a certain age without the consent of their parent or other person having lawful care or charge of them, or the taking or enticing of girls for the purpose of prostitution. The statutes vary in the different jurisdictions.

231. Particular Statutes—English Statutes.

By the statute of 3 Hen. VII. c. 2, it was enacted that if any person should, for lucre, take any woman, being maid, widow, or wife, and having substance either in goods or lands, being heir apparent to her ancestors, contrary to her will, and afterwards she should be married to such a wrongdoer, or by his consent to another, or defiled, such person, his procurers and abettors, and such as should knowingly receive such woman, should be deemed guilty of felony. This statute was afterwards repealed, and new statutes enacted. The present statute punishes (1) any person who, from motives of lucre, shall take away or detain, against her will, any woman of any age, having certain property or expectancies, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; (2) or who, with such intent, shall fraudulently allure, take away, or detain 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; (3) or who shall by force take away or detain against her will any woman of any age, with such intent; (4) or who shall unlawfully take or cause to be taken any unmarried girl under the age of sixteen years, out of the possession and against the will of her father or mother, or of any person having the lawful care or charge of

her; (5) or who shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, 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, or any person who shall with such intent, and with knowledge of the facts, receive or harbor any such child. In the section last mentioned there is an exception in favor of persons claiming to be the father of an illegitimate child.[173]

Statutes in This Country.—In this country the statutes vary greatly in the different states. Some of them embrace provisions contained in the English statute above set out. Others are very different. It would serve no useful purpose to set out these statutes, and no general statement can be made as to their provisions. The student therefore must consult the statute of his own state.[174]

232. Construction of the Statutes.

Under a statute punishing any person who shall unlawfully take or cause to be taken any unmarried girl under a certain age out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, the taking must be a taking under the power, charge, or protection of the taker.[175] And generally under the statutes

[173] 24 & 25 Vict. c. 100, §§ 53-56.

[174] As to these statutes generally, see 1 Am. & Eng. Enc. Law (2d Ed.) 173 et seq.

[175] Steph. Dig. Crim. Law, art. 262. Where two girls under sixteen years of age run away from home together, neither is guilty of the abduction of the other. Reg. v. Meadows, 1 Car. & K. 399, Dears. C. C. 161, note.

A man is not bound to return to her father's custody a girl who, without any inducement on his part, has left her home, and has come to him; but if, at any time, he has attempted to induce her to leave home, without her parents' consent, and she afterwards does so, he is

there must be some taking or enticing, and not merely a receiving or harboring.[176] It is generally immaterial whether the girl is taken with her consent or at her own suggestion, or against her will.[177]

The fact that the taker believes in good faith that the girl is above the age mentioned in the statute is no defense;[178] but it seems to be necessary that he shall know or have reason to believe that she is under the lawful care or charge of her father, mother, or some other person.[179] It also seems that there must be some improper motive.[180] Though it is immaterial whether

guilty of abducting her, even though he disapproves of the act at the particular time at which she gives effect to his previous persuasions. Reg. v. Olifier, 10 Cox, C. C. 402. See, also, People v. Parshall, 6 Park. Cr. R. (N. Y.) 129.

[176] Reg. v. Olifier, 10 Cox, C. C. 402 (preceding note); Reg. v. Hibbert, L. R. 1 C. C. 184, 11 Cox, C. C. 246; Reg. v. Green, 3 Fost. & F. 274; People v. Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236; People v. Parshall, 6 Park. Cr. R. (N. Y.) 129.

[177] Where a girl under sixteen asked a man, by whom she had been seduced, to elope with her, and he did so, it was held that he was guilty of abduction. Reg. v. Biswell, 2 Cox, C. C. 279. See, also, Reg. v. Robins, 1 Car. & K. 456; Reg. v. Kipps, 4 Cox, C. C. 167; People v. Cook, 61 Cal. 478; Tucker v. State, 8 Lea (Tenn.) 633; Griffin v. State, 109 Tenn. 17, 70 S. W. 61; State v. Stone, 106 Mo. 1, 16 S. W. 890; State v. Bobbst, 131 Mo. 328, 32 S. W. 1149; State v. Bussey, 58 Kan. 679, 50 Pac. 891; Gould v. State (Neb.) 99 N. W. 541.

It is otherwise under some statutes. See Lampton v. State (Miss.) 11 So. 656; State v. Hromadko, 123 Iowa, 665, 99 N. W. 560.

[178] Reg. v. Prince, L. R. 2 C. C. 154, 13 Cox, C. C. 138, Mikell's Cas. 173; Reg. v. Robins, 1 Car. & K. 456; Reg. v. Olifier, 10 Cox, C. C. 402; Reg. v. Mycock, 12 Cox, C. C. 28; People v. Fowler, 88 Cal. 136, 25 Pac. 1110; State v. Johnson, 115 Mo. 480, 22 S. W. 463. Contra, Mason v. State, 29 Tex. App. 24, 14 S. W. 71.

[179] Steph. Dig. Crim. Law, art. 262. Thus, where a man met a girl under sixteen in the street, and got her to stay with him for several hours, during which time he seduced her, and then took her back to the place where he found her, and she returned home, but he was not aware at the time that she had a father or mother living, it was held that he was not guilty of abduction. Reg. v. Hibbert, L. R. 1 C. C. 184, 11 Cox, C. C. 246. See, also, Reg. v. Green, 3 Fost. & F. 274.

[180] Thus, in Reg. v. Tinkler, 1 Fost. & F. 513, Beale's Cas. 285, where

the purpose be accomplished.[180a] Under some of the statutes it is immaterial whether the girl was previously chaste.[180b]

The expression "taking out of the possession" means taking the girl to some place where the person in whose charge she is cannot exercise control over her, for some purpose inconsistent with the objects of such control.[181] Where a lady persuaded a girl under sixteen to leave her father's house and come to her house for a short time, for the purpose of going to the play with her, it was held that there was no abduction.[182] A taking for a short time only may amount to an abduction. Thus, where a man persuaded a girl to leave her father's house and sleep with him for three nights, and then sent her back, it was held an abduction.[183]

When the taking is required, as in the English statute, to be against the will of the father or other person having the care or charge of the girl, the taking must be without his consent. But it is not necessary, unless expressly required by the statute,

the defendant was indicted for the abduction of a girl under sixteen, and it did not appear that he had any improper motive, the jury was directed to acquit him if they thought he merely wished to have the child to live with him, and honestly believed that he had a right to the custody of the child, although he might have had no such right. Compare, however, Reg. v. Booth, 12 Cox, C. C. 231.

[180a] It does not matter that sexual intercourse did not follow the taking. State v. Bobbst, 131 Mo. 328, 32 S. W. 1149; State v. Rorebeck, 158 Mo. 130, 59 S. W. 67.

[180b] State v. Bobbst, 131 Mo. 328, 32 S. W. 1149.

Especially if she was chaste as to all but the abductor. South v. State, 97 Tenn. 496, 37 S. W. 210.

In some states chastity is required. Bradshaw v. People, 153 Ill. 156, 38 N. E. 652.

[181] Steph. Dig. Crim. Law, art. 262. See Slocum v. People, 90 Ill. 274.

A girl who is away from her home is still in the custody or possession of her father, if she intends to return to her home. Reg. v. Mycock, 12 Cox, C. C. 28.

[182] Steph. Dig. Crim. Law, p. 199; Reg. v. Timmins, Bell, C. C. 276, 8 Cox, C. C. 401.

[183] Reg. v. Timmins, Bell, C. C. 276, 8 Cox, C. C. 401. See, also, Reg. v. Baillie, 8 Cox, C. C. 238; South v. State, 97 Tenn. 496, 37 S. W. 210.

to show a trespass or force, or anything of that nature, in the taking. Persuasion or enticement is sufficient.[184]

If the consent of the person from whose possession the child is taken is obtained by fraud, the taking is against his will, within the meaning of the statute.[185]

Enticement for the Purpose of Prostitution or Concubinage. —It has been held that, to constitute the statutory offense of enticing or taking away an unmarried female "for the purpose of prostitution," the enticement or abduction must be for the purpose of making a "common prostitute" of the woman, and that a man is not guilty of this offense where he entices or abducts a female for the purpose of illicit intercourse with himself alone, for the term "prostitution" imports the practice of a female offering her body to an indiscriminate intercourse with men,—the common lewdness of a female.[186]

[184] Reg. v. Frazer, 8 Cox, C. C. 446; Reg. v. Hopkins, Car. & M. 254; Reg. v. Biswell, 2 Cox, C. C. 279; Reg. v. Kipps, 4 Cox, C. C. 167; Reg. v. Robb, 4 Fost. & F. 59; State v. Gordon, 46 N. J. Law, 432; People v. Carrier, 46 Mich. 442, 9 N. W. 487; State v. Johnson, 115 Mo. 480, 22 S. W. 463; State v. Chisenhall, 106 N. C. 676, 11 S. E. 518; Mason v. State, 29 Tex. App. 24, 14 S. W. 71; State v. Jamison, 38 Minn. 21, 35 N. W. 712; State v. Bussey, 58 Kan. 679, 50 Pac. 891.

[185] Thus, when a man induced a girl's father to permit her to go away by falsely pretending that he would find a place for her, he was held guilty of abduction. Reg. v. Hopkins, Car. & M. 254.

See, also, People v. Lewis, 141 Cal. 543, 75 Pac. 189.

[186] State v. Stoyell, 54 Me. 24, 89 Am. Dec. 716. In this case, a statute punished any person who should fraudulently and deceitfully entice or take away an unmarried female "for the purpose of prostitution at a house of ill fame, assignation, or elsewhere," etc. The defendant had, by false representations, induced a female to go with him to a neighboring town, where, having induced partial intoxication, he had repeated sexual intercourse with her. It was held that this was not within the statute, as his purpose was not to make her a common prostitute, but to have intercourse with her himself only. See, also, Haygood v. State, 98 Ala. 61, 13 So. 325; Nichols v. State, 127 Ind. 406, 26 N. E. 839; State v. Rorebeck, 158 Mo. 130, 59 S. W. 67.

Detention for the purpose of prostitution does not occur where a stepfather detains his stepdaughter in his own house for the purpose

When the statute punishes a taking for the purpose of concubinage, this purpose must be shown.[187] The courts, however, do not agree as to what constitutes a taking for the purpose of concubinage. Some of them require more than a single act of intercourse, while others do not.[188] In some jurisdictions the term has been held to apply to any lewd intercourse between the parties.[189]

VI. Homicide.

(A) The Homicide.

233. Definition.—Homicide is any killing of a human being.[189a] It is either—

1. Justifiable,

2. Excusable, or

3. Felonious. And a felonious homicide is either—

(a) Murder, or

(b) Manslaughter.

To constitute a homicide, and to render a person accused responsible at all, aside from any question as to whether he is guilty of murder or manslaughter, or whether the homicide is justifiable or excusable,

1. The killing must be of a living human being, and not of a child unborn. Any human being is the subject of a homicide.

of having intercourse with her himself. Bunfild v. People, 154 Ill. 640, 39 N. E. 565.

[187] State v. Gibson, 108 Mo. 575, 18 S. W. 1109.

[188] See State v. Gibson, 111 Mo. 92, 19 S. W. 980; State v. Johnson, 115 Mo. 480, 22 S. W. 463; State v. Wilkinson, 121 Mo. 485, 26 S. W. 366; State v. Rorebeck, 158 Mo. 130, 59 S. W. 67. See, also, State v. Richardson, 117 Mo. 586, 23 S. W. 769; Slocum v. People, 90 Ill. 274; Henderson v. People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391; State v. Overstreet, 43 Kan. 299, 23 Pac. 572; State v. Bussey, 58 Kan. 679, 50 Pac. 891.

[189] People v. Cummons, 56 Mich. 544, 23 N. W. 215.

[189a] It must be done by man, for "if it be done by an ox, a dog, or other thing, it is not properly termed homicide." Bract. f. 120b, Mikell's Cas. 551.

2. The means by which the death is caused are immaterial.

3. The death must have been caused by the act or omission of the accused. If this is so, he is none the less responsible because other causes contributed.

4. Death must happen within a year and a day after the injury.

Mode of Treatment.—Every killing of a human being by a human being is a homicide.[189b] Every homicide, however, is not a crime. It may be justifiable, in which case no fault whatever is imputable to the slayer; or it may be excusable, in which case some fault is imputable to him, though he is not now punished. A homicide which is not justifiable or excusable is felonious. It is murder if committed with malice aforethought, and manslaughter if committed without malice aforethought. Before taking up these different grades or kinds of homicide, it is necessary to deal with those principles of the law of homicide that relate solely to the killing,—principles that determine, not whether a particular homicide was murder or manslaughter, or whether it was justifiable or excusable, but whether there has been any homicide at all. They relate to (1) the subject of a homicide, (2) the manner of causing death, and (3) the relation of cause and effect, or causal connection, between the act or omission of the accused and the death.

234. The Subject of a Homicide.

(*a*) *In General.*—The subject of a homicide must be a living human being. It follows that on a prosecution for murder or manslaughter it is always necessary that it shall appear, either by direct proof or by recognized presumptions, that the deceased was alive at the time when the injury is alleged to have been inflicted.[190]

[189b] "Homicide properly so called, is either against a man's own life, or that of another." 1 Hawk. P. C., c. IX, Mikell's Cas. 551.

[190] 1 Whart. Crim. Law (10th Ed.) § 309; U. S. v. Hewson, 7 Law Rep. 361, Fed. Cas. No. 15,360; Com. v. Harman, 4 Barr (Pa.) 269.

Ordinarily, if it is proved that he was alive shortly before the alleged injury, continuance of life may be presumed.[191]

(*b*) *Infanticide—Unborn Children.*—A child is not a living human being, so as to be the subject of a homicide, until it has been fully born alive, and it is not fully born until an independent circulation has been established.[192]

The destruction of an unborn child, even though it be destroyed in the very process of delivery, is not homicide at all, but, if it is any offense, it is simply a misdemeanor commonly known as "abortion."[193]

According to the better opinion, a child is not fully born, and is not the subject of homicide, until the umbilical cord has been severed, for until then the blood of the child is renovated through the lungs of the mother, and its circulation, therefore, is not independent.[194] It is not enough to show that the child had breathed, for a child may breathe before it has an independent circulation.[195]

In U. S. v. Hewson, supra, a mother was charged with the murder of her child by throwing it overboard from a vessel. It appeared that at the time she was suffering from puerperal fever, and from great mental distress and excitement, and there was some doubt as to whether the child was alive or dead when she threw it overboard. Judge Story charged the jury that she could not be convicted without proof that the child was then alive, and she was acquitted.

[191] Com. v. Harman, supra.

[192] 3 Inst. 50, Mikell's Cas. 553; 1 Hale, P. C. 433, Beale's Cas. 419; 1 Hawk. P. C. c. 31, § 16; Rex v. Enoch, 5 Car. & P. 539; Rex v. Brain, 6 Car. & P. 349, Mikell's Cas. 554; Reg. v. Trilloe, Car. & M. 650; Wallace v. State, 7 Tex. App. 570; Wallace v. State, 10 Tex. App. 255; State v. Winthrop, 43 Iowa, 519, 22 Am. Rep. 257; State v. Prude, 76 Miss. 543, 24 So. 871; Evans v. People, 49 N. Y. 86; Com. v. O'Donohue, 8 Phila. (Pa.) 623.

Bracton says that if the foetus be formed and animated, particularly if it be animated, it is homicide. Fol. 120b, Mikell's Cas. 553.

[193] Post, § 289 et seq.

[194] State v. Winthrop, 43 Iowa, 519, 22 Am. Rep. 257. Some early English cases are to the contrary. Reg. v. Trilloe, Car. & M. 650; Reg. v. Reeves, 9 Car. & P. 25; Rex v. Crutchley, 7 Car. & P. 814.

[195] Rex v. Sellis, 7 Car. & P. 850; Rex v. Enoch, 5 Car. & P. 539. It

It is not necessary that the child shall be fully born before the *injury* is inflicted. If a child is wounded by an instrument, or if a drug is administered, while the child is in its mother's womb, or while it is in process of delivery, and it is fully born alive, and dies *afterwards* as a result of the wound or drug, it is homicide.[196]

(*c*) *Criminal Sentenced to Death.*—A criminal under sentence of death is as much the subject of a felonious homicide as any other person. If he is executed in a way not authorized by law, or by a person not authorized by law to execute him, the homicide is felonious.[197]

And a man is guilty of murder as principal in the second degree or accessary before the fact, according to the circumstances, if he advises or abets a criminal sentenced to death in the commission of suicide.[198]

(*d*) *Alien Enemies.*—An alien enemy is the subject of a felonious homicide. It is not a crime to kill an alien enemy in time of war, and in the actual exercise of war, but, if the killing is not in the actual exercise of war, the homicide is murder or manslaughter, according to the circumstances.[199]

is not necessary to show that the child had breathed, for a child may not breathe for a while after an independent circulation has been established. Rex v. Brain, 6 Car. & P. 349, Mikell's Cas. 554.

[196] 3 Inst. 50; Rex v. Senior, 1 Mood. C. C. 346, 1 Lewin, C. C. 183, note; Clarke v. State, 117 Ala. 1, 23 So. 671.

In Reg. v. West, 2 Car. & K. 784, Mikell's Cas. 565, it was held that if a person, intending to procure an abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state in which it is much less capable of living, and it afterwards dies in consequence of its exposure to the external world, he is guilty of murder.

[197] Post, § 267.

[198] Post, § 250; Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154, Mikell's Cas. 555.

[199] 3 Inst. 50; 1 Hale, P. C. 433, Beale's Cas. 419; State v. Gut, 13 Minn. 341, Mikell's Cas. 87, n.

235. Manner of Causing Death.

(*a*) *In General.*—To render a person responsible for a homicide, it need not have been caused by any particular means. As was said in an early English case: "Murder may be committed without any stroke. The law has not confined the offense to any particular circumstances or manner of killing; but there are as many ways to commit murder as there are to destroy a man, provided the act be done with malice, express or implied."[200]

There are many cases in the reports in which a man has been held responsible for a homicide caused by unusual means, —as, for example, by communicating a venereal disease to a woman in committing rape;[201] by forcibly confining a person, against his will, in an unwholesome and dangerous room;[202] or exposing a helpless person to a contagious disease,[203] inclement weather,[204] or other dangers.[205]

There is no good reason to doubt that a man would be guilty of murder if he should falsely and maliciously accuse another of a capital offense, and by false testimony procure his conviction and execution.[206]

[200] Rex v. Huggins, 2 Ld. Raym. 1574, 1578, 2 Strange, 882, Mikell's Cas. 559. See, also, 1 East, P. C. c. 5, § 13; 1 Hale, P. C. 425, Beale's Cas. 418; 1 Hawk. P. C. c. 13, Mikell's Cas. 556; Nixon v. People, 2 Scam. (Ill.) 267, 269.

"The killing," says Blackstone, "may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome." 4 Bl. Comm. 196.

[201] Reg. v. Greenwood, 7 Cox, C. C. 404, Beale's Cas. 424, Mikell's Cas. 566.

[202] Rex v. Huggins, 2 Ld. Raym. 1574, 2 Strange, 882, Mikell's Cas. 559.

[203] Castill v. Bambridge, 2 Strange, 854, Beale's Cas. 420.

[204] Pult. de Pace, 122, Beale's Cas. 420; Reg. v. Martin, 11 Cox, C. C. 136; Reg. v. Walters, Car. & M. 164; Nixon v. People, 2 Scam. (Ill.) 267.

[205] In U. S. v. Freeman, 4 Mason, 505, Fed. Cas. No. 15,162, Mikell's Cas. 561, the captain of a vessel compelled a seaman to go aloft, when, by reason of debility and exhaustion, he was unable to do so safely, and

(*b*) *Omission to Act.*—The death need not necessarily be caused by a positive act. It may be caused by an omission to act at all, when one is under a legal duty to act. Thus, it is murder or manslaughter, according to the circumstances, if a man causes the death of his helpless wife or child by inexcusable failure to furnish shelter, food, or medical attendance;[207] if a switchman causes the death of a person on a railroad train by inexcusable failure to adjust a switch;[208] or if an employe in a mine causes the death of a fellow miner by neglecting to ventilate the mine, when he is charged with this duty.[209]

(*c*) *Working upon the Feelings—Fright, Grief, etc.*—It has been said that one cannot commit a homicide by working on the feelings of another,—that there must be "some physical or corporeal injury, negative or positive, as a blow, deprivation of necessaries, and the like."[210]

But this statement is apt to mislead, unless properly limited. It is no doubt very true that the law cannot undertake to punish as for homicide, when it is claimed that the death was caused solely by grief or terror, for the death could not be traced to such causes with any degree of certainty.[211]

he fell, and was drowned. It was held that he was responsible for the death, and was guilty of felonious homicide.

In Rex v. Carr, 8 Car. & P. 163, an iron founder who had repaired a cannon with lead in a dangerous manner, so that it burst and killed another, was held responsible for the death.

[206] Reg. v. Macdaniel, 1 Leach, C. C. 44, 1 East, P. C. 333, Beale's Cas. 421.

[207] Reg. v. Conde, 10 Cox, C. C. 547, Beale's Cas. 424; Reg. v. Plummer, 1 Car. & K. 600, 8 Jur. 921; Rex v. Friend, Russ. & R. 20, Beale's Cas. 190; post, §§ 247, 265 d.

[208] State v. O'Brien, 32 N. J. Law, 169, Mikell's Cas. 218.

[209] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170. See, also, U. S. v. Knowles, 4 Sawy. 517, Fed. Cas. No. 15,540, where the captain of a vessel neglected to rescue a seaman who had fallen overboard. And see post, §§ 247, 265.

[210] Per Byles, J., in Reg. v. Murton, 3 Fost. & F. 492, Beale's Cas. 426, note.

[211] Reg. v. Murton, 3 Fost. & F. 492, Beale's Cas. 426, note; Rex v.

Working upon the feelings and fears of another, however, may be the direct cause of physical or corporeal injury resulting in death, and in such a case the person causing the injury may be as clearly responsible for the death as if he had used a knife. In an English case a man struck a woman while she was nursing a child, and the child became frightened, and went into convulsions and died. It was held that if the assault upon the mother caused the child's fright, and this caused the convulsions, and they caused the death, the accused was responsible, and was guilty of manslaughter at least.[212] Many other cases are to be found in the reports.[213] In all such cases

Hickman, 5 Car. & P. 151, Mikell's Cas. 564; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

In East, P. C. c. 5, § 13, it is said: "Working upon the fancy of another, or treating him harshly or unkindly, by which he dies of grief or fear, is not such a killing as the law takes notice of." See, also, 1 Hale, P. C. 425, Beale's Cas. 418.

In Reg. v. Murton, supra, it was held that unkind treatment, not amounting to physical injury, by a husband of his wife, as the use of harsh language, turning her out of her home, etc., whereby it was charged that her spirit and heart were broken, and she died, did not render the husband responsible as for homicide.

[212] Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425. See, also, Cox v. People, 80 N. Y. 500.

[213] Reg. v. Halliday, 61 L. T. (N. S.) 701, Beale's Cas. 427; Reg. v. Pitts, Car. & M. 284; Reg. v. Williamson, 1 Cox, C. C. 97, Mikell's Cas. 91; Hendrickson v. Com., 85 Ky. 281, 3 S. W. 166, Beale's Cas. 430; Blackburn v. State, 23 Ohio St. 146; Adams v. People, 109 Ill. 444, 50 Am. Rep. 617; Thornton v. State, 107 Ga. 683, 33 S. E. 673.

A man is guilty of homicide if he intentionally causes a panic in a crowded theater or other building by a false alarm of fire, and people are, as a natural consequence, crushed to death in trying to escape. Reg. v. Martin, 14 Cox, C. C. 633, 8 Q. B. Div. 54.

A man is responsible for the death of one who jumps from a window, or into the water, from a well-grounded apprehension of violence, threatened by him, which will endanger life. Rex v. Evans, 1 Russ. Crimes, 656; Reg. v. Pitts, Car. & M. 284; Reg. v. Halliday, 61 L. T. (N. S.) 701, Beale's Cas. 427.

In Rex v. Hickman, 5 Car. & P. 151, Mikell's Cas. 564, a man was held guilty of manslaughter where he had charged another person on horseback, and so frightened him that he spurred his horse, and, in consequence, the horse fell, and caused his death.

the fear must be well grounded and reasonable under the circumstances.[214]

(*d*) *Compelling One to Kill Himself.*—What has just been said shows that a man does not escape responsibility for a homicide because it was immediately caused by the act of the deceased himself, if that act was caused by him. And this is true in many other cases. If a man, for instance, sets poison or a spring gun for another, he is responsible if the other innocently takes the poison or discharges the gun, and is thereby killed.[215]

And if men board a railroad train, draw deadly weapons on a passenger, rob him, and by threats cause him to jump from the train while it is in motion, and he is thereby killed, they are guilty of murder.[216]

If a person puts poison in a glass of medicine with intent to cause another's death, and another innocently takes it and dies, he is none the less responsible because the deceased stirred the mixture and thereby made it deadly, and because it would not have caused death without the stirring.[217]

[214] In Hendrickson v. Com., 85 Ky. 281, 3 S. W. 166, Beale's Cas. 430, the defendant and his wife had a fight, and on his starting for his knife, and threatening to cut her throat, she fled from the house. The next morning she was found frozen to death in the snow. After the defendant was convicted of manslaughter, it was held, on appeal, that the court properly instructed the jury to convict "if they believed that the accused used such force and violence as to cause the deceased to leave the house from fear of death or great bodily harm;" but that, as it appeared that the husband was a cripple, and the wife, from temper and physique, was well able to contend with him, it was error to refuse to submit to the jury the question whether such fear was well-grounded and reasonable. See, also, State v. Preslar, 3 Jones Law (N. C.) 421.

[215] Gore's Case, 9 Coke, 81a, Beale's Cas. 209, Mikell's Cas. 557; Reg. v. Saunders, 2 Plowd. 473; Reg. v. Michael, 9 Car. & P. 356; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Harvey v. State, 40 Ind. 516.

[216] Adams v. People, 109 Ill. 444, 50 Am. Rep. 617.

[217] Gore's Case, 9 Coke, 81a, Beale's Cas. 209, Mikell's Cas. 557.

(*e*) *Killing by an Innocent Third Person.*—We have seen in a previous chapter that a man may commit a homicide himself through the agency of an innocent third person, as by giving poison to a child, or to an adult who is ignorant of its character, with directions that the latter shall give it to another.[218]

236. Causal Connection between the Act or Omission of the Accused and the Death—In General.

A man is not responsible for the death of another, unless it was *caused* by his own act or omission, or by the act or omission of some other person for which he is responsible under the rules stated in the chapter relating to principals and accessaries.[219] If his unlawful act or omission was merely a *condition,* and not a *cause* of the death, he is not responsible.[220]

In a Massachusetts case it was sought to hold one of a party of rioters responsible for the death of a bystander who was shot by a soldier engaged in suppressing the riot, on the ground that it was a result of the unlawful act—the riot—in which he was engaged. The court held that he was not responsible, as the death was not caused by his act, nor by the act of any of the persons with whom he was acting in concert. The riot was a condition, and not a cause of the death.[221] And in a Michigan case, where a man was trampled and killed by a horse, after he had been knocked down by the accused, and the accused

[218] Ante, § 168.

[219] Ante, § 163 et seq.

[220] Reg. v. Pocock, 5 Cox, C. C. 172, Beale's Cas. 423, Mikell's Cas. 233; Reg. v. Bennett, Bell, C. C. 1, Mikell's Cas. 567; Rex v. Waters, 6 Car. & P. 328, Mikell's Cas. 90; Fenton's Case, 1 Lewin, C. C. 179, Mikell's Cas. 563; Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; People v. Rockwell, 39 Mich. 503; Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425; Reg. v. Williamson, 1 Cox, C. C. 97, Mikell's Cas. 91.

[221] Com. v. Campbell, supra. See, also, Butler v. People, 125 Ill. 641, 18 N. E. 338, 8 Am. St. Rep. 423, 1 L. R. A. 211.

was charged with manslaughter on the ground that his unlawful act was the cause of the death, it was held that the trampling by the horse was not a natural consequence of the act of the accused, and that he was not responsible.[222]

But where train robbers compelled the locomotive fireman to go with them to the express car where he was killed by a passenger opposing the attempted robbery, it was held that they were responsible for his death; their forcing him to go from his own proper place of comparative security to one of known great danger being sufficient to charge them with his death as a reasonable, natural, and probable result of their act.[222a]

Omission to Act.—The same principle applies where a man is charged with manslaughter because of omission to act. There must have been a personal duty, the neglect of which has directly caused death. Thus, it has been held that the trustees of a highway, who fail to have the highway repaired, are not for that reason guilty of the manslaughter of a traveler who is killed by reason of the want of repair. "In all the cases of indictment for manslaughter," said Erle, J., "where the death has been occasioned by omission to discharge a duty, it will be found that the duty was one connected with life, so that the ordinary consequence of neglecting it would be death."[223]

237. Contributing Causes.

(*a*) *In General.*—It is not necessary that the act or omission of the accused shall have been the *sole cause* of the death. If the unlawful act or omission of a person is a proximate cause of another's death, and not merely a condition, he is not relieved from responsibility by reason of the fact that other causes contributed.[224]

[222] People v. Rockwell, supra.

[222a] Taylor v. State, 41 Tex. Cr. R. 564, 55 S. W. 961, Mikell's Cas. 575; Keaton v. State, 41 Tex. Cr. R. 621, 57 S. W. 1125. See ante, §§ 58, 59.

[223] Reg. v. Pocock, 5 Cox, C. C. 172, Beale's Cas. 423, Mikell's Cas. 233.

[224] Rex v. Martin, 5 Car. & P. 130; Reg. v. Holland, 2 Mood. & R. 351, Beale's Cas. 164; Reg. v. Plummer, 1 Car. & K. 600; Reg. v. Swindall,

But if the death resulted solely from some *independent cause,* and not from his act or omission, he is not responsible; and it can make no difference that it would have resulted from his act or omission, if the independent cause had not intervened.[225] These principles have been applied in a variety of cases. For convenience in treatment, they may be classified as cases in which the contributing or intervening cause was (1) the state or condition of the deceased at the time of the injury; (2) the conduct of the deceased at the time of the injury; (3) the state or condition of the deceased after the injury; (4) the conduct of the deceased after the injury; (5) the act or omission of some third person before or at the time of the injury, or afterwards.

(*b*) *State or Condition of the Deceased at the Time of the Injury.*—If an injury causes death, the person who inflicted it cannot escape responsibility for the homicide by showing that the deceased, by reason of disease or drunkenness, or other physical infirmity, as heart disease, for example, was more susceptible to fatal effects, or even that the injury would not have proved fatal except for his condition; and it can make no difference that the accused did not know of his condition.[226]

2 Car. & K. 230, Beale's Cas. 167; Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; Com. v. Fox, 7 Gray (Mass.) 586; Burnett v. State, 14 Lea (Tenn.) 439.

"If death results indirectly from a blow through a chain of natural causes, unchanged by human action, the blow is regarded as the cause of death." Cunningham v. People, 195 Ill. 550, 63 N. E. 517; Kelley v. State, 53 Ind. 311, Mikell's Cas. 575, note.

[225] Livingston v. Com., 14 Grat. (Va.) 592; State v. Scates, 5 Jones (50 N. C.) 420.

In a recent California case one who inflicted a necessarily fatal wound was held guilty, though deceased subsequently cut his own throat. People v. Lewis, 124 Cal. 551, 57 Pac. 470, Mikell's Cas. 569. But this was on the theory that both wounds contributed to his death.

[226] In Rex v. Johnson, 1 Lewin, C. C. 164, where the deceased had died from a blow received in a fight with the accused, it appeared that he was intoxicated at the time, and a surgeon expressed the opinion that the blow would not have caused his death if he had been sober. Hallock, B., directed an acquittal on the ground, as stated by him, that where death is occasioned partly by a blow, and partly by a predis-

Of course, if the disease or other infirmity of the deceased was the sole cause of his death, and the act of the accused did not accelerate it, or contribute to it at all, he cannot be held responsible.[227]

To convict, the jury must be satisfied beyond a reasonable doubt that death would not have occurred at the time it did, except for the act of the accused. If it is left reasonably in doubt whether the disease or other infirmity or the act of the accused was the cause of the death, there must be an acquittal.[228]

(*c*) *Conduct of the Deceased at the Time of the Injury.*—If the act or omission of a person was the cause, and not merely a condition, of another's death, he has clearly committed *homicide,* whatever may have been the conduct of the deceased at the time of the injury.[228a] The homicide, however, may be rendered justifiable or excusable by the conduct of the deceased.[229]

posing circumstance, it is impossible to apportion the operation of the several causes, and to say with certainty that the death was occasioned by any one of them in particular.

This decision, however, is clearly unsound, and there are many decisions opposed to it. In Reg. v. Martin, 5 Car. & P. 130, it appeared that the deceased was in an infirm state of health at the time of the blow which caused his death. Parke, B., said to the jury: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." See, also, Reg. v. Plummer, 1 Car. & K. 600; Com. v. Fox, 7 Gray (Mass.) 586; State v. Smith, 73 Iowa, 32, 34 N. W. 597; State v. Castello, 62 Iowa, 404, 17 N. W. 605; State v. O'Brien, 81 Iowa, 88, 46 N. W. 752, Beale's Cas. 433; State v. Morea, 2 Ala. 275; Hopkins v. Com. (Ky.) 80 S. W. 156.

[227] Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; State v. O'Brien, 81 Iowa, 88, 46 N. W. 752, Beale's Cas. 433; Com. v. Fox, 7 Gray (Mass.) 586; Livingston v. Com., 14 Grat. (Va.) 592.

See Rogers v. State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465, where defendant first shot deceased in necessary self-defense, giving him a fatal wound, and again shot him after the necessity had passed.

[228] Com. v. Fox, 7 Gray (Mass.) 586.

[228a] Ante, § 236.

[229] Post, § 276 et seq.

(*d*) *Contributory Negligence.*—The rule that there can be no recovery in a civil action for personal injury or death resulting therefrom, if the person injured or killed was guilty of contributory negligence, has no application in prosecutions for homicide.[230]

If a person by criminal negligence, as by reckless driving, or by exposing poison or dynamite, causes another's death, he is responsible therefor, and guilty of murder or manslaughter, according to the circumstances, notwithstanding the fact that the deceased may have been guilty of negligence contributing to his death, and notwithstanding the fact that he would not have been killed if he had used due care.[231]

(*e*) *State or Condition of the Deceased after the Injury.*—If death results from an injury, the person who inflicted it is responsible, though the injury may have resulted in disease or sickness, as gangrene or fever, and the disease or sickness may

[230] Ante, § 158.

[231] Such a defense as this was allowed on a charge of manslaughter in Reg. v. Birchall, 4 Fost. & F. 1087; but this view is wrong, and is opposed by a number of cases.

In Reg. v. Longbottom, 3 Cox, C. C. 439, Mikell's Cas. 94, where the defendants were indicted for manslaughter in negligently driving over a man and killing him, it was held that they were guilty, notwithstanding the deceased was deaf, and was negligently walking in the middle of a public road on a dark night. "There is a very wide difference," said Rolfe, B., "between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, and there is no balance of blame in charges of felony, but whenever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished." The following cases are to the same effect: Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167; Reg. v. Kew, 12 Cox, C. C. 355, Beale's Cas. 165; Reg. v. Dalloway, 2 Cox, C. C. 273, Beale's Cas. 165; Reg. v. Desvignes, 70 L. T. 76, Mikell's Cas. 96, n.; Reg. v. Hutchinson, 9 Cox, C. C. 555; Belk v. People, 125 Ill. 584, 17 N. E. 744; Com. v. Boston & L. R. Corp., 134 Mass. 211.

have been the immediate cause of death, for in such a case the death is traceable to the injury as a proximate cause.[232]

If, however, the disease or sickness was not caused by the injury, but resulted from some independent cause, the person who inflicted the injury is not responsible, even though it be conceded that the injury would have caused death if the independent cause had not intervened.[233]

(*f*) *Conduct of the Deceased after the Injury.*—If a person injures another, and the injury causes death, he is responsible for the homicide, though the injury may not have been in its nature necessarily mortal, but may have become so because of misconduct or neglect on the part of the deceased, as because of failure or refusal to procure medical treatment, or to submit to a surgical operation, or because of imprudent exposure, or the use of intoxicating liquors.[234]

In an English case the deceased was severely cut by the accused across the finger by an iron instrument, and refused to have the finger amputated. At the end of a fortnight lockjaw came on, and the finger was then amputated, but it was too late, and the lockjaw ultimately caused his death. The surgeon was of the opinion that early amputation would probably have saved the life of the deceased, but it was nevertheless held that the accused was responsible.[235]

[232] 1 Hale, P. C. 428; Reg. v. Holland, 2 Mood. & R. 351, Beale's Cas. 164; Rex v. Tye, Russ. & R. 345; Burnett v. State, 14 Lea (Tenn.) 439. It has been so held, for example, where a wound resulted in lockjaw, and the lockjaw ultimately caused death. Reg. v. Holland, supra, and where a bullet wound caused pneumonia or congestion of the lung, resulting in death. Smith v. State, 50 Ark. 545, 8 S. W. 941.

[233] Livingston v. Com., 14 Grat. (Va.) 592; Bush v. Com., 78 Ky. 268.

[234] 1 Hale, P. C. 428; 1 Hawk. P. C. c. XIII, Mikell's Cas. 557; Rex v. Rew, J. Kelyng, 26, Beale's Cas. 163, Mikell's Cas. 559; Reg. v. Holland, 2 Mood. & R. 351, Beale's Cas. 164; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; Com. v. Hackett, 2 Allen (Mass.) 136.

[235] Reg. v. Holland, supra. See, also, Hopkins v. U. S., 4 App. D. C. 430; Franklin v. State, 41 Tex. Cr. R. 21, 51 S. W. 951. In Rex v. Rew, J. Kelyng, 26, Beale's Cas. 163, Mikell's Cas. 559, it was decided as early as the year 1662 that "if one gives wounds to another who neg-

(*g*) *Acts or Omissions of Third Persons*—(*1*) *In General.*—If a person inflicts a wound, or is otherwise guilty of any criminal act or omission, and such act or omission is *a cause* of the death of another, he is not relieved from responsibility for the homicide by the fact that the unlawful act or omission of a third person also contributed to cause the death, or would itself have caused the death. He is not responsible, however, if the act or omission of a third person was the *sole cause* of the death, even though, but for it, his own act or omission would have resulted fatally.[236]

If a man wounds another, and the wound causes death, he is responsible for the homicide, though another wound, which would have proved fatal, had previously been inflicted by another. But in such a case the person who inflicted the first wound, if he was not acting in concert with the person who inflicted the second, is not guilty.[237]

If the criminal negligence of a person operates directly to cause another's death, he is none the less responsible because the negligence of a third person contributed.[238]

(*2*) *Act or Negligence of Physician or Surgeon.*—Persons accused of murder or manslaughter have frequently sought to escape responsibility for the homicide on the ground that it was caused by the act of a physician or surgeon in administering chloroform or performing an operation, or by his unskillfulness or neglect in treating the deceased. This defense, however, will

lects the cure of them, or is disorderly, and doth not keep the rule which a person wounded should do, yet, if he die, it is murder or manslaughter, according as the case is in the person who gave the wounds, because, if the wounds had not been, the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them."

[236] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; People v. Ah Fat, 48 Cal. 61; Fisher v. State, 10 Lea (Tenn.) 151.

[237] People v. Ah Fat, supra; State v. Scates, 5 Jones (50 N. C.) 420.

[238] Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167; Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170.

not generally prevail. It has repeatedly been held, and it must be regarded as settled, that when a surgical operation is performed or chloroform administered in a proper manner, and under circumstances which render it necessary, in the opinion of competent surgeons, upon one who has received a dangerous wound, though the wound may not be necessarily mortal in itself, and the operation is ineffectual to save the life of the patient, or it or the chloroform is itself the immediate cause of the patient's death, the person who gave the wound is nevertheless responsible for the consequences.[239] Nor is he relieved from responsibility by the mere fact that improper or unskillful treatment or negligence on the part of the physician or surgeon contributed to cause death.[240] If it appears, however, that improper treatment was the sole cause of death, the person who gave the wound is not responsible.[241]

238. Lapse of Time between Injury and Death.

To render one responsible for homicide because of a wound or other injury inflicted by him, the death must occur within a year

[239] Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; State v. Bantley, 44 Conn. 537, 26 Am. Rep. 486; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; Com. v. McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Crum v. State, 64 Miss. 1, 1 So. 1, 60 Am. Rep. 44 (overruling McBeth v. State, 50 Miss. 81). See, also, Reg. v. Johnson, 1 Lewin, C. C. 164; Reg. v. Minnock, 1 Craw. & D. 45; Reg. v. Lee, 4 Fost. & F. 63; U. S. v. Warner, 4 McLean, 463, Fed. Cas. No. 16,643; Parsons v. State, 21 Ala. 300; Bowles v. State, 58 Ala. 335; Kee v. State, 28 Ark. 155; Clark v. Com., 90 Va. 360, 18 S. E. 440; Coffman v. Com., 10 Bush (Ky.) 495; State v. Scott, 12 La. Ann. 274; State v. Baker, 1 Jones (N. C.) 267; Com. v. Green, 1 Ashm. (Pa.) 289; Com. v. Eisenhower, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670, Mikell's Cas. 575.

[240] Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; Com. v. Hackett, 2 Allen (Mass.) 136; Parsons v. State, 21 Ala. 300.

[241] 1 Hale, P. C. 428; Reg. v. Cheverton, 2 Fost. & F. 833; Harvey v. State, 40 Ind. 516; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; Com. v. Hackett, 2 Allen (Mass.)136.

and a day. If it does not, the law conclusively presumes that the death was due to some other cause.[242]

(B) Murder at Common Law.

239. Definition.—Murder is the unlawful killing of a human being with malice aforethought, express or implied.[243]

There is express malice—the homicide not being justifiable or excusable, and not being committed under extenuating circumstances reducing it to manslaughter—

1. **When there is an actual intent to cause the death of the person killed.**
2. **When there is an actual intent to cause the death of any other person.**

Malice is implied, with the same exceptions—

1. **When there is an actual intent to inflict great bodily harm.**
2. **When an act is willfully done or a duty willfully omitted, and the natural tendency of the act or omission is to cause death or great bodily harm.**
3. **Subject, perhaps, to some limitations, when a homicide is committed, though unintentionally, in an attempt to commit or the commission of some other felony.**
4. **When a homicide is committed, though unintentionally, in resisting a lawful arrest, or in obstructing an officer in his attempt to suppress a riot or affray.**

[242] 3 Inst. 53; 2 Hale, P. C. 179; 1 Hawk. P. C. c. 23; Id., c. 13, Mikell's Cas. 556; State v. Orrell, 1 Dev. (N. C.) 139, 17 Am. Dec. 563; People v. Aro, 6 Cal. 207; People v. Kelly, 6 Cal. 210; State v. Mayfield, 66 Mo. 125; Hardin v. State, 4 Tex. App. 355, 370.

[243] Murder is committed, said Lord Coke, "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." 3 Inst. 47. See, also, 4 Bl. Comm. 195; 1 Hale, P. C. 451; 1 Hawk. P. C. c. 13, Mikell's Cas. 592; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Bivens v. State, 11 Ark. 455; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

240. Malice Aforethought.

(*a*) *In General.*—The distinguishing characteristic of murder is malice aforethought.[244] When it exists, the homicide is always murder. When it does not exist, the homicide cannot be murder, but is either manslaughter, or else is justifiable or excusable. The expression "malice aforethought" is very technical, and cannot be taken in the ordinary sense of the term "malice." It must be construed according to the decided cases, which have given it a meaning different from that which might be supposed. It does not necessarily mean anger, hatred, or ill-will, but, as we shall see in subsequent sections, includes many other unlawful or wrongful motives or conditions of mind. Chief Justice Shaw said in the celebrated Webster Case that it is not confined to ill-will towards one or more individual persons, but is intended to denote "an action flowing from any wicked and corrupt motive,—a thing done *malo animo*,—where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief."[245]

[244] "The killing must be with malice aforethought, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing." 4 Bl. Comm. 198; Com. v. York, 9 Metc. (50 Mass.) 93, 43 Am. Dec. 373.

[245] Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. See, also, 4 Bl. Comm. 198; Fost. C. L. 256; Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; Com. v. Drum, 58 Pa. 9, 19; McClain v. Com., 110 Pa. 263, 1 Atl. 45; State v. Douglass, 28 W. Va. 297; McAdams v. State, 25 Ark. 405; Davidson v. State, 135 Ind. 254, 34 N. E. 972; Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698; Com. v. York, 9 Metc. (50 Mass.) 93, 43 Am. Dec. 373; State v. Chavis, 80 N. C. 353; Ellis v. State, 30 Tex. App. 601, 18 S. W. 139.

"Reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification." Holmes, C. J., in Com. v. Chance, 174 Mass. 252, 54 N. E. 551, Mikell's Cas. 597, note.

(*b*) *Deliberation and Premeditation.*—Where, by statute, murder is divided into degrees, deliberation and premeditation are generally made essential to murder in the first degree.[246] The common law, however, recognizes no degrees of murder, and, to constitute murder at common law, deliberation and premeditation are not necessary. In other words, the "malice aforethought" required by the common law need not exist for any length of time before the killing, but it is sufficient if it exists at the time of killing. It may arise simultaneously with the act which causes death.[247]

Provoking language, as we shall see, is not sufficient provocation to reduce an intentional killing to manslaughter. Therefore, if a man, when provoked by insulting words, immediately revenges himself by the use of a deadly weapon, and death ensues, there is malice aforethought, and the homicide is murder. It is none the less malice *aforethought* because the act is done suddenly and without deliberation or premeditation.[248]

"The law," said the Tennessee court, "knows no specific time

[246] Post, § 253.

[247] Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Com. v. York, 9 Metc. (50 Mass.) 93, 43 Am. Dec. 373; Allen v. U. S., 164 U. S. 492; McMillan v. State, 35 Ga. 54; State v. Anderson, 2 Overt. (Tenn.) 6, 5 Am. Dec. 648; McAdams v. State, 25 Ark. 405; People v. Williams, 43 Cal. 344; Cook v. State, 77 Ga. 96; State v. Ashley, 45 La. Ann. 1036, 13 So. 738; State v. Decklotts, 19 Iowa, 447; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; Peri v. People, 65 Ill. 17; People v. Clark, 7 N. Y. 385; Leighton v. People, 88 N. Y. 117, Beale's Cas. 472; Nye v. People, 35 Mich. 16; State v. Moore, 69 N. C. 267; Green v. State, 13 Mo. 382.

[248] Com. v. Webster, supra. It was said in this case: "It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed. It is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought' in the description of murder do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design, in contradistinction to accident and mischance."

within which an intent to kill must be formed so as to make it murder. If the will accompanies the act, a moment antecedent to the act itself which causes death, it seems to be as completely sufficient to make the offense murder as if it were a day or any other time."[249]

(*c*) *Express and Implied Malice.*—From a very early day malice has been divided into express and implied malice.[250] This distinction has been criticised on the ground that malice must of necessity always be inferred from the circumstances, and is therefore always implied. In a sense, this is true, but it is not sufficient reason for not recognizing the distinction as it has been understood in the law of homicide. It is convenient, and, if properly understood, it is not misleading. It is expressly recognized by the statutes in some states in dividing murder into degrees. By *express malice* is meant an actual intention to kill. It exists whether the intention be to kill the person who is killed, or to kill some other person.[251] *Implied malice* exists when there is no actual intent to kill any person, but death is caused by conduct which the law regards as showing such an abandoned state of mind as to be equivalent to an actual intent to kill. From such conduct the law implies malice.[252]

[249] State v. Anderson, 2 Overt. (Tenn.) 6, 5 Am. Dec. 648.

[250] 4 Bl. Comm. 198, 199; 1 Hale, P. C. 451.

[251] "Express malice," says Blackstone, "is when one, with a sedate and deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes." 4 Bl. Comm. 198. And see McCoy v. State, 25 Tex. 33, 78 Am. Dec. 520; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; Warren v. State, 4 Cold. (44 Tenn.) 130.

[252] See Hadley v. State, 55 Ala. 31, Beale's Cas. 468; Rex v. Halloway, Cro. Car. 131, Mikell's Cas. 593; State v. Capps, 134 N. C. 622, 46 S. E. 730; McClain v. Com., 110 Pa. 263, 1 Atl. 45; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799. See, also, ante, § 62, and notes thereto.

241. Actual Intent to Kill.

(*a*) *In General.*—Whenever an accountable man kills another intentionally, he is guilty of murder with express malice unless the killing is justifiable or excusable,[253] or unless there are such circumstances of provocation as will reduce the homicide to manslaughter.[254] And if a man voluntarily and willfully does an act, the natural and probable consequence of which is to cause another's death, an intent to kill will be presumed.[255]

(*b*) *Killing a Person not Intended.*—The same is true if a man kills one person when he intends to kill another. If a man shoots at one person with intent to kill him, and unintentionally kills another, or sets poison for one person and another drinks it and dies, it is murder with express malice of the person killed, even though he be a friend.[256]

[253] Post, § 266 et seq.

[254] Post, § 256 et seq.

[255] No principle is better settled in the criminal law than the principal that "a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts." Per Chief Justice Shaw in Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. See ante, § 58; post, § 244.

"If one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life." Com. v. York, 9 Metc. (50 Mass.) 93, 103, 43 Am. Dec. 373; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799, Mikell's Cas. 604.

[256] Ante, § 59(b); 1 Hale, P. C. 466; Gore's Case, 9 Coke, 81a, Beale's Cas. 209; Rex v. Plummer, 12 Mod. 627; Saunders' Case, 2 Plowd. 473; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; Com. v. Eisenhower, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670; State v. Raymond, 11 Nev. 98; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; Johnson v. State, 92 Ga. 36, 17 S. E. 974; Durham v. State, 70 Ga. 264; State v. Montgomery, 91 Mo. 52, 3 S. W. 379; Wareham v. State, 25 Ohio St. 601. See, also, Reg. v. Latimer, 16 Cox, C. C. 70, Beale's Cas. 217, Mikell's Cas. 163.

If two persons engage in a duel, and one accidentally kills a by-

The intention need not even be to kill any particular person. It is murder to willfully shoot into a crowd, or to do any other dangerous act, with a general intent to kill or inflict great bodily harm.[257]

242. Absence of Actual Intent to Kill—In General.

One may be guilty of murder at common law, though there may have been no actual intent to kill. Whether or not the offense is murder depends upon the nature and extent of the injury or wrong actually intended. It has been said that there are really only four cases in which an unintentional killing will constitute murder,—only four cases, that is, in which the law will imply malice where there was no actual intent to cause death. These are: (1) Cases in which there was an intent to inflict great bodily harm; (2) cases in which, conceding that there was no actual intent to injure, an act was done or duty omitted *willfully,* and without justification or excuse, the natural tendency of which was to cause death or great bodily harm; (3) cases in which the death was caused while engaged in the commission of, or attempt to commit, some other felony; and (4) cases in which the death was caused while resisting a lawful arrest, or obstructing an officer in an attempt to suppress a riot or affray. A homicide unintentionally committed in doing an unlawful act not coming within any of these cases is gen-

stander, he is guilty of the murder of the bystander. State v. Raymond, 11 Nev. 98.

If a person attempts to poison one person, and unintentionally poisons and kills another, he is guilty of the murder of the latter. Saunders' Case, 2 Plowd. 474; State v. Fulkerson, Phil. (N. C.) 233.

See Reporter's note to Saunders' Case, 2 Plowd. 473, reprinted in Mikell's Cas. 490.

[257] 1 Hawk. P. C. c. 29, § 12; 1 Hale, P. C. 275; Reg. v. Fretwell, Leigh & C. 443, 9 Cox, C. C. 471; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; Hopkins v. Com., 50 Pa. 9; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; Herrin v. State, 33 Tex. 638; Robinson v. State, 54 Ala. 86; Presley v. State, 59 Ala. 98; State v. Young, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846.

erally involuntary manslaughter,[258] or not punishable at all, and is not murder.[259]

243. Intention to Inflict Great Bodily Harm.

All the authorities agree that, where death is caused, though unintentionally, by an act done with intent to inflict great bodily harm, and without justification or excuse, nor under circumstances reducing the homicide to manslaughter, it is murder. The intent shows such a disregard of consequences that the law implies malice, and it is no defense in such a case to say that there was no intent to kill.[260]

Thus, killing a person by cruel torture, wantonly inflicted, and causing grievous bodily injury, is murder, even conceding that there was no intent to cause death.[261]

244. Acts or Omissions Tending to Cause Death or Great Bodily Harm.

(*a*) *In General.*—It is also settled that, if death is caused by a willful act or omission, the natural tendency of which is to cause death or great bodily harm, the homicide is murder unless justifiable or excusable, or reduced to manslaughter by extenuating circumstances. An intent to kill or inflict great bodily harm will be implied as a matter of law, and without inquiry into the actual intent, on the principle that a man is to be presumed to have intended the natural and probable consequences of his voluntary acts. And it can make no difference in such a case that the act was done in sudden anger or in recklessness, and without an actual intent to kill.[262]

[258] Post, § 262 et seq.

[259] See Wellar v. People, 30 Mich. 16.

[260] See Fost. C. L. 259; 1 Hale, P. C. 491; State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196.

[261] State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383.

[262] Grey's Case, J. Kelyng, 64 Beale's Cas. 463, Mikell's Cas. 400; Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465; Rex v. Halloway,

Thus, it is murder at common law to kill a person by willfully riding an unruly and vicious horse into a crowd,[263] or by willfully throwing a missile from the roof of a building into a crowded street.[264]

So, if the warden of a prison unnecessarily takes a prisoner to a house in which there is a case of smallpox, knowing this fact, and knowing that the prisoner has never had the disease, and desires not to be exposed to it, and the prisoner catches the disease and dies, the warden is guilty of murder.[265]

If a man deliberately shoots in the direction of another, who is within shooting distance, and kills him, he is guilty of murder, whether he intended to hit him or not. He cannot escape responsibility by showing that he merely intended to frighten him, or to cause his horse to throw him, etc.[266]

(*b*) *Use of a Deadly Weapon.*—In accordance with this principle, the willful use of a deadly weapon upon another without justification, excuse or extenuating circumstances is universally recognized as showing malice. Thus, in a leading English case, a blacksmith, who in a fit of sudden anger struck his servant on the head with an iron bar, and killed him, was held guilty of murder, whether he actually intended to kill or not.[267]

Cro. Car. 131, Mikell's Cas. 593; Wellar v. People, 30 Mich. 16; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; Hadley v. State, 55 Ala. 31, Beale's Cas. 469; Adams v. People, 109 Ill. 444, 50 Am. Rep. 617; McMillan v. State, 35 Ga. 54; State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383; Lewis v. State, 72 Ga. 164; Pennsylvania v. Honeyman, Add. (Pa.) 147, Mikell's Cas. 595.

[263] 1 Hale, P. C. 476.

[264] Boles v. State, 9 Smedes & M. (Miss.) 284.

[265] Castell v. Bambridge, 2 Strange, 854, Beale's Cas. 420.

[266] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468.

[267] Grey's Case, J. Kelyng, 64, Beale's Cas. 463, Mikell's Cas. 400. And see Com. v. York, 9 Metc. (50 Mass.) 93, 43 Am. Dec. 373; McMillan v. State, 35 Ga. 54; Hadley v. State, 55 Ala. 31, Beale's Cas. 469; State v. Decklotts, 19 Iowa, 447; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Musick, 101 Mo. 260, 14 S. W. 212; Palmore v. State, 29 Ark. 248; Murphy v. People, 9 Colo. 435, 13 Pac. 528;

To bring a case within the operation of this rule, the weapon must be a deadly one, either in its nature or in the manner in which it is used. Where the instrument used is not one likely to cause death or great bodily harm, as where one strikes another with his fist, or with a small stick or stone, or kicks him, the killing is manslaughter only, in the absence of an actual intent showing a felonious purpose. A felonious intent in such cases will not be implied, but must be clearly proved.[268]

A common assault which is not committed with a deadly weapon, nor under such circumstances as to naturally cause death or great bodily harm, will not supply the element of malice necessary to constitute murder, where there is no actual intent to kill. This distinction is clearly brought out by Judge Campbell in a Michigan case. "It is not necessary in all cases," he said, "that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not

People v. Barry, 31 Cal. 357; Beauchamp v. State, 6 Blackf. (Ind.) 300; Clem v. State, 31 Ind. 480; Davison v. People, 90 Ill. 221; Hurd v. People, 25 Mich. 405; Evans v. State, 44 Miss. 762; State v. Evans, 65 Mo. 574; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State v. Douglass, 28 W. Va. 297.

[268] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347 (where a man kicked another in ejecting him from his house); Turner's Case, 1 Ld. Raym. 143 (where a servant was hit on the head with a clog); Rex v. Kelly, 1 Mood. C. C. 113 (where it was uncertain whether the deceased was killed by a blow with the fist, which threw him upon a brick, or by a blow from a brick); Wellar v. People, 30 Mich. 15 (where a man struck his wife with his fist, and perhaps kicked her); State v. Jarrott, 1 Ired. (N. C.) 76 (where the blow causing death was given with a stick). See, also, Darry v. People, 10 N. Y. 120; Com. v. Fox, 7 Gray (Mass.) 585; State v. McNab, 20 N. H. 160; State v. Smith, 32 Me. 369; Williams v. State, 81 Ala. 1, 1 So. 179; Sylvester v. State, 71 Ala. 17.

A familiar illustration is in the case of death caused in a prize fight, which is held to be manslaughter only, unless an actual intent to kill or inflict great bodily harm is shown. 1 East, P. C. 270; Rex v. Murphy, 6 Car. & P. 103; Rex v. Hargrave, 5 Car. & P. 170. A stick or pocket knife may be a deadly weapon. It is so, if of such a size, or used in a way, as to be likely to cause death. Sylvester v. State, 71 Ala. 17; State v. West, 6 Jones (N. C.) 505.

always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally, the intent must have been to commit either a specific felony, or at least an act involving all the wickedness of a felony. And, if the intent be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either periling life or leading to great bodily harm. There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was one of a very serious character, which might naturally and commonly involve loss of life or grievous mischief. Every assault involves bodily harm. But any doctrine which would hold every assailant as a murderer where death follows his act would be barbarous and unreasonable. * * * In general, it has been held that, where the assault is not committed with a deadly weapon, the intent must be clearly felonious, or the death will subject only to the charge of manslaughter. The presumption arising from the character of the instrument of violence is not conclusive either way, but, where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. There are cases on record where death by kicking and beating has been held to warrant a verdict of murder, the murderous intent being found. But where there was no such intent, the ruling has been otherwise. * * * Where the weapon or implement used is not one likely to kill or to maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose."[269]

(*c*) *Assault with the Hands or Feet Only.*—Ordinarily, where an assault is made with the hands or feet only, and with-

[269] Wellar v. People, 30 Mich. 16.

The case of Pennsylvania v. Honeyman, Add. (Pa.) 147, Mikell's Cas. 595, holding the contrary, is not sustained by the weight of authority.

out a deadly weapon, and death results therefrom, the killing will not amount to murder, but will be manslaughter only.[270] But an assault may be made with the fists or feet in such a manner that the law will imply the malice necessary to constitute murder. Thus, if a strong man should strike or kick a very young infant, or should intentionally kick a grown person in a vital spot, as in the temple, the natural result of such an act would be to kill, or at the least to inflict great bodily harm, and the felonious intent should be presumed.[271]

(*d*) *Setting Fire to a Building.*—On the principle stated above, a man is guilty of murder if he willfully sets fire to a building in which he knows, or ought reasonably to know, there are human beings, and burns them to death, though the building may not be a dwelling house, and he may not be guilty of arson.[272]

(*e*) *Committing, or Attempting to Commit, an Abortion.*—Since an attempt to procure an abortion by the use of instruments or drugs, where the woman is quick with child, is an unlawful act endangering her life, unintentionally causing her death in such an attempt is murder.[273] The same principle

[270] Wellar v. People, 30 Mich. 16; Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; and other cases above cited.

[271] McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; Pennsylvania v. Honeyman, Add. (Pa.) 147, Mikell's Cas. 595. And see Murphy v. People, 9 Colo. 435, 13 Pac. 528; State v. John, 172 Mo. 220, 72 S. W. 525, 95 Am. St. Rep. 513.

[272] Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465; Mikell's Cas. 600.

In Reg. v. Horsey, 3 Fost. & F. 287, Mikell's Cas. 599, an acquittal was had on the theory that deceased may have come into the inclosure after the fire was set, and hence his death was not the natural or probable result of the prisoner's act in setting it.

[273] 1 Hale, P. C. 429, 430; State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776. See, also, Com. v. Keeper of Prison, 2 Ashm. (Pa.) 227; Ann v. State, 11 Humph. (Tenn.) 159; Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; People v. Com., 87 Ky. 487, 9 S. W. 509, 810; State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312.

must apply where the woman is not quick with child, if the attempt is made in a way to endanger her life.[274]

245. Reckless and Wanton Acts.

To make an unintentional killing by the use of a deadly weapon murder, the weapon need not be used in anger or ill-will. It is sufficient if it is used wantonly and recklessly in such a way as to manifestly endanger life. In a *South Carolina* case, the defendant had wantonly fired his pistol in the direction of a man riding along the road, with the intent, as the evidence tended to show, to cause the man's horse to throw him, and the shot killed a bystander. He claimed that he shot merely as a joke, but a conviction was sustained.[275]

246. Circumstances Showing an Abandoned and Malignant Heart.

It has often been laid down by writers on the criminal law and in the cases that, where the circumstances under which a man kills another show an abandoned and malignant heart, malice will be implied, and the killing is murder. This is a clearly settled principle of the common law,[276] and in some states it is expressly declared by statute.[277]

[274] Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Com. v. Jackson, 15 Gray (Mass.) 187; State v. Alcorn, 7 Idaho, 599, 64 Pac. 1014, 97 Am. St. Rep. 252.

If the attempt is not made in such a way as to endanger life, or threaten great bodily harm, the homicide is manslaughter only. See post, § 263 d.

[275] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; State v. Young, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846. And see Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; State v. Harris, 63 N. C. 1; State v. Shaw, 64 S. C. 566, 43 S. E. 14, 60 L. R. A. 801 (where a boy was killed by brutal and continuous chastisement by one in loco parentis).

[276] Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698; McMillan v. State, 35 Ga. 54; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas.

"If the act which produced the death," said the South Carolina court, "be attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, the law, from these circumstances, will imply malice, without reference to what was passing in the prisoner's mind at the time he committed the act."[278]

In an Illinois case, in which the defendant was indicted for the murder of his wife, it appeared that he came home after he had been drinking, and at once began to abuse the members of his family. He threw a tin quart measure at his daughter, and then threw a heavy beer glass in the direction of his wife. The glass struck a lamp which she was carrying, causing it to explode, and she was burned to death. It was held that the jury could properly convict him of murder, if they believed from the evidence that the circumstances showed an abandoned and malignant heart on his part, though he may have had no actual intention to kill his wife.[279]

468; State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383; State v. Shaw, 64 S. C. 566, 43 S. E. 14, 60 L. R. A. 801.

[277] Thus, in Illinois it is declared by statute that "malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." In Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698, this was said to be merely declaratory of the common law.

[278] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468.

[279] Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698. "It was utterly immaterial," said the court, "whether the plaintiff in error intended the glass should strike his wife, his mother-in-law, or his child, or whether he had any specific intent, but acted solely from general malicious recklessness, disregarding any and all consequences. It is sufficient that he manifested a reckless, murderous disposition,—in the language of the old books, 'a heart void of social duty, and fatally bent on mischief.' A strong man who will violently throw a tin quart measure at his daughter,—a tender child,—or a heavy beer glass, in a direction which he must know will probably cause it to strike his wife, sufficiently manifests malice in general to render his act murderous when death is the consequence of it. He may have intended some other result, but he is responsible for the actual result. When the

The principle was also applied in a South Carolina case, where a man recklessly shot in the direction of another for the purpose, as he claimed, of making his horse throw him, and killed a bystander. He was convicted of murder.[280]

Death resulting from severe torture, wantonly inflicted with the design of producing grievous suffering, will render the person causing the death guilty of murder, and not merely of manslaughter.[281]

247. Willful Omission to Perform a Legal Duty.

To be guilty of murder, a man need not necessarily do a positive act. The crime may be committed by mere nonfeasance, or omission to act at all, where there is a duty to act. Ordinarily, to cause death by criminal neglect of duty is manslaughter,[282] but if the omission is willful, and the natural tendency is to cause death or great bodily harm, and death ensues in consequence, it is murder.[282a] For example, if a father neglects to provide shelter and food and medical attendance for a child that is helpless and dependent upon him, where he has the means to do so, but not willfully, he is guilty of manslaughter only.[283] But if he does so willfully, and with reck-

act is, in itself, lawful, or, even if unlawful, not dangerous in its character, the rule is different. In cases like the present, the presumption is the mind assented to what the hand did, with all the consequences resulting therefrom, because it is apparent he was willing that any result might be produced, at whatever of harm to others. In the other case, the result is accidental, and therefore not presumed to have been within the contemplation of the party, and so not to have received the assent of his mind."

[280] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468.

[281] State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383; Chapman v. State, 43 Tex. Cr. R. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; State v. Shaw, 64 S. C. 566, 43 S. E. 14, 60 L. R. A. 801.

[282] Post, § 265.

[282a] Ter. v. Manton, 7 Mont. 162, 14 Pac. 637, 8 Mont. 95, 19 Pac. 387; State v. Shelledy, 8 Iowa, 477; Lee v. State, 1 Cold. (41 Tenn.) 62.

[283] Post, § 265 d.

less disregard of the consequences, and *a fortiori,* when he actually intends to cause death, he is guilty of murder.[284] And the same is true in any other case where a person willfully fails to provide for the necessities of a helpless person under his special charge, when he is under a legal duty to provide for him.[285]

The principle also applies where a switchman in the employ of a railroad company willfully omits to adjust a switch, and thereby causes a collision between trains, and the death of a passenger, or of another employe of the railroad company.[286]

In all cases, to render one responsible for a homicide by reason of mere nonfeasance, he must have omitted some duty which he was legally bound to perform. A man who sees a stranger drowning, or about to take poison by mistake, or about to commit suicide, is not under any legal duty, as distinguished from mere moral duty, to save him, and his omission to do so, whatever may be his motive, cannot render him guilty of murder.[287]

248. Homicide in the Commission of a Felony.

(*a*) *In General.*—At common law, malice was implied as a matter of law in every case of homicide while engaged in the commission of some other felony, and such a killing was murder whether death was intended or not. The mere fact that the party was engaged in the commission of a felony was regarded as sufficient to supply the element of malice.[288]

[284] Reg. v. Conde, 10 Cox, C. C. 547, Beale's Cas. 424. And see Lewis v. State, 72 Ga. 164, 53 Am. Rep. 835.

[285] See Reg. v. Bubb, 4 Cox, C. C. 455; Ter. v. Manton, 7 Mont. 162, 14 Pac. 637, 8 Mont. 95, 19 Pac. 387. And see post, § 265 d.

[286] State v. O'Brien, 32 N. J. Law, 169, Mikell's Cas. 218.

[287] See post, § 265 e.

[288] Fost. C. L. 258; 1 Hale, 475.

"Every felony, by the common law, involved a forfeiture of the lands or goods of the offender, upon a conviction of the offense; and nearly

On this principle, it was murder at common law to unintentionally kill another in committing, or attempting to commit, burglary, arson, rape, robbery, or larceny.[289]

The doctrine has repeatedly been recognized and applied in this country, and is to be regarded as still in force, except where it has been expressly abrogated by statute.[290]

The decisions at common law do not require that the act done shall have been of such a nature as to endanger life, or threaten great bodily harm, but the malice necessary to constitute murder is implied from the mere fact that the accused was committing, or attempting to commit, a felony. This was certainly the common-law doctrine. If it had been otherwise, the doctrine would have been altogether unnecessary, because the killing would be murder because of the *tendency* of the act,[291] without regard to its being done in the commission of a felony.[292]

all offenses of that grade were punishable with death, with or without benefit of clergy. In such cases, therefore, the malicious and premeditated intent to perpetrate one kind of felony was, by implication of law, transferred from such offense to the homicide which was actually committed, so as to make the latter offense a killing with malice aforethought, contrary to the real fact of the case as it appeared in evidence." People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197, 200.

[289] Steph. Dig. Crim. Law, art. 223; Reg. v. Greenwood, 7 Cox, C. C. 404, Beale's Cas. 424; Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465, Mikell's Cas. 600; State v. McNab, 20 N. H. 160; State v. Cooper, 13 N. J. Law, 361; State v. Shelledy, 8 Iowa, 477; Adams v. People, 109 Ill. 444, 50 Am. Rep. 617; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Com. v. Riley, Thatch. C. C. (Mass.) 471; State v. Barrett, 40 Minn. 77, 41 N. W. 463; Kennedy v. State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; Dill v. State, 25 Ala. 15; Reddick v. Com., 17 Ky. L. R. 1020, 33 S. W. 416; State v. Wagner, 78 Mo. 644; People v. Olsen, 80 Cal. 122, 22 Pac. 125; Rupe v. State, 42 Tex. Cr. R. 477, 61 S. W. 929.

To kill in the attempt to escape with the booty after committing robbery is to kill in the commission of robbery. State v. Brown, 7 Or. 186, Mikell's Cas. 611.

[290] People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; People v. Sullivan, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353.

[291] Ante, § 244.

The doctrine, in so far as the commission of felonies not dangerous to life is concerned, has been criticised and rendered doubtful, but it seems never to have been expressly repudiated.[293]

(*b*) *Attempt to Commit Suicide.*—Suicide was a felony at common law,[294] and therefore a homicide unintentionally committed by a person in an attempt to commit suicide has been held to be murder.[295]

[292] In Reg. v. Greenwood, 7 Cox, C. C. 404, Beale's Cas. 424, Mikell's Cas. 556, the accused had communicated a venereal disease to a woman in committing a rape upon her, and the court charged the jury that the fact that he was committing a felony—the rape—made the homicide murder. Cf. Rex v. Lad, 1 Leach, C. C. 96, Mikell's Cas. 602, n.

And in an earlier English case it was held that, if a man shot at a hen with intent to steal it, he was guilty of murder because of his felonious intent to steal the hen. Rex v. Plummer, 1 Hale, P. C. 475.

[293] In Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465, Mikell's Cas. 600, decided in England in 1877, Stephen, J., expressed a doubt as to the soundness of the doctrine, and was of opinion that no court in England would follow the old cases to the full extent; but that, "instead of saying that any act done with intent to commit a felony, and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder." As has been heretofore suggested, however, if the doctrine is thus restricted, it is unnecessary to regard the intent to commit a felony at all, as the dangerous tendency of the act, in itself, renders the killing murder. There can be no doubt that the broad doctrine was well established at common law, and whether it is to be still adhered to is a question for the legislatures, and not for the courts, whose duty it is to enforce the law, and not to make it.

[294] Post, § 250.

[295] State v. Levelle, 34 S. C. 120, 27 Am. St. Rep. 799, Mikell's Cas. 604.

In Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cas. 206, a conviction of manslaughter was sustained where a person killed another in an attempt to commit suicide, and it was intimated that the conviction might perhaps have been of murder. This, however, was not decided.

(c) *Statutory Felonies.*—It was said in a New York case that it necessarily follows, from this principle of the common law, that as often as the legislature creates new felonies, or raises offenses which were only misdemeanors at common law to the grade of felony, a new class of murders is created by the application of the principle to the case of a homicide committed while engaged in the perpetration of a newly-created felony; and on the other hand, when the legislature abolishes an offense which was a common-law felony, or reduces it to the grade of a misdemeanor, unintentional homicide by a person in the perpetration of such an act is no longer murder, but involuntary manslaughter.[296] The latter part of this proposition is no doubt true, but the first part is not so clear.

249. Homicide in Resisting Arrest or Obstructing an Officer.

The malice necessary to constitute murder at common law will also be implied where an officer or private person is killed by a man in resisting or obstructing a lawful attempt to arrest him or another, or even to execute civil process, though the killing may have been unintentional. The law implies malice in such a case because the party "set himself against the justice of the realm."[297]

[296] People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197.

[297] Yong's Case, 4 Coke, 40 a, Beale's Cas. 462; Pew's Case, Cro. Car. 183, Mikell's Cas. 594; Rex v. Ford, Russ. & R. 329; Rex v. Baker, 1 Leach, C. C. 112, 1 East, P. C. 323; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Com. v. Grether, 204 Pa. 203, 53 Atl. 753; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; Weatherford v. State, 31 Tex. Cr. R. 530, 21 S. W. 251, 37 Am. St. Rep. 828; Boyd v. State, 17 Ga. 194; Rafferty v. People, 69 Ill. 111; State v. Spaulding, 34 Minn. 361.

This rule does not apply where an arrest is attempted in such a wanton and menacing manner as to endanger life, or threaten great bodily harm, even though there may be a right to make the arrest. Jones v. State, 26 Tex. App. 1, 19 S. W. 53, 8 Am. St. Rep. 454; Croom v. State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; note 302, infra.

The same principle applies where either an officer or a private person is killed by another, though unintentionally, in resisting his attempt to suppress a riot or affray.[298] Where a person, in resisting a lawful attempt to arrest him or to suppress a riot or affray, attempts to kill the officer, and by accident kills a third person, the killing is murder.[299]

As we shall see in treating of excusable homicide, a person may oppose force to force in resistance of an illegal attempt to arrest him, and if, in the conflict which ensues, he kills the officer to save himself from death or great bodily harm, the homicide is excusable.[300] And, as we shall see in treating of manslaughter, if a man kills another in the heat of passion caused by an illegal arrest, and not from malice, the homicide is voluntary manslaughter only.[301] Therefore, to make the killing of an officer or private individual in resisting an arrest murder, and not manslaughter merely, or excusable, these three things are necessary, namely: (1) Legal authority to make the arrest; (2) knowledge of that authority on the part of the person sought to be arrested, or knowledge of facts from which such knowledge may be imputed to him; and (3) an attempt to make the arrest in a legal manner.[302]

[298] Yong's Case, 4 Coke, 40 a, Beale's Cas. 462; Tomson's Case, J. Kelyng, 66, Beale's Cas. 462; Rex v. Hodgson, 1 Leach, C. C. 6; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412.

When a private individual interposes in an affray to separate the combatants, he must give notice of his pacific intent, in order that the killing of him shall be murder, instead of manslaughter. State v. Ferguson, supra.

[299] Angell v. State, 36 Tex. 542, 14 Am. Rep. 380. And see Rex v. Hodgson, 1 Leach, C. C. 6.

[300] Post, § 278.

[301] Post, § 260 c.

[302] See Tomson's Case, J. Kelyng, 66, Beale's Cas. 462, where it is held that the slayer must know, or have reason to know, that the person killed comes for the purpose of making the arrest, or sup-

As we shall see in another connection, if a homicide is committed in resisting an illegal arrest, not because of and under the influence of the provocation, and the heat of blood caused by the attempt to arrest, but from malice, the killing is not manslaughter, but murder.[303]

(C) Suicide.

250. In General.—Suicide, or self-murder, was a felony at common law, and it is still regarded as unlawful and criminal, though it is no longer punished.

By the common law of England, suicide was considered a crime. The lands and goods of the offender were forfeited to the king, as in the case of other felonies, and his body was ignominiously buried in the highway. He was deemed a murderer of himself and a felon.[304] Suicide is no longer punishable either in England or in this country, but it has not for that reason ceased to be criminal.[305] One who persuades another to kill himself, and is present when he does so, is guilty of murder as principal in the second degree, or, if absent, he is guilty as an accessary before the fact.[306] And if two persons agree to kill

pressing the riot or affray. And see Drennan v. People, 10 Mich. 169; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Creighton v. Com., 83 Ky. 142, 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; Rex v. Thompson, 1 Mood. C. C. 80, Beale's Cas. 477; Mockabee v. Com., 78 Ky. 380; Fleetwood v. Com., 80 Ky. 1; Croom v. State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179.

[303] Post, § 260 c.

[304] 3 Inst. 54; 1 Hale, P. C. 411; 2 Hale, P. C. 62; 1 Hawk. P. C. c. 27; Id. c. 9, Mikell's Cas. 551; 4 Bl. Comm. 189; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cas. 206.

See monograph, "Is Suicide Murder?" by Wm. E. Mikell, 3 Col. Law Rev. 379.

[305] Com. v. Mink, supra.

[306] 4 Bl. Comm. 189; Rex v. Dyson, Russ. & R. 523; Com. v. Mink, supra; Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154, Mikell's Cas. 555;

themselves together, and the means employed take effect upon one only, the survivor is guilty of murder of the one who dies.[307] An attempt to commit suicide is indictable, unless the statutes make it otherwise.[308] And if a person unintentionally kills another in attempting to commit suicide, he is guilty of manslaughter at least, and, according to some decisions, of murder.[309]

(D) Statutory Degrees of Murder.

251. In General.—In many of the states, murder has by statute been divided into degrees, according to the state of mind of the person committing the same, or of the circumstances attending its commission. In most states, murder in the first degree is where there is an actual intent to kill and deliberation or premeditation, or where the homicide is committed, though

Com. v. Hicks (Ky.) 82 S. W. 265. But an accessory could not be punished because the principal could not be tried and convicted. Id.; Rex v. Russell, 1 Mood. C. C. 356; Reg. v. Leddington, 9 Car. & P. 79.

By the statute in Missouri one who assists another to commit suicide is guilty of manslaughter. State v. Ludwig, 70 Mo. 412. See, also, People v. Kent, 41 Misc. 191, 83 N. Y. S. 948.

In Ohio a conviction of murder by administering poison was had under such circumstances. Blackburn v. State, 23 Ohio St. 146.

Neither suicide nor furnishing the means to commit suicide is a crime in Texas. Grace v. State, 44 Tex. Cr. R. 193, 69 S. W. 529.

[307] Rex v. Tyson, Russ. & R. 523; Reg. v. Alison, 8 Car. & P. 418; Rex v. Abbott, 67 J. P. 151; Reg. v. Jessop, 10 Cr. Law Mag. 862, 16 Cox, C. C. 204; Burnett v. People, 204 Ill. 208, 68 N. E. 505, 66 L. R. A. 304, 98 Am. St. Rep. 206.

[308] Reg. v. Doody, 6 Cox, C. C. 463, Beale's Cas. 261; Reg. v. Burgess, Leigh & C. 258, 9 Cox, C. C. 247; State v. Carney, 69 N. J. Law, 478, 55 Atl. 44.

An attempt to commit suicide is not punishable under the Massachusetts statutes. Com. v. Dennis, 105 Mass. 162.

[309] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cas. 206; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State v. Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776; ante, § 248 b; post, § 263 f.

unintentionally, in the perpetration of certain felonies. Murder in the second degree includes other homicides which would be punished as murder at common law. The statutes, however, vary in the different states, and what is murder in the first degree in one state may be murder in the second degree in another. In some states there is a third degree of murder.

252. Particular Statutes.

At common law there were no degrees of murder. All homicide with malice aforethought, whether express or implied, was simply murder. And all murder was punished by death. It has been thought that many cases of homicide which the common law regarded as murder, and punished by death, should not be punished so severely, and in many of the states statutes have been enacted from time to time dividing murder into degrees, and punishing murder in the first degree by death, and murder in the second degree by confinement in the penitentiary for life or for a less term. The first state to pass such a statute was *Pennsylvania.* By the act of March 31, 1860, it was provided that all murder which should be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which should be committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, or burglary, should be deemed murder of the first degree; and all other kinds of murder should be deemed murder of the second degree.[310]

In *New York,* the statute is somewhat different. It is there declared that the killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed either from a deliberate and premeditated design to

[310] Act Pa. March 31, 1860, No. 375; Com. v. Drum, 58 Pa. 9, Mikell's Cas. 607.

The statute of 1794 of which this is the re-enactment was the forerunner of all similar legislation in the United States. Mikell's Cas. 605, n.

effect the death of the person killed, or of another; or by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without the premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony, either upon or affecting the person killed or otherwise; or when perpetrated in committing arson in the first degree. Such killing of a human being is murder in the second degree when committed with a design to effect the death of the person killed, or of another, but without deliberation or premeditation.[311]

In *Massachusetts,* the statute is not exactly like either of the above. It is there declared that murder committed with deliberately premeditated malice aforethought, or in the commission of, or in the attempt to commit, a crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree. Murder not appearing to be in the first degree is murder in the second degree.[312]

Effect of Statutes.—As a rule, these statutes have not otherwise changed the common law than by changing the punishment for murder committed under certain circumstances. What was murder at common law is still murder, though it may be only murder in the second degree, and therefore not a capital offense.[313]

[311] Pen. Code N. Y. §§ 183, 184; Leighton v. People, 88 N. Y. 117.

[312] Pub. St. Mass. c. 202, §§ 1-3.

[313] See State v. Decklotts, 19 Iowa, 447; People v. Haun, 44 Cal. 96; Weighorst v. State, 7 Md. 442; Nye v. People, 35 Mich. 16.

In most states the killing of a person other than the intended victim is murder in the first degree if it would have been had the person intended been slain, though the statute contains no express provision to that effect. Wareham v. State, 25 Ohio St. 601; State v. Payton, 90 Mo. 220, 2 S. W. 394; Com. v. Breyessee, 160 Pa. 451, 28 Atl. 824. Contra, Breedlove v. State, 26 Tex. App. 445, 9 S. W. 768, Mikell's Cas. 606.

253. Deliberation and Premeditation.

According to the better opinion, the terms "deliberation" and "premeditation" in these statutes are not synonymous. "Premeditation" implies merely "previous contrivance or formed design," and does not necessarily exclude acts on a sudden impulse.[314]

"Deliberation" implies "reflection, however brief, upon the act before committing it; fixed and determined purpose, as distinguished from sudden impulse."[315] And it has been held, therefore, that a homicide committed on a sudden impulse, while it may be said to be premeditated because of the intent to kill, is not deliberate, and therefore does not constitute murder in the first degree.[316]

There must be, before the killing, a fully formed purpose to kill, with so much time for deliberation and premeditation as to convince the jury that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design.[317]

No Considerable Length of Time Necessary.—It is not necessary, however, to render a killing deliberate as well as premeditated, that the intention to kill shall have been entertained for any considerable length of time. It is enough if there is time for the mind to think upon or consider the act, and then determine to do it.[318]

[314] Cent. Dict. & Cyc. "Premeditation."

[315] Cent. Dict. & Cyc. "Deliberation."

[316] Copeland v. State, 7 Humph. (Tenn.) 479; Com. v. Drum, 58 Pa. 9, Mikell's Cas. 607; Leighton v. People, 88 N. Y. 117; Beale's Cas. 472; Fahnestock v. State, 23 Ind. 231; Harris v. State, 36 Ark. 127.

[317] Com. v. Drum, 58 Pa. 9, Mikell's Cas. 607.

[318] Leighton v. People, 88 N. Y. 117, Beale's Cas. 472; Com. v. Drum, 58 Pa. 9, Mikell's Cas. 607; Keenan v. Com., 44 Pa. 55; Atkinson v. State, 20 Tex. 522. And see Miller v. State, 54 Ala. 155; People v. Kiernan, 101 N. Y. 618, 4 N. E. 130; Binns v. State, 66 Ind. 428; State v. Williams, 69 Mo. 110; State v. Wieners, 66 Mo. 13; Schlencker v. State, 9 Neb. 241, 1 N. W. 857; McDaniel v. Com., 77 Va. 281; Wright v. Com., 33 Grat. (Va.) 880; Hill v. Com., 2 Grat. (Va.) 594.

"An act," said the New York court, "coexistent with and inseparable from a sudden impulse, although premeditated, could not be deemed deliberate, as when, under sudden and great provocation, one instantly, although intentionally, kills another. But the statute is not satisfied unless the intention was deliberated upon. If the impulse is followed by reflection, that is deliberation. Hesitation even may imply deliberation. So may threats against another and selection of means with which to perpetrate the deed. If, therefore, the killing is not the instant effect of impulse,—if there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act,—it is sufficient to characterize the crime as deliberate and premeditated murder."[319]

254. Murder in the Second Degree.

An actual intent to kill is not necessary to constitute murder in the second degree under the statutes, but it is sufficient if the circumstances are such that malice aforethought would be implied at common law, as where a deadly weapon is used without justification or excuse, and without such provocation as will suffice to reduce the offense to manslaughter.[320] As was stated in a previous section, the statutes have merely divided murder into degrees, for the purpose of fixing the punishment according to the heinousness of the offense, and have not otherwise changed the common-law rules.

(E) Manslaughter.

(1) In General.

255. Definition.—Manslaughter is a homicide committed without justification or excuse, and without malice afore-

[319] Per Danforth, J., in Leighton v. People, 88 N. Y. 117, Beale's Cas. 472. Cf. People v. Conroy, 97 N. Y. 62; People v. Schmidt, 168 N. Y. 568, 61 N. E. 907.

[320] State v. Decklotts, 19 Iowa, 447.

thought, express or implied.[321] It may be (1) voluntary, or (2) involuntary,—voluntary manslaughter being an intentional homicide, and involuntary manslaughter an unintentional homicide.

Nature of Offense.—The characteristic distinction between murder and manslaughter is that in murder, as we have seen, the homicide is committed with malice aforethought, express or implied, while in manslaughter the killing is without malice. Although death may be intended, yet if a blow is given immediately after such provocation by the deceased as is reasonably calculated to excite sudden and angry passion and create heat of blood, this fact rebuts the presumption of malice, and, if there is no malice in fact, the offense is manslaughter only. It is unlawful and a felony, for the law does not excuse a man who allows his passion to cause him to kill his fellow man, but it is not so grievous an offense as a killing without provocation.

(2) VOLUNTARY MANSLAUGHTER.

256. Definition.—Voluntary manslaughter is an intentional homicide in sudden passion or heat of blood caused by a reasonable provocation, and not with malice aforethought.[322] The following principles apply to this grade of felonious homicide:

1. **The killing is intentional.**
2. **It must be without malice.**
3. **The provocation must be so great as to reasonably excite passion in an ordinary man, and cause him to act rashly and without reflection. By the weight of authority, the provocation is adequate—**

[321] 1 Hawk. P. C. c. 30, §§ 2, 3; 1 Hale, P. C. 466; Young v. State, 11 Humph. (Tenn.) 200; Steph. Dig. Crim. Law, art. 223.

[322] 1 Hawk. P. C. c. 30, § 3; 1 Hale, P. C. 466; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Creek v. State, 24 Ind. 151; Young v. State, 11 Humph. (Tenn.) 200; State v. Johnson, 1 Ired. (N. C.) 354, 35 Am. Dec. 742; Brown v. Com., 86 Va. 466, 10 S. E. 745.

(a) Where the party is assaulted violently or with great rudeness.

(b) When an unlawful attempt is made to arrest him.

(c) When the killing is in mutual combat, provided no unfair advantage is taken by the slayer, and the occasion was not sought for the purpose of killing.

(d) Where a husband sees his wife in an act of adultery, and kills her or her paramour. Under the old common law it was necessary that he should see the act, but this qualification has been repudiated in late cases.

(e) Insulting words or gestures are not sufficient provocation.

(f) Mere trespass against the land or goods of another is not sufficient.

(g) By the weight of authority, perhaps, it is for the court to determine and instruct the jury as to the adequacy of a particular provocation. But on principle, and according to the better opinion, it is a question of fact for the jury, unless the provocation is clearly inadequate.

4. Provocation does not reduce a homicide to manslaughter—

(a) If the blood had actually cooled at the time the blow was given.

(b) If there was a reasonable time for cooling.

(c) Whether there was actual cooling, or a reasonable time for cooling, is ordinarily a question of fact for the jury.

257. Distinguished from Murder.

Voluntary manslaughter is distinguished from murder by the fact that it is committed, not with malice aforethought, express

or implied, but in the heat of passion or heat of blood caused by reasonable provocation. When a man, in killing another, acts under the influence of sudden passion caused by a reasonable provocation, but not in necessary defense of his life, nor in order to prevent great bodily harm, the law does not excuse him because of the provocation; but it does not hold him guilty of murder. The law recognizes the fact that a man, when greatly provoked, will lose the control of his reason, and, under the influence of the passion and excitement caused by the provocation, resort to violence of which he would not be guilty in the absence of passion. It therefore attributes the killing to the frailty of human nature, and not to malice, and, while it does not excuse the killing altogether, it reduces it to manslaughter.[323]

258. Intention to Kill.

There is *dictum* in some of the cases to the effect that the killing must have been unintentional to constitute manslaughter. But this is not true. A homicide without justification or excuse is not murder merely because there was an intention to kill. In all cases of voluntary manslaughter there is an actual intention to kill, or there is an intention to inflict great bodily harm, from which such an intent may be implied. It is manslaughter, and not murder, because there is no malice afore-

[323] State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412. And see the authorities cited in the note preceding.

"The true nature of manslaughter is that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood or violence of anger, and not through malice, or that cold-blooded desire for revenge which more properly constitutes the feeling, emotion, or passion of malice." Per Shaw, C. J., in Com. v. Webster, 5 Mass. 295, 52 Am. Dec. 711.

thought, not because of any absence of intention to kill.[324] As was said in a *Michigan* case, provocation reduces a homicide from murder to manslaughter, not because the law supposes that the passion caused thereby made the slayer unconscious of what he was about to do, but because it presumes that it disturbed the sway of reason. It does not regard him as temporarily deprived of intellect, and, therefore, not an accountable being, but as one in whom the exercise of judgment was impeded by the violence of excitement, and accountable, therefore, as an infirm human being.[325]

259. Absence of Malice.

Voluntary manslaughter, though intentional, is a killing

[324] State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396, Mikell's Cas. 618; People v. Freel, 48 Cal. 436; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; Creek v. State, 24 Ind. 151; Haile v. State, 1 Swan (Tenn.) 248; Young v. State, 11 Humph. (Tenn.) 200; Brown v. Com., 86 Va. 466, 10 S. E. 745.

"We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge, and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the furor brevis, renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity." State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396, Mikell's Cas. 618.

[325] Per Christiancy, J., in Maher v. People, 10 Mich. 212, 81 Am. Dec. 781. To hold, as was said by Judge Christiancy in this case, that the reason must be entirely dethroned or overcome by passion, so as to destroy intelligent volition, would require such a degree of mental disturbance as is equivalent to utter insanity, and this would render the accused altogether innocent, whereas manslaughter is a very grievous felony, only a little short of murder. See, also, Young v. State, 11 Humph. (Tenn.) 200.

"A transport of passion, which deprives of the power of self control, is, in a modified or restricted sense, a dethronement of the reasoning faculty—a divestment of its sovereign power; but an entire dethronement is a deprivation of the intellect for the time being." Clopton, J., in Smith v. State, 83 Ala. 28, 3 So. 551, Mikell's Cas. 620, note.

without malice aforethought. As was stated in defining the offense, it is the absence of malice that distinguishes it from murder. No provocation, however grievous, will reduce a voluntary homicide to manslaughter, if the circumstances show that the slayer acted, not in the heat of blood, but from malice.[326] "There can be no such thing in law as a killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot coexist."[327] Illustrations of this principle will be shown in dealing with particular provocations in the following sections.

260. The Provocation.

(*a*) *Sufficiency in General.*—To reduce a homicide from murder to manslaughter, the provocation must be adequate in the eye of the law, and to be so it must be so great as to reasonably excite passion and heat of blood. Passion without adequate provocation is not enough.[328] If a man unreasonably allows his passion to control his judgment, he is responsible to the full extent for the consequences of his acts. The line which

[326] 1 Hawk. P. C. c. 11, § 18; Rex v. Mason, 1 East, P. C. 239; Reg. v. Kirkham, 8 Car. & P. 115; Collins v. U. S., 150 U. S. 62; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; State v. Lane, 4 Ired. (N. C.) 113; State v. McCants, 1 Speers (S. C.) 384; Huggett's Case, J. Kelyng, 59, Beale's Cas. 474; State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148; Slaughter v. Com., 11 Leigh (Va.) 681, 37 Am. Dec. 638.

[327] Per Gaston, J., in State v. Johnson, 1 Ired. (N. C.) 354, 35 Am. Dec. 742. And see, to the same effect, Brown v. Com., 86 Va. 466, 10 S. E. 745.

[328] State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; People v. Sullivan, 7 N. Y. 399; Preston v. State, 25 Miss. 383; Campbell v. State, 23 Ala. 44; and other cases cited in the notes following.

distinguishes provocations which will mitigate the offense from those which will not cannot, in the nature of things, be clearly defined. Reasonableness is the test. The law contemplates the case of a reasonable man,—an ordinarily reasonable man,—and requires that the provocation shall be such as might naturally induce such a man, in the anger of the moment, to commit the deed.[329] The rule is that reason should, at the time of the act, be disturbed by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly, and without reflection, and from passion rather than judgment.[330]

(*b*) *Assault and Battery.*—Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a deadly weapon, even with intent to kill, and death ensues, it is regarded as done through heat of blood, and, unless malice is shown by the circumstances, the killing is only

[329] Reg. v. Welsh, 11 Cox, C. C. 336, Beale's Cas. 479; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Flanagan v. State, 46 Ala. 703; State v. Decklotts, 19 Iowa, 447, 455; Silgar v. People, 107 Ill. 563; Thomas v. State, 61 Miss. 60; People v. Freeland, 6 Cal. 96.

In State v. Ferguson, supra, it was said: "Those provocations which are in themselves calculated to produce a high degree of resentment, and which ordinarily superinduce a great degree of violence, when compared with those that are slight and trivial, and from which a great degree of violence does not usually follow, may serve as a general outline to mark the distinction, and, when applied with judgment and discretion, will usually lead to correct results."

[330] Per Christiancy, J., in Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482. It was said in this case: "In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard, unless the person whose guilt is in question be shown to have some peculiar weakness or infirmity of temper, not arising from wickedness of heart, or cruelty of disposition."

manslaughter.[331] To reduce the killing to manslaughter, the assault must have been with violence or great rudeness, and must have been reasonably calculated to excite passion and heat of blood. A mere touching of the person of another, as by intentionally pushing against him, or a light touch with a small cane, though technically an assault and battery, would not be sufficient.[332]

Malice.—In no case will an assault, however violent, mitigate the offense, if there was malice. And malice may well be inferred if the retaliation was outrageous in its nature, either in the manner or the circumstances of it, and beyond all proportion to the provocation, "because," as it has been said, "it manifests rather a diabolical depravity than the frailty of human nature."[333]

[331] Stedman's Case, Fost. C. L. 292, Beale's Cas. 477; Reg. v. Mawgridge, J. Kelyng, 119, Mikell's Cas. 613; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Atkins v. State, 16 Ark. 568; Hurd v. People, 25 Mich. 405; Stewart v. State, 78 Ala. 436; Ex parte Warrick, 73 Ala. 57; People v. Turley, 50 Cal. 469; Bird v. State, 55 Ga. 317; State v. Levigne, 17 Nev. 435, 30 Pac. 1084; State v. Curry, 1 Jones (N. C.) 280; State v. Blunt, 91 Mo. 503, 4 S. W. 394; Draper v. State, 4 Baxt. (Tenn.) 246.

[332] See Honesty v. Com., 81 Va. 283; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Stewart v. State, 78 Ala. 436; State v. Anderson, 4 Nev. 265; State v. Barfield, 8 Ired. (N. C.) 344.

In State v. Ferguson, supra, it was held to be murder, and not manslaughter, where the only provocation was that the deceased had, without using unnecessary violence, separated the accused from a person whom he was beating.

Throwing a stick or club at another, without hitting him, is not such provocation as will reduce a killing to manslaughter. State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148. See, also, Thompson v. State, 55 Ga. 47.

Acts which might amount to provocation if done by one's equal in physical prowess will not be so regarded where done by a woman, a child, or a cripple. Stedman's Case, Fost. 292; Com. v. Mosler, 4 Barr (4 Pa.) 264; State v. Kloss, 117 Mo. 591, 23 S. W. 780.

[333] State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412. And see McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645.

(*c*) *Unlawful Arrest.*—We have seen that a homicide committed in resisting a lawful arrest is murder, even when unintentional.[334] *A fortiori,* it is murder where the killing is intended. It is otherwise, however, even where there is an intent to kill, if the arrest is unlawful for some reason, as where it is attempted without a warrant, or under a void warrant, when a warrant is necessary, or outside of the officer's jurisdiction, or in an unlawful manner. In such a case, the attempt to arrest is so grievous an assault that it is regarded as sufficient provocation to reduce a homicide in resisting it to manslaughter.[335]

Malice.—In these, as in other cases, the blow must be given in heat of blood, and by reason thereof. If the circumstances show that there was malice, the mere fact that there was provocation will not reduce the offense from murder.[336]

[334] Ante, § 249.

[335] 1 Hale, P. C. 457; Rex v. Thompson, 1 Mood. C. C. 80, Beale's Cas. 477; Creighton v. Com., 83 Ky. 142, 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; Com. v. Carey, 12 Cush. (Mass.) 246; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Jones v. State, 14 Mo. 409; Drennan v. People, 10 Mich. 169; Rafferty v. People, 72 Ill. 37; State v. Oliver, 2 Houst. (Del.) 585; Dias v. State, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448; People v. Burt, 51 Mich. 199, 16 N. W. 378; Poteete v. State, 9 Baxt. (Tenn.) 261, 40 Am. Rep. 90.

Where an officer, attempting to make an arrest on suspicion of a felony, is asked for his authority, and says that he has a warrant, but refuses to produce it, and gives no explanation whatever, but makes the arrest with circumstances of violence, and the person arrested resists, and kills the officer, it is not a case of murder, but of manslaughter. Drennan v. People, 10 Mich. 169.

Strangers may interfere to prevent an unlawful arrest or detention of a person. Such arrest or detention, it has been held, is provocation, not only to the person arrested or detained, but also to strangers, and if the person who is making the arrest, or is guilty of the detention, is killed without malice, the homicide is manslaughter only. Huggett's Case, J. Kelyng, 59; Reg. v. Phelps, Car. & M. 180; Reg. v. Allen, Steph. Dig. Crim. Law, App. XV; Reg. v. Mawgridge, J. Kelyng, 119, Mikell's Cas. 613; Reg. v. Tooley, 2 Ld. Raym. 1296. But see Reg. v. Adey, 1 Leach, C. C. 206.

[336] Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Roberts v. State,

Illegal Arrest of a Felon.—There is *dictum* in a Pennsylvania case to the effect that if a man who is actually guilty of a felony is pursued for the purpose of arrest, and, when overtaken, kills his pursuer, he is guilty of murder, though the arrest may have been illegal. While this is not laid down in any of the books as an invariable rule of law, it is obvious that it must generally, if not always, apply. "An innocent man is unconscious of guilt," said the court, "and may stand on his own defense. When assailed under a pretense which is false, his natural passion rises, and he turns upon his assailant with indignation and anger. To be arrested without cause is to the innocent great provocation. If, in the frenzy of passion, he loses his self-control and kills his assailant, the law so far regards his infirmity that it acquits him of malicious homicide. But this is not the condition of the felon. Conscious of his crime, he has no just provocation—he knows his violation of law, and that duty demands his capture. The passion is wickedness, and resistance is crime. Neither reason nor law accords to him that sense of outrage which springs into a mind unconscious of offense, and makes it stand in defense of personal liberty. On the contrary, fear settles upon his heart, and, when he uplifts his hand, the act is prompted by wicked hate and fear of punishment. * * * A sense of guilt cannot arouse honest indignation in the breast, and therefore cannot extenuate a cruel and willful murder to manslaughter."[337]

(*d*) *Mutual Combat.*—The same rules apply to homicide in mutual combat, the killing being attributed to heat of blood

14 Mo. 138, 55 Am. Dec. 97; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; State v. McNally, 87 Mo. 644; Roberson v. State, 43 Fla. 156, 29 So. 535, 52 L. R. A. 751.

Thus, if a man who has committed a crime kills an officer who is attempting to arrest him, not through heat of blood, but because of his consciousness of guilt, and for the purpose of escaping, he is guilty of murder, not manslaughter, though the attempt to arrest him may have been illegal. Brooks v. Com., supra.

[337] Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645.

occasioned by the combat, and not to malice, though it be intentional. The doctrine in such cases has been thus stated: If two persons meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat; and if no unfair advantage is taken at the outset, and the occasion was not sought for the purpose of gratifying malice, and one of them seizes a weapon and strikes a fatal blow, it is regarded as homicide in the heat of blood, and manslaughter.[338]

Malice.—The killing in such cases, to constitute manslaughter instead of murder, must have been without malice. If the circumstances show that the accused sought the occasion or provoked the difficulty for the purpose of killing the deceased, he is guilty of murder, for this shows malice.[339] And the same

[338] Lord Morley's Case, J. Kelyng, 53, Beale's Cas. 473; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Rex v. Ayes, Russ. & R. 166; Rex v. Snow, 1 Leach, C. C. 151, 1 East, P. C. 244; State v. Hill, 4 Dev. & B. (20 N. C.) 629, 34 Am. Dec. 396, Mikell's Cas. 618; State v. Curry, 1 Jones (N. C.) 280; State v. Moore, 69 N. C. 267; McCoy v. State, 8 Ark. 451; Copeland v. State, 7 Humph. (Tenn.) 479; Cates v. State, 50 Ala. 166; People v. Sullivan, 7 N. Y. 396; State v. Levigne, 17 Nev. 435, 30 Pac. 1084; People v. Sanchez, 24 Cal. 17; Stiles v. State, 57 Ga. 183; Tate v. State, 46 Ga. 148; State v. Partlow, 90 Mo. 608, 4 S. W. 14; State v. McDonnell, 32 Vt. 491.

[339] If a man commences an affray with the preconceived purpose of killing his adversary, or of doing him great bodily harm, and does kill him, nothing that may have occurred during the affray can reduce the killing to manslaughter. The malice of the first assault, notwithstanding any violence with which it may have been returned, communicates its character to the act of killing, and the accused cannot be heard to say that the homicide was by reason of uncontrollable passion, caused by the violence of the deceased, and not by reason of the previous malice. State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396, Mikell's Cas. 618; State v. Lane, 4 Ired. (N. C.) 113; State v. McCants, 1 Speer (S. C.) 384; Huggett's Case, J. Kelyng, 59, Beale's Cas. 474; State v. Martin, 2 Ired. (N. C.) 101; Ex parte Nettles, 58 Ala. 268; Tate v. State, 46 Ga. 148. See, also, State v. Howell, 9 Ired. (N. C.) 485; State v. Smith, 24 W. Va. 814; State v. Matthews, 80 N. C. 417; State v. Underwood, 57 Mo. 40.

is true if he took an unfair advantage at the outset, as by secretly arming himself, in anticipation of the conflict.[340] But in cases of homicide in mutual combat, it makes no difference that the accused struck the first blow, if the occasion was unpremeditated, and at the commencement of the contest the parties were on equal terms.[341] Nor does it make any difference that dangerous weapons were used from the beginning, if the combat was unpremeditated, and both parties were equally armed and ready, or that, in the course of the combat, the accused used against an unarmed adversary a deadly weapon, if it was hastily snatched in the heat of passion, and not clearly provided for the purpose.[342]

Previous Encounters and Threats.—When a man kills another in mutual combat, it is not to be presumed that he acted with malice merely because he was actuated by malice in a former encounter with the deceased, and because he had quarreled with the deceased, and made threats against him. "Certainly, where two persons have formerly fought on malice, and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended that they were moved by the old grudge, unless it so appears from the circumstances of the affair."[343]

[340] 1 East, P. C. 242, 243; Fost. C. L. 295; Whiteley's Case, 1 Lewin, C. C. 173; State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148; State v. McCants, 1 Speers (S. C.) 384; Slaughter v. Com., 11 Leigh (Va.) 681; State v. Hildreth, 9 Ired. (N. C.) 429, 51 Am. Dec. 364; Ex parte Nettles, 58 Ala. 268.

[341] State v. McCants, 1 Speers (S. C.) 384.

Thus, in State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396, where the accused made a simple assault upon the deceased, and the deceased, to avenge the blow, attacked the accused with a knife, and severely wounded him, and the accused instantly, and in a transport of passion thus excited, and without previous malice, killed the deceased, it was held a case of manslaughter. See, also, State v. Levigne, 17 Nev. 435, 30 Pac. 1084.

[342] State v. McCants, 1 Speers (S. C.) 384; State v. Levigne, 17 Nev. 435, 30 Pac. 1084.

[343] 1 Hawk. P. C. c. 13, § 30; Copeland v. State, 7 Humph. (Tenn.)

Duel.—A homicide committed in a deliberate duel, however fairly the combat may be conducted, is not manslaughter, but murder. "The punctilios of false honor the law regards as furnishing no excuse for homicide. He who deliberately seeketh the blood of another, in compliance with such punctilios, acts in open defiance of the laws of God and of the state, and with that wicked purpose which is termed 'malice aforethought.' "[344]

(*e*) *Sight or Knowledge of Wife's Adultery.*—It has long been settled that if a man sees his wife in the act of adultery, this is sufficient provocation to reduce to manslaughter an instant killing either of the wife or of her paramour.[345] According to the old authorities the husband must see the act. If he kills on suspicion, however well founded, or on information, he is guilty of murder. And there are late cases also holding this doctrine.[346] The distinction, however, is not reasonable. For example, it is not reasonable to hold a husband guilty of murder, instead of manslaughter, in killing his wife's paramour, if he did so under the influence of passion immediately

479; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; State v. Hildreth, 9 Ired. (N. C.) 429, 51 Am. Dec. 364.

[344] State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396.

[345] 1 Hale, P. C. 486; Fost. C. L. 296; 1 East, P. C. 234, 251; 4 Bl. Comm. 192; Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; Hooks v. State, 99 Ala. 166, 13 So. 767; and cases cited in the notes following.

[346] Reg. v. Mawgridge, J. Kelyng, 119, Mikell's Cas. 613; Reg. v. Fisher, 8 Car. & P. 182; Reg. v. Kelly, 2 Car. & K. 814; State v. John, 8 Ired. (N. C.) 330, 49 Am. Dec. 396; State v. Samuel, 3 Jones (N. C.) 74, 64 Am. Dec. 596; State v. Neville, 6 Jones (51 N. C.) 423; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196. See, also, Shuffin v. People, 62 N. Y. 229; Jones v. People, 23 Colo. 276, 47 Pac. 275; Sawyer v. State, 35 Ind. 83; State v. Avery, 64 N. C. 608; State v. Harman, 78 N. C. 519; People v. Horton, 4 Mich. 69; Bugg v. Com., 18 Ky. L. R. 844, 38 S. W. 684.

In State v. Samuel, supra, it was held that the fact that the husband knows that the other man has previously been in the habit of adulterous intercourse with his wife, and that he believes, when he kills him, that he is then accompanying her for that purpose, will not reduce the homicide to manslaughter.

after their separation, and with conclusive evidence of their guilt. And there are some well-considered cases holding that it is a question for the jury in such cases whether the provocation was sufficient.[347]

Malice.—Even the sight of his wife's adultery does not reduce a homicide by the husband to manslaughter if he committed the deed with malice, and not under the influence of indignation and passion caused by the sight.[348]

(*f*) *Adultery with Daughter, Sister, or Other Relative.*—It was held in Pennsylvania that where a man detects another in bed with his sister under circumstances showing clearly that she has been committing adultery, and kills the man, there is no such provocation as will reduce the homicide to manslaughter.[349] According to the better opinion, however, the question in such a case would be for the jury.[350]

(*g*) *Insulting Words and Gestures.*—It is well settled, as a general rule, that no words of reproach or contemptuous gestures, however insulting, will constitute sufficient provocation to reduce a homicide to manslaughter.[351] But this rule does not apply

[347] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; State v. Grugin, 147 Mo. 39, 47 S. W. 1058, Mikell's Cas. 625; Hooks v. State, 99 Ala. 166, 13 So. 767; Biggs v. State, 29 Ga. 723.

To see them in a position justifying a belief in their guilt is sufficient. The husband need not judge of the fact at his peril. State v. Yanz, 74 Conn. 177, 50 Atl. 37, 54 L. R. A. 780, Mikell's Cas. 631.

[348] See the cases above cited. And see ante, § 259.

[349] Lynch v. Com., 77 Pa. 205.

[350] Post, § 260 i; State v. Grugin, 147 Mo. 39, 47 S. W. 1058, Mikell's Cas. 625 (outrage of daughter).

[351] 1 Hale, P. C. 456; Fost. C. L. 290; Lord Morely's Case, J. Kelyng, 53, Beale's Cas. 473; Reg. v. Mawgridge, J. Kelyng, 119, Mikell's Cas. 613; Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Preston v. State, 25 Miss. 383; U. S. v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; State v. Carter, 76 N. C. 20; Taylor v. State, 48 Ala. 180; Ex parte Brown, 65 Ala. 446; People v. Butler, 8 Cal. 435; Malone v. State, 49 Ga. 210; Bird v. State, 55 Ga. 317; People v. Turley, 50 Cal. 469;

where, because of insulting words or gestures, persons become suddenly heated and engage in mutual combat, and the person insulted slays the other under the influence of passion caused by the other's blows, and not because of the insulting words or gestures. In such a case it is manslaughter in mutual combat.[352] An assault, too slight in itself to be sufficient provocation to reduce murder to manslaughter, may become sufficient for that purpose when accompanied by words of great insult,[352a] and there is authority for saying that there may be circumstances under which words alone may constitute sufficient provocation, if the jury think that they were such as to reasonably excite uncontrollable passion.[353]

In Texas the statute makes it manslaughter, and not murder, where a man kills another because of insulting words or conduct towards a female relative, if the killing occurs as soon as the parties meet after knowledge of the insult.[354] And in Alabama a statute provides that opprobrious words shall in some circumstances justify an assault and battery.[354a]

Johnson v. State, 27 Tex. 758; State v. Evans, 65 Mo. 574; Green v. Com., 83 Pa. 75; State v. Martin, 30 Wis. 216.

"This rule governs every case where the party killing upon such provocation made use of a deadly weapon, or otherwise manifested an intention to kill, or do some great bodily harm." 1 East, P. C. c. 5, § 20.

[352] Lord Morley's Case, J. Kelyng, 53, Beale's Cas. 473; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396. Ante, § 260 d.

[352a] Reg. v. Smith, 4 Fost. & F. 1066; Reg. v. Sherwood, 1 Car. & K. 556; State v. Grugin, 147 Mo. 39, 47 S. W. 1058, Mikell's Cas. 625.

[353] Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; State v. Grugin, 147 Mo. 39, 47 S. W. 1058, Mikell's Cas. 625; post, § 260 i.

[354] See Richardson v. State, 9 Tex. App. 612; Orman v. State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662; Simmons v. State, 23 Tex. App. 653, 5 S. W. 208; Hardcastle v. State, 36 Tex. Cr. R. 555, 38 S. W. 186.

It is immaterial that the female is dead and that she was the wife of the person insulting her. Willis v. State (Tex. Cr. App.) 75 S. W. 790.

[354a] Riddle v. State, 49 Ala. 389; Brown v. State, 74 Ala. 42. And see Mitchell v. State, 41 Ga. 527; ante, § 212.

(*h*) *Trespass upon Land or Goods.*—It is also well settled that no mere trespass upon the land or goods of another is sufficient to reduce an intentional killing to manslaughter. If one uses a deadly weapon upon another to prevent a mere trespass upon his property, and kills him, he is guilty of murder.[355]

It will be shown in a subsequent section that a man may kill another to prevent a felony attempted by violence or surprise, as burglary or robbery. These are more than mere trespasses, and the homicide is justifiable.[356] So, as we shall see, a man may sometimes kill to prevent an entry into his dwelling house.[357]

A man may also oppose force to force to prevent a mere trespass if he does not use a deadly weapon, or use unnecessary force, and if it becomes necessary, during the encounter, to kill in order to save himself from death or great bodily harm, he will be excused.[358] In such a case, if he should kill the other during the conflict, not in order to save himself from death or great bodily harm, but because of passion caused by the other's blows, it would be manslaughter in mutual combat.[359] If he should kill him from malice in such case, it would be murder.[360]

(*i*) *Question of Law or Fact.*—The weight of authority in *England* is to the effect that it is for the court to determine in the abstract whether a particular act of provocation is adequate, and to instruct the jury as a matter of law that it is or is not,

[355] Reg. v. Mawgridge, J. Kelyng, 119, Mikell's Cas. 613; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; Com. v. Drew, 4 Mass. 396; People v. Horton, 4 Mich. 67; Beauchamp v. State, 6 Blackf. (Ind.) 299; State v. Vance, 17 Iowa, 138; Monroe v. State, 5 Ga. 85; Hayes v. State, 58 Ga. 35; Sellers v. State, 99 Ga. 689, 26 S. E. 484, 59 Am. St. Rep. 253; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Oliver v. State, 17 Ala. 587; Lambeth v. State, 23 Miss. 322.

[356] Post, § 268.

[357] Post, § 287.

[358] Post, § 278.

[359] Com. v. Drew, 4 Mass. 391; Claxton v. State, 2 Humph. (Tenn.) 181; ante, § 260 d.

[360] Ante, §§ 259, 260d.

and that it is for the jury to say whether such provocation was given, whether it caused heat of blood, and whether the homicide was committed in the heat of blood.[361] And there are cases in this country to the same effect.[362] The soundness of this view is more than doubtful, and there are well-considered cases both in England and in this country to the effect that the adequacy of any act of provocation to arouse passion in an ordinarily reasonable man, which all agree to be the test, is essentially a question for the jury, unless it is so clearly inadequate as to admit of no reasonable doubt upon any theory.[363] As

[361] Reg. v. Fisher, 8 Car. & P. 182; Reg. v. Kelly, 2 Car. & K. 814.

Thus, in Reg. v. Fisher and Reg. v. Kelly, supra, the jury were instructed, as a matter of law, that a wife's adultery was not sufficient provocation to the husband, where he did not see the act.

[362] State v. John, 8 Ired. (N. C.) 330. In this case it was held as a matter of law that a wife's adultery was not sufficient provocation to the husband where he did not see the act.

[363] Reg. v. Welch, 11 Cox, C. C. 336, Beale's Cas. 479; Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; State v. Grugin, 147 Mo. 39, 47 S. W. 1058, Mikell's Cas. 625; Hooks v. State, 99 Ala. 166, 13 So. 767.

In Maher v. People, supra, it was said by Judge Christiancy: "It is doubtless, in one sense, the province of the court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule, the court, after informing the jury to what extent the passions must be aroused, and reason obscured, to render the homicide manslaughter, should inform them that the provocation must be one, the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter."

It was further said: "Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are much better qualified to judge of the sufficiency and tendency of a given provocation, and

was said by Judge Christiancy in a *Michigan* case, "Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents."[364]

261. Cooling of Blood.

(*a*) *In General.*—Not only must the provocation have been of such a nature as might reasonably excite passion and overthrow reason, but the homicide must have been committed before the passion subsided and the blood cooled, and before the lapse of a reasonable time for cooling. If the blood of the accused actually did cool before he gave the fatal blow, it is clearly a case of murder, however short the time between the provocation and the blow. And if the circumstances show that he reflected, as where it appears that he sought some advantage, or took time to choose some convenient place for fighting, or to strike at a particular vital spot, actual cooling may well be inferred, for

much more likely to fix, with some degree of accuracy, the standard of ordinary human nature, than the judge, whose habits and course of life give him much less experience of the working of passion in the actual conflicts of life."

In the case from which these quotations are taken, the evidence showed that the accused shot another when laboring under great excitement. His counsel offered to prove, for the purpose of showing provocation, that the person assaulted had committed adultery with the wife of the accused within half an hour prior to the shooting, that the accused saw them come out of the woods, and followed them, and, after they had separated, went into a saloon after the person assaulted, and instantly shot him, and that, a few minutes before he entered the saloon, a friend told him that his wife and the person assaulted had committed adultery in the woods the day before. According to the old authorities, this would not show adequate provocation, as the accused did not see the act (ante, § 269e), and the trial court excluded the evidence. On writ of error after a conviction of assault with intent to murder, the judgment was reversed on the ground that it was for the jury to say whether there was sufficient provocation, and that the evidence should have been admitted.

[364] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482.

these circumstances show the exercise of reason and judgment.[365]

(*b*) *Reasonable Time for Cooling.*—It is not necessary, however, in all cases, to show that the blood actually did cool, in order to make out a case of murder. It is enough to show that there was a reasonable time for cooling, for the law requires that men shall act reasonably in controlling their passions.[366] The reasonable time for cooling is the time within which an ordinarily reasonable man would cool under like circumstances.[367] In applying this test, all the circumstances attending the homicide are to be taken into consideration, including the

[365] See 1 East, P. C. 252; Rex v. Oneby, 2 Ld. Raym. 1485. "If, from any circumstance whatever," said East, "it appear that the party reflected, deliberated, or cooled any time before the fatal stroke given, or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder." 1 East, P. C. 252.

[366] 1 East, P. C. 252; Rex v. Oneby, 2 Ld. Raym. 1485; Lord Morely's Case, J. Kelyng, 53, Beale's Cas. 473; State v. McCants, 1 Speers (S. C.) 384, Mikell's Cas. 621 (one of the best cases on this point to be found in the reports); State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396, Mikell's Cas. 618; Kilpatrick v. Com., 31 Pa. 198; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70.

"'Was he cool?' means, not was there in fact a gentle flowing of the blood, which had been hurried in its circulation, but means, was there, in law, malice in his act; and the reasonable time then is not mere evidence of actual cooling, or cooling in its popular sense, but is, in itself, a circumstance which, in law, stands in place of actual cooling, and is equally significant of malice. He who has received a sufficient legal provocation, such as might have mitigated to manslaughter a mortal blow proceeding from it and given instantly, would not be less than a murderer if he should remain in apparently undiminished fury for a length of time unreasonable under the circumstances, and then kill." State v. McCants, 1 Speers (S. C.) 384.

[367] State v. McCants, 1 Speers (S. C.) 384, Mikell's Cas. 621; Kilpatrick v. Com., 31 Pa. 198.

Where, after men had been engaged in mutual combat, they ceased to fight, and one of them went to some distance after a weapon, and then returned and killed the other, it was held that the homicide was murder, whether the party actually cooled or not. Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166.

nature and extent of the provocation, the physical and mental constitution of the accused, his condition in life and peculiar situation at the time of the affair, his education and habits, and his conduct, manner, and conversation throughout the affair. "In a word, all pertinent circumstances may be considered, and the time in which an ordinary man, in like circumstances, would have cooled, is the reasonable time."[368]

(*c*) *Question of Law or Fact.*—Some of the cases hold that whether there was reasonable time for cooling is a question of law to be decided by the court upon consideration of the length of time and all the other circumstances found by the jury on a special verdict, or else to be given to the jury in the court's charge.[369] This, however, is wrong. The proper practice is to leave the question to be determined by the jury as a question of fact, under proper instructions, and by a general verdict. Whether, under all the circumstances, there was time for the passions of an ordinary man to cool must depend upon the nature of man and the laws of the human mind, as well as upon the nature and circumstances of the provocation, and in ordinary cases is essentially a question of fact for the jury.[370]

(3) Involuntary Manslaughter.

262. Definition.—Involuntary manslaughter is a homicide committed unintentionally, but without excuse, and not under such circumstances as to raise the implication of malice.[371] It may arise—

1. From malfeasance, or the doing of a criminal act not amounting to a felony, nor naturally tending to cause death or great bodily harm.

[368] State v. McCants, 1 Speers (S. C.) 384, Mikell's Cas. 621. See State v. Moore, 69 N. C. 267.

[369] Rex v. Oneby, 2 Ld. Raym. 1485; Reg. v. Fisher, 8 Car. & P. 182; State v. McCants, 1 Speers (S. C.) 384, Mikell's Cas. 621.

[370] Rex v. Hayward, 6 Car. & P. 157; Rex v. Lynch, 5 Car. & P. 324; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; Hooks v. State, 99 Ala. 166, 13 So. 767.

2. From misfeasance, or the doing of a lawful act with gross negligence.

3. From nonfeasance, or the omission to perform a legal duty under circumstances showing gross negligence.

The absence of an intent to kill or to inflict great bodily harm distinguishes involuntary manslaughter from voluntary manslaughter. It is distinguished from murder in that there is no malice, either express or implied,—that is, no actual intent to kill or inflict great bodily harm, nor circumstances from which malice will be implied, as the doing of an act dangerous to life, or the commission of a felony, or resistance of a lawful arrest. It is distinguished from excusable homicide by accident by the fact that the killing results from doing a criminal act.

263. Malfeasance.

(*a*) *In General.*—An unintentional homicide in the doing of a criminal act not amounting to a felony, nor naturally tending to cause death or great bodily harm, is generally manslaughter.[372]

As we have seen, it is murder to unintentionally kill another in committing, or attempting to commit, some felony, as burglary, rape, arson, or robbery, or by doing an act which has a natural tendency to cause death or great bodily harm, because in such cases the law implies malice from the nature of the act.[373]

[371] See Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425; Mirror of Justices (Sel. Soc.) c. 15, Mikell's Cas. 215; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417; Keenan v. State, 8 Wis. 132; People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883.

[372] Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 245; Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417. See, also, People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883; Rex v. Sullivan, 7 Car. & P. 641.

[373] Ante, §§ 244, 248.

If the act is not of such a nature, but is criminal,—that is, a misdemeanor,—and is *malum in se* and not merely *malum prohibitum,* the law does not excuse the act altogether as an accident, but, because the act was criminal, punishes the homicide as manslaughter.[374]

(*b*) *Assaults, Breaches of the Peace, and Unlawful Games.* —If one assaults another, but not in a way to naturally cause death or great bodily harm, he is guilty of a criminal act, and if death ensues, though contrary to his intention and wish, the homicide is manslaughter.[375] So, if men engage in a prize fight under such circumstances as to constitute a breach of the peace, and one of them unintentionally kills the other, it is manslaughter at common law because of the breach of the peace.[376] The same is true of a homicide unintentionally caused in an affray.[377] And it is manslaughter to unintentionally kill another in an unlawful game or sport, as in a game of football

[374] See the cases cited in note 372, supra, and in the notes following. And see post, § 263 g.

[375] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; Fray's Case, 1 East, P. C. 236, Beale's Cas. 477; Wigg's Case, 1 Leach, C. C. 378; Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425; People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883. And see Reg. v. Bruce, 2 Cox, C. C. 262, Beale's Cas. 202.

In Reg. v. Towers, supra, this principle was applied where a man assaulted a woman who was nursing a child, and thereby caused the child to go into convulsions, and die.

It is manslaughter if, on a sudden quarrel between two persons, a blow intended for one of them accidentally falls upon and kills a third person. Rex v. Brown, 1 Leach, C. C. 135.

It is murder if the assault is made in a way to manifestly endanger life, or threaten great bodily harm, as when it is made with a deadly weapon, though without intent to kill. Ante, § 244.

[376] See Ward's Case, 1 East, P. C. 270; Reg. v. Knock, 14 Cox, C. C. 1.

If, by statute in the particular jurisdiction, prize fighting is lawful, the homicide is excusable as an accident. Post, § 274. If prize fighting should be made a felony by statute, the homicide, according to the common-law doctrine, would be murder. Ante, § 248.

[377] Reg. v. Knock, 14 Cox, C. C. 1.

played in such a manner as to be dangerous.[378] If a game is played in such a way as to make it likely to cause death, it is unlawful, and this principle applies, notwithstanding it is played according to established rules.[379]

(*c*) *Immoderate Correction of Child, Pupil or Apprentice.*—It is lawful for a parent or one in *loco parentis* to correct his child, and, if the correction does not exceed the bounds of moderation, the unintentional killing of the child will be excused as an accident.[380] If the correction is immoderate, however, either because of the instrument used, or because of the extent of the punishment, it becomes an assault and battery, and, if death ensues in consequence, it is a case of manslaughter.[381] Of course, in determining whether the correction was moderate or not, the age of the child must be taken into consideration.[382] The same principle applies to the correction of a pupil by his teacher, or an apprentice by his master, where the right to correct at all is recognized.[383]

(*d*) *Attempting or Procuring an Abortion.*—If a person attempts to procure an abortion under such circumstances, or in such a manner, as to inflict serious injury on the woman, and endanger her life, and she dies by reason thereof, the homicide, as we have seen, is murder.[384] If the attempt is not made in such a way as to inflict serious injury or endanger life, the homicide is manslaughter, for the attempt to procure an abor-

[378] Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146. If the game or sport is lawful, the homicide is excusable. Post, § 274.

[379] Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146.

[380] Ante, § 274b.

[381] 1 Hale, P. C. 455; Fost. C. L. 262, Beale's Cas. 185, 315; Reg. v. Griffin, 11 Cox, C. C. 402, Beale's Cas. 315; Rex v. Cheeseman, 7 Car. & P. 455; State v. Fields, 70 Iowa, 196, 30 N. W. 480; Com. v. Randall, 4 Gray (Mass.) 36; State v. Shaw, 64 S. C. 566, 43 S. E. 14; post, § 274 b.

[382] Reg. v. Griffin, 11 Cox, C. C. 402, Beale's Cas. 315.

[383] Grey's Case, J. Kelyng, 64, Beale's Cas. 463, Mikell's Cas. 400; Reg. v. Hopley, 2 Fost. & F. 202; ante, § 211; post, § 274b.

[384] Ante, § 244e.

tion is unlawful.[385] Such a homicide is punishable as manslaughter, though the statute provides a specific penalty for abortion.[385a]

(*e*) *Riots.*—A riot is not a felony, so as to make an unintentional homicide while engaged in a riot murder.[386] But such a homicide is manslaughter, if there is no intention to kill or inflict great bodily harm, for the riot is a misdemeanor.[387]

(*f*) *Attempt to Commit Suicide.*—One who, in attempting to commit suicide, unintentionally kills a bystander, is guilty of manslaughter at least, because an attempt to commit suicide is criminal and *malum in se,* though no longer punishable.[388]

(*g*) *Acts Merely Mala Prohibita.*—To constitute involuntary manslaughter by malfeasance, the act done must be *malum in se,* and not merely *malum prohibitum.* For this reason it was held in a *Massachusetts* case, referred to in a previous section, that a person was not guilty of criminal assault and battery in driving over a man in the street, merely because he was driving at a rate of speed prohibited by a city ordinance, where he was not driving so recklessly as to be guilty of criminal negligence.[389] This case would apply, of course, if the man had

[385] Reg. v. Gaylor, Dears. & B. C. C. 288; Yundt v. People, 65 Ill. 372; People v. Olmstead, 30 Mich. 431; Willey v. State, 46 Ind. 363; People v. Clark, 7 N. Y. 385; State v. Glass, 5 Or. 73; Com. v. Railing, 113 Pa. 37, 4 Atl. 459; Worthington v. State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506.

[385a] State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902.

[386] Ante, § 248.

[387] 1 Whart. Crim. Law, §§ 326, 398; Rex v. Murphy, 6 Car. & P. 103; Brennan v. People, 15 Ill. 511; Sloan v. State, 9 Ind. 565; Patten v. People, 18 Mich. 314, Mikell's Cas. 433; State v. Jenins, 14 Rich. (S. C.) 215.

[388] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cas. 206; ante, § 250.

In South Carolina and Nevada it has been held murder. State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State v. Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776.

[389] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204, Mikell's Cas. 160; ante, §§ 59, 71.

been killed and the indictment had been for manslaughter. There is some authority apparently against this view. In a *Kentucky* case a man was held guilty of manslaughter without regard to any question of negligence, where he deliberately fired his pistol within the limits of a city in violation of an ordinance, and unintentionally killed a bystander.[390] This case may perhaps be sustained, however, on the ground that the act of firing the pistol was wanton and *malum in se.* Carrying a concealed weapon in violation of law being only *malum prohibitum* is not such an unlawful act as will render one liable for manslaughter if the accidental discharge of the weapon results in homicide.[390a]

(*h*) *Act Constituting a Mere Civil Wrong.*—The *dictum* in many of the cases is broad enough to make it manslaughter to unintentionally kill another while engaged in committing a mere civil wrong or tort, but this is not the law. To have this effect the act must, at least, be a misdemeanor. In a leading English case it was said that the mere fact of a person committing a civil wrong against another ought not to be used as an incident which is a necessary step in a criminal case, apart from the question of criminal negligence, and it was therefore held that the mere fact of a person wrongfully taking up a box from a refreshment stall on a sea pier, and wantonly throwing it into the sea, thereby unintentionally causing the death of a person who was bathing in the sea, was not *per se,* apart from the question of negligence, sufficient to make him guilty of manslaughter.[391]

[390] Sparks v. Com., 3 Bush (Ky.) 111, 96 Am. Dec. 196. And it was held that the same result follows if he expresses an intention to discharge his pistol in violation of law, and it is accidentally discharged in drawing it. Sparks v. Com., supra.

[390a] Potter v. State, 162 Ind. 213, 70 N. E. 129, 64 L. R. A. 942.

[391] Reg. v. Franklin, 15 Cox, C. C. 163, Beale's Cas. 203, Mikell's Cas. 158. Compare Rex v. Sullivan, 7 Car. & P. 641.

264. Misfeasance.

(*a*) *In General.*—The unintentional killing of another by gross negligence in the doing of a lawful act is manslaughter at common law.[392] If a man does a lawful act in a lawful manner, and unintentionally kills another, the homicide is excusable as an accident.[393] And it is also excusable if he was negligent, provided his negligence was not gross under the circumstances. Negligence rendering a man liable in a civil action for damages does not necessarily render him criminally responsible. To have this effect it must be gross.[394]

(*b*) *Careless Driving or Bicycling, etc.*—It is perfectly lawful for a man to drive along a frequented thoroughfare, but he must take care not to injure others in doing so. If he is guilty of gross negligence in the manner of his driving, and runs over and kills another, he is guilty of manslaughter.[395] What is gross negligence in such cases must depend upon the circumstances. Proper speed on a country road might be excessive speed on a city street, and proper speed in the daytime might be grossly excessive at night. Precisely the same principle must necessarily apply to death caused by careless bicycling, or carelessness in the use of automobiles and other conveyances.[395a]

[392] Fost. C. L. 262, Beale's Cas. 185; Reg. v. Salmon, 14 Cox, C. C. 494, Beale's Cas. 189; Knight's Case, 1 Lewin, C. C. 168, Mikell's Cas. 217; Rigmaidon's Case, 1 Lewin, C. C. 180, Mikell's Cas. 217.

[393] Post, § 274.

[394] Rex v. Long, 4 Car. & P. 398, 423; Reg. v. Spilling, 2 Mood. & R. 107; Reg. v. Spencer, 10 Cox, C. C. 525; Rex v. Williamson, 3 Car. & P. 635; Hull's Case, J. Kelyng, 40, Mikell's Cas. 215; Rex v. Green, 7 Car. & P. 156; Rex v. Allen, 7 Car. & P. 153.

[395] Reg. v. Swindall, 2 Car. & K. 230, 2 Cox, C. C. 141, Beale's Cas. 167; Reg. v. Longbottom, 3 Cox, C. C. 439, Mikell's Cas. 94; Knight's Case, 1 Lewin, C. C. 168, Mikell's Cas. 217; Reg. v. Dalloway, 2 Cox, C. C. 273, Beale's Cas. 165; Reg. v. Kew, 12 Cox, C. C. 355, Beale's Cas. 165; Belk v. People, 125 Ill. 584, 17 N. E. 744; Crum v. State, 64 Miss. 1, 1 So. 1, 60 Am. Rep. 44; Lee v. State, 1 Cold. (Tenn.) 62; White v. State, 84 Ala. 421, 4 So. 598; State v. Stentz, 33 Wash. 444, 74 Pac. 588.

[395a] In a recent Ohio case it was held that inasmuch as there were

(c) *Careless Handling of Deadly Weapons, Poisons, and Other Agencies.*—A man may also be guilty of manslaughter because of carelessness in the handling of a deadly weapon. It is perfectly lawful to shoot at a mark in the absence of statutory prohibition; yet, if a man negligently takes such a position that the bullets must go in the direction of a habitation, he will be guilty of manslaughter if they happen to kill a person.[396] And the same is true in any other case of culpable negligence in handling a deadly weapon.[397] The principle also applies to negligence in handling poisons and other dangerous drugs.[398]

no common law crimes in that state, and no statute had declared gross negligence a crime, a homicide committed by negligently riding a man down with a bicycle could not be manslaughter under a statute punishing homicide in the commission of an "unlawful act." Johnson v. State, 66 Ohio St. 59, 63 N. E. 607, 90 Am. St. Rep. 564. In this case the court failed to take into consideration the fact that many acts are "unlawful" that are not crimes, either at the common law or under statutes. See 90 Am. St. Rep. 571, note.

[396] Reg. v. Salmon, 14 Cox, C. C. 494, Beale's Cas. 189; Reg. v. Hutchinson, 9 Cox, C. C. 555.

[397] In State v. Hardie, 47 Iowa, 647, 29 Am. Rep. 496, the accused, for the purpose of frightening a woman, snapped a pistol at her, and it went off, and killed her. The weapon had been in the house for five years, and unsuccessful attempts had repeatedly been made to fire it off, and it was clear from the evidence that the accused did not think it would go off. He was convicted of manslaughter, however, and the conviction was sustained on the ground that he was guilty of gross negligence. See, also, Rampton's Case, J. Kelyng, 41; People v. Fuller, 2 Park. Cr. R. (N. Y.) 16; Reg. v. Campbell, 11 Cox, C. C. 323; Reg. v. Jones, 12 Cox, C. C. 628; Sparks v. Com., 3 Bush (Ky.) 111, 96 Am. Dec. 196; People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883; State v. Emery, 78 Mo. 77, 47 Am. Rep. 92; State v. Roane, 2 Dev. (N. C.) 58; State v. Vines, 93 N. C. 493, 53 Am. Rep. 466; Robertson v. State, 2 Lea (Tenn.) 239, 31 Am. Rep. 602; State v. Vance, 17 Iowa, 138; People v. Fuller, 2 Park. Cr. R. (N. Y.) 16.

[398] Reg. v. Crook, 1 Fost. & F. 521; Reg. v. Markuss, 4 Fost. & F. 356; Reg. v. Gaylor, Dears. & B. C. C. 288, 7 Cox, C. C. 253; Com. v. Thompson, 6 Mass. 134; Rice v. State, 8 Mo. 561; State v. Center, 35 Vt. 378.

A person causing the death of a child by giving it spirituous liquors in a quantity unfit for its tender age is guilty of manslaughter. Rex v. Martin, 3 Car. & P. 211.

A building contractor is guilty of manslaughter if, by using poor and defective materials, he constructs a building in such a manner as to render it dangerous, and it collapses because of such negligence on his part, and causes a death.[399]

(*d*) *Negligence of Physicians and Surgeons.*—If a physician or surgeon honestly and in good faith performs an operation, or administers a drug, and the patient dies therefrom, he is not guilty of manslaughter, merely because he made a mistake, or did not have sufficient skill.[400] But if the death was due to gross negligence, inattention, or ignorance, he is guilty.[401] By the weight of authority, the same rules apply to one who assumes to act as a physician or surgeon without being regularly licensed.[402]

265. Nonfeasance.

(*a*) *In General.*—The unintentional killing of another by omission to perform a legal duty owing to him, under circumstances showing inexcusable negligence, or failure to exercise reasonable diligence, is manslaughter.[403] Whether a homicide

[399] People v. Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766.

[400] 1 Hale, P. C. 428; 4 Bl. Comm. 197; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Reg. v. Spencer, 10 Cox, C. C. 525; Rex v. Williamson, 3 Car. & P. 635; Rex v. Van Butchell, 3 Car. & P. 629; Rex v. Long, 4 Car. & P. 398; Reg. v. Macleod, 12 Cox, C. C. 534, Mikell's Cas. 220; Com. v. Thompson, 6 Mass. 134; Rice v. State, 8 Mo. 561; post, § 274.

[401] Rex v. Long, 4 Car. & P. 423; Rex v. Spiller, 5 Car. & P. 333; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Reg. v. Macleod, 12 Cox, C. C. 534, Mikell's Cas. 220; Reg. v. Spilling, 2 Mood. & R. 107; Reg. v. Spencer, 10 Cox, C. C. 525; State v. Hardister, 38 Ark. 605, 42 Am. Rep. 5; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264. See, also, Rex v. Senior, 1 Mood. C. C. 346; Reg. v. Markuss, 4 Fost. & F. 356; Reg. v. Crook, 1 Fost. & F. 521; Mirror of Justices (Sel. Soc.) c. 15, Mikell's Cas. 215.

[402] 1 Hale, P. C. 429; Rex v. Van Butchell, 3 Car. & P. 629; Rex v. Long, 4 Car. & P. 398, 423; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187. And see the cases cited in the notes preceding.

[403] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; Reg. v. Lowe, 3 Car. & K. 123, Beale's Cas. 192; Reg. v. Hughes, 7 Cox, C. C. 301.

The captain of a vessel is guilty of manslaughter, at least, if he neg-

by mere nonfeasance, or omission to perform a duty, is murder or manslaughter, depends upon whether the omission was willful or not. If it was not willful, but due to gross negligence, the homicide is manslaughter; but if it was willful, and the natural consequence was to cause death, the homicide is murder.[404] Whether such a homicide is manslaughter or excusable homicide depends upon whether the omission was due to gross negligence. If the negligence was not gross under the circumstances, the homicide is excusable.[405]

(*b*) *Negligence of Persons in Charge of Railroad Trains, Machinery, Appliances, etc.*—The above principle has repeatedly been applied to persons in charge of railroad trains and steamboats, and other persons charged with duties in connection therewith, or with other kinds of machinery and appliances. In the case of a collision between railroad trains, and the death of a passenger or employe of the company caused by the negligence of the engineer or of a switchman or train dispatcher, if his omission was willful, and, *a fortiori*, if he actually intended the collision, he is guilty of murder. If the omission was not due to gross negligence or inattention, the homicide is excusable as an accident. If it was due to gross negligence or inattention, it is manslaughter.[406]

ligently fails to stop the vessel, and lower a boat, so as to rescue a seaman who has fallen overboard. U. S. v. Knowles, 4 Sawy. 517, Fed. Cas. No. 15,540.

[404] Ante, § 247.

[405] Post, § 274.

[406] State v. O'Brien, 32 N. J. Law, 169, Mikell's Cas. 218; Reg. v. Pargeter, 3 Cox, C. C. 191; State v. Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111.

A person in charge of a steamboat was held guilty of manslaughter where death was caused by his leaving the boat in the charge of a person who was incompetent. Reg. v. Lowe, 3 Car. & K. 123, 4 Cox, C. C. 449. But there must, in such case, be some act done by the captain to make him liable; mere omission to act is not enough. Rex v. Green, 7 Car. & P. 156; Rex v. Allen, 7 Car. & P. 153.

Failure of the officers of a vessel, or of an employe on a street car, to

(*c*) *Negligence in Connection with Mines.*—The same principle applies when a mine owner or a superintendent or employe in a mine, charged with the duty of ventilating the mine, or of attending the engine for drawing up the miners, fails to properly perform his duty, and thereby causes the death of a miner. If his neglect was due to failure to exercise reasonable diligence, he is guilty of manslaughter.[407]

(*d*) *Neglect of Children and other Dependent Persons.*—The doctrine under consideration has repeatedly been applied in case of the death of a child or other helpless person, caused by the neglect of those charged with his custody and care. It is well settled that if a parent, being able, fails through culpable negligence to provide food, shelter, medical attendance and other necessaries for his dependent child, and thereby causes the child's death, he is guilty of manslaughter at least.[408] If the omission is willful, he is guilty of murder.[409] The same principle applies if a husband, by such neglect, causes the death of a sick and helpless wife,[410] or in any other case in which a person has undertaken, whether for a compensation or not, to attend and care for one who is helpless.[411]

keep a lookout, will render them guilty of manslaughter if death is caused thereby. Reg. v. Lowe, supra; Reg. v. Spence, 1 Cox, C. C. 352; Com. v. Metropolitan R. Co., 107 Mass. 236.

[407] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; Reg. v. Lowe, 3 Car. & K. 123, Beale's Cas. 192.

Failure of employe in a mine to plank up a shaft, when he is charged with this duty, will render him guilty of manslaughter if death is caused thereby. Reg. v. Hughes, 7 Cox, C. C. 301.

[408] Reg. v. Conde, 10 Cox, C. C. 547, Beale's Cas. 424; Reg. v. Downes, 13 Cox, C. C. 111, Beale's Cas. 195; Reg. v. Senior, 19 Cox, C. C. 219, Mikell's Cas. 143; Gibson v. Com., 106 Ky. 360, 50 S. W. 532, 90 Am. St. Rep. 230. See Rex v. Friend, Russ. & R. 20, Beale's Cas. 190.

Omission to call in a physician from religious and conscientious scruples is elsewhere considered. See ante, § 65.

[409] Ante, § 247.

[410] Reg. v. Plummer, 1 Car. & K. 600; State v. Smith, 65 Me. 257.

[411] Reg. v. Instan [1893] 1 Q. B. 450, 17 Cox, C. C. 602, Beale's Cas.

Inability to provide the necessary food, medical attendance, etc., is a sufficient excuse.[412] But such a case must be reported to the public authorities, if there are poor laws providing for public aid to sick or helpless paupers.[413]

There is no liability if the person neglected, whether wife, child, servant, or stranger, is able to help himself, and avoid the consequences of the neglect.[414]

(*e*) *There must be a Duty to Act.*—To render one responsible for a homicide because of mere nonfeasance, he must have omitted some legal duty which he owed to deceased. Failure to perform acts of mercy or mere moral obligations is not enough.[415] For a stranger to neglect to give warning so as to prevent a collision between railroad trains, or to prevent a man from taking poison, or for him to fail to rescue a drowning person or feed a starving child, would not render him guilty of manslaughter, for he is only under a moral obligation to interfere in such cases, and the law does not undertake to punish for failure to perform moral obligations. There must have been a legal duty, and it must have been owing to the deceased.[416]

198; Reg. v. Nicholls, 13 Cox, C. C. 75, Beale's Cas. 193; Reg. v. Marriott, 8 Car. & P. 425, Mikell's Cas. 229.

"Every person under a legal duty, whether by contract or by law, or by the act of taking charge, wrongfully or otherwise, of another person, to provide the necessaries of life for such other person, is criminally responsible for the neglect of that duty, if the person to whom the duty is owing is, from age, health, insanity, or any other cause, unable to withdraw himself from the control of the person from whom it is due, but not otherwise." Steph. Dig. Crim. Law, art. 213.

[412] Reg. v. Hogan, 2 Den. C. C. 277, 5 Cox, C. C. 255; Reg. v. Philpott, 6 Cox, C. C. 140.

[413] Reg. v. Mabbett, 5 Cox, C. C. 339.

[414] Rex v. Friend, Russ. & R. 20; Reg. v. Shepherd, Leigh & C. 147, 9 Cox, C. C. 123, Mikell's Cas. 223; Reg. v. Waters, 2 Car. & K. 864, 1 Den. C. C. 356; Reg. v. Smith, Leigh & C. 607, 10 Cox, C. C. 82.

[415] 1 Whart. Crim. Law, §§ 329, 330; Connaughty v. State, 1 Wis. 159; Burrell v. State, 18 Tex. 713.

[416] In Reg. v. Smith, 11 Cox, C. C. 210, Beale's Cas. 192, the accused

Knowledge of Facts Giving Rise to Duty.—It is also necessary, in cases of this character, that the accused shall have known of the facts making it his duty to act, for a man cannot be said to neglect to perform a duty unless he knows of the condition of things which requires performance at his hands.[417] In some cases, however, it may be a part of his duty to inform himself of the facts so that a failure to do so through culpable negligence would render him responsible.

(F) Justifiable and Excusable Homicide.

(1) Justifiable Homicide in General.

266. Definition.—Justifiable homicide is the necessary killing of another in the performance of a legal duty, or the exercise of a legal right, the slayer not being at all in fault.[417a] A homicide is justifiable, so that no blame whatever attaches, in the following cases:

was employed by the owner of a tramway, which crossed a public highway, to warn travelers on the highway of the approach of trucks on the tramway, but the owner of the tramway was under no legal duty to warn travelers. Under these circumstances, it was held that the accused owed no duty to the travelers, and that his failure to give warning, whereby the death of a traveler was caused, did not make him guilty of manslaughter. If a statute had imposed a duty to give warning, it would have been otherwise.

Failure to provide food or medical attendance for a starving or sick and helpless person or child does not render one guilty of homicide, if he is under no legal duty to do so. Thus, in Rex v. Smith, 2 Car. & P. 449, it was held that a person was not responsible for allowing his idiot brother to die of want, though living in the same house, where it did not appear that he had undertaken to support him. See, also, Reg. v. Pelham, 8 Q. B. Div. 959; Reg. v. Shepherd, Leigh & C. 147, 9 Cox, C. C. 123, Mikell's Cas. 223; Reg. v. Saunders, 7 Car. & P. 277.

This principle does not apply where a person has specially undertaken to supply the wants of a helpless person, or has put him beyond the reach of relief from others; and it makes no difference that there is no relationship between the parties. Reg. v. Smith, Leigh & C. 607, 10 Cox, C. C. 82; Reg. v. Marriott, 8 Car. & P. 425, Mikell's Cas. 229.

[417] State v. Smith, 65 Me. 257.

[417a] 1 Hawk. P. C. c. 10, Mikell's Cas. 551.

1. **When a person convicted of a capital offense, and sentenced to death by a court of competent jurisdiction, is executed by the proper officer in accordance with the sentence.**
2. **When a person is necessarily killed, either by a peace officer or by a private person, in order to prevent him from committing a felony by violence or surprise.**
3. **When a homicide is necessarily committed, either by a peace officer or by a private person, in suppressing a riot.**
4. **When a person is necessarily killed in effecting an arrest for a felony committed by him, or in preventing his escape after he has been arrested and is in custody.**
5. **When a person who is feloniously assaulted, and who is himself without fault, kills his assailant to save himself from death or great bodily harm.**

267. Execution of Criminals.

One of the clearest cases of justifiable homicide is where an officer executes one who has been convicted of a capital offense and sentenced to death.[418] To be justifiable, the homicide must be in accordance with the law, and in strict conformity with the sentence. "The law must require it," says Blackstone, "otherwise it is not justifiable; therefore, wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder.[419] And further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder.[420] Also, such judgment, when legal, must be executed by the proper officer or his appoint-

[418] 4 Bl. Comm. 178; Fost. C. L. 267; Beale's Cas. 311; 1 Hale, P. C. 496, Mikell's Cas. 392; 1 Hawk. P. C. c. 10, Mikell's Cas. 552.

[419] 4 Bl. Comm. 178; 1 Hale, P. C. 497.

[420] 4 Bl. Comm. 178; 1 Hale, P. C. 497; 1 Hawk. P. C. 70.

ed deputy. If another person doth it of his own head, it is held to be murder, even though it be the judge himself.[421] It must, further, be executed *servato juris ordine;* it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa,* it is murder."[422]

268. Homicide to Prevent a Felony.

(*a*) *In General.*—It is a well-settled principle of the common law that any person, whether he be a peace officer or merely a private individual, may and should kill another, if necessary to prevent him from committing a felony attempted by force or surprise, as murder, rape, sodomy, robbery, burglary, or arson.[423] The homicide in such a case is not merely excusable, but it is justifiable. "Such homicide," said Blackstone, "as is committed for the prevention of any forcible and atrocious crime, is justifiable by the laws of nature, and also by the law of England, as it stood as early as the time of Bracton;" and he specifies as of that character the offenses mentioned above.[424] It is not at all necessary that the felony shall be directed against the person, habitation, or property of the person committing the homicide, but it is justifiable to kill in order to prevent such a felony against a third person, even though he may be a stranger.

(*b*) *Statutory Felonies.*—This doctrine applies, it has been held, to felonies created by statute, if they are forcible felonies, although they may not have been crimes at all at common law. Thus, it has been applied to a homicide committed in

[421] 4 Bl. Comm. 178.

[422] 4 Bl. Comm. 179; 3 Inst. 52; 1 Hale, P. C. 501.

[423] 4 Bl. Comm. 180; Fost. C. L. 259, 273, Beale's Cas. 326; Hawk. P. C. c. X, Mikell's Cas. 552; Steph. Dig. Crim. Law, art. 199; Cooper's Case, Cro. Car. 544, Beale's Cas. 347; Reg. v. Rose, 15 Cox, C. C. 540, Beale's Cas. 343; Howell's Case, Sel. Soc. Pl. 145, Mikell's Cas. 406; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Pond v. People, 8 Mich. 150; Stoneman v. Com., 25 Grat. (Va.) 887; Ruloff v. People, 45 N. Y. 213; Osborne v. State, 140 Ala. 84, 37 So. 105.

[424] 4 Bl. Comm. 180.

order to prevent the statutory felony of breaking and entering a shop or warehouse with intent to steal, although this was no crime at all at common law.[425]

(*c*) *Necessity for the Homicide—Acting on Appearances.*—To bring a case within the doctrine, the homicide must be necessary to prevent the felony. It is only on the ground of necessity that it is justifiable.[426] It has been said that it need not be actually necessary, but it is enough if it is reasonably apparently so; that if a man kills another under a reasonable apprehension that the other intends to commit a felony, and that there is imminent danger of such design being carried into execution, he is justified in so doing, though the danger is unreal.[427] Strictly speaking, however, the homicide is not justifiable under such circumstances, but excusable on the ground of the mistake of fact.[428]

(*d*) *Secret Felonies.*—Since a homicide in prevention of a felony is only justifiable when necessary to prevent the felony, the doctrine does not apply to the prevention of felonies not attempted by violence or surprise. It does not apply to secret felonies, like larceny.[429]

[425] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159. See, also, Pond v. People, 8 Mich. 150.

[426] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Storey v. State, 71 Ala. 330, Mikell's Cas. 406. And see People v. Cook, 39 Mich. 236, 33 Am. Rep. 380, Beale's Cas. 345; post, § 288.

[427] Stoneman v. Com., 25 Grat. (Va.) 887.

In a New York case it was said: "One who is opposing and endeavoring to prevent the consummation of a felony by others may properly use all necessary force for that purpose, and resist all attempts to inflict bodily injury upon himself, and may lawfully detain the felons and hand them over to the officers of the law. Although the use of wanton violence and the infliction of unnecessary injury to the persons of the criminals is not permitted, yet the law will not be astute in searching for such line of demarcation in this respect as will take the innocent citizen, whose property and person are in danger, from its protection, and place him at the mercy of the felon." Ruloff v. People, 45 N. Y. 213.

[428] See Levett's Case, Cro. Car. 538, Beale's Cas. 279; post, § 274.

[429] Reg. v. Murphy, 1 Craw. & D. 20, Beale's Cas. 318.

(*e*) *Knowledge.*—And under no circumstances is a homicide justifiable because the deceased was committing a felony, if the accused had no knowledge of this fact at the time of the killing.[430]

269. Homicide to Prevent Misdemeanor or Trespass.

A homicide to prevent another from committing a mere misdemeanor, as, for example, a simple assault and battery, which does not endanger life or threaten great bodily harm, or an unlawful arrest, etc., is not justifiable.[431] Nor is a man justified in killing another to prevent a bare trespass upon land or goods.[432] As we have seen, however, a man, in such cases, may use reasonable force short of taking life or inflicting great bodily harm, without being guilty of assault and battery;[433] and, as we shall presently see, he will be excused if, in the conflict which ensues, he necessarily kills the other to save himself from death or great bodily harm.[434]

270. Homicide in Suppressing a Riot.

There is one exception to the rule that life cannot be taken to

In Storey v. State, 71 Ala. 330, the evidence tended to show that the defendant killed the deceased in order to recapture a horse which the deceased had stolen from him. The larceny being a felony, the defendant requested the court to charge the jury that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity to kill him in order to recover the property, and prevent the consummation of the felony, the homicide was justifiable. The request was refused, and the supreme court held that it was proper to refuse it, as a homicide to prevent a felony is justifiable only where the felony is attempted by force or surprise, as in the case of murder, robbery, rape, etc., and that the rule does not apply to secret felonies, like larceny. See, also, State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[430] See Reg. v. Dadson, 4 Cox, C. C. 358, Beale's Cas. 317.

[431] Ante, § 260 a-f; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[432] Ante, § 260h; State v. Moore, supra.

[433] Ante, §§ 212-214.

[434] Post, §§ 277, 278.

prevent a mere misdemeanor. Though a riot is only a misdemeanor at common law, it is generally so serious an offense that life may be taken, if necessary, in order to suppress it. "The intentional infliction of death or bodily harm," therefore, "is not a crime when it is done either by justices of the peace, peace officers, or private persons, whether such persons are, and whether they act as, soldiers under military discipline, or not, for the purpose of suppressing a general and dangerous riot which cannot otherwise be suppressed."[435]

271. Homicide in Effecting Arrest or Preventing Escape.

(*a*) *In Cases of Felony.*—Either an officer or a private person, having authority to arrest another for a felony, may kill him if he cannot otherwise be taken, and he may do so when the party is fleeing, as well as when he is engaged in violent resistance.[436] *A fortiori,* when a felon has once been arrested, the officer or other person having him in custody may kill him, if necessary, in order to prevent his escape.[437] A person cannot justify the killing of another on the ground that he had committed a felony, unless he knew of the fact at the time of the killing.[438]

(*b*) *In Cases of Misdemeanor.*—Some of the courts have applied the same rule to cases of misdemeanor, holding that life

[435] Steph. Dig. Crim. Law, art. 198; Pond v. People, 8 Mich. 150.

[436] Fost. C. L. 267, Beale's Cas. 311; Steph. Dig. Crim. Law, art. 199; Leonin's Case, Sel. Soc. Pl. 133, Mikell's Cas. 393; Carr v. State, 43 Ark. 99. And see Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

[437] U. S. v. Clark, 31 Fed. 710, Beale's Cas. 319; Carr v. State, 43 Ark. 99; Reneau v. State, supra.

"The intentional infliction of death or bodily harm is not a crime when it is done by any person in order to arrest a traitor, felon, or pirate, or retake or keep in lawful custody a traitor, felon, or pirate who has escaped, or is about to escape, from such custody, although such traitor, felon, or pirate offers no violence to any person; provided the object for which death or harm is inflicted cannot be otherwise accomplished." Steph. Dig. Crim. Law, art. 199.

[438] Reg v. Dadson, 4 Cox, C. C. 358, Beale's Cas. 317.

may be taken, if necessary, in effecting an arrest for a misdemeanor, or in order to prevent the escape of a person who is in custody for a misdemeanor.[439] The better opinion, however, is to the contrary,[440] "the theory of the law being that it is better that a misdemeanant escape than that human life be taken."[441] If a lawful attempt to arrest a person for a misdemeanor is resisted, the officer may lawfully employ any necessary force short of taking life in order to effect the arrest, and if, in the course of the conflict, he is threatened with death or great bodily harm, and he necessarily kills the person whom he is attempting to arrest to save himself, the homicide is justifiable.[442]

(2) Excusable Homicide in General.

272. Definition.—Excusable homicide is homicide committed under circumstances that constitute, not a justification, but merely an excuse. It is of two sorts:

1. **Homicide per infortunium, or by misadventure,—where a person unfortunately kills another in doing a lawful act, without any intent to hurt, and without criminal negligence.**
2. **Homicide se defendendo, or in self-defense, upon a sud-**

[439] See State v. Garrett, 1 Winst. (N. C.) 144, 84 Am. Dec. 359; State v. Phillips, 119 Iowa, 652, 94 N. W. 229, 67 L. R. A. 292.

[440] Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; U. S. v. Clark, 31 Fed. 710, Beale's Cas. 219; Stephens v. Com., 20 Ky. L. R. 544, 47 S. W. 229; Handley v. State, 96 Ala. 48, 11 So. 322; State v. Smith (Iowa) 101 N. W. 710.

[441] Brown, J., in U. S. v. Clark, supra.

[442] Steph. Dig. Crim. Law, art. 200; U. S. v. Rice, 1 Hughes, 560, Fed. Cas. No. 16,153, Mikell's Cas. 394; U. S. v. Jailer, 2 Abb. U. S. 265, Fed. Cas. No. 15,463; North Carolina v. Gosnell, 74 Fed. 734; Smith v. State, 59 Ark. 132, 26 S. W. 712; Lynn v. People, 170 Ill. 527, 48 N. E. 964.

But the attempt to arrest must be a lawful attempt, and a police officer loses the protection of his office if he first brings on a difficulty with deceased and in its course attempts an arrest. Johnson v. State, 58 Ark. 57, 23 S. W. 7.

den affray,—where a person necessarily kills another, after becoming engaged in a sudden affray, in order to save himself from reasonably apparent danger of death or great bodily harm.[443]

273. Distinguished from Justifiable Homicide.

At common law there was certainly a clear distinction between excusable and justifiable homicide.[444] In justifiable homicide the slayer was regarded as doing what was right, and no fault whatever was imputed to him. This, of course, is still true. In excusable homicide, however, he was regarded as to some extent in fault. Thus, in the case of homicide in self-defense, on a sudden affray, he was regarded as at fault in being engaged in the affray.[445] And in the case of homicide by misadventure, the law "presumed negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it, who therefore was not altogether faultless."[446] Sir Edward Coke said that anciently excusable homicide was punished by death;[447] but this is probably not true.[448] It was certainly punished, however, by forfeiture of goods and chattels.[449] Now it is no longer punished at all, either in England or in the United States.

[443] 4 Bl. Comm. 182; Hawk. P. C. c. XI, Mikell's Cas. 552.

[444] See Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733, where the distinction between justifiable and excusable self-defense is clearly explained. And see Fost. C. L. 262, Beale's Cas. 326.

[445] 4 Bl. Comm. 186, 187; Fost. C. L. 262, Beale's Cas. 326; Erwin v. State, supra; Pond v. People, 8 Mich. 150.

[446] 4 Bl. Comm. 186. See Pond v. People, 8 Mich. 150.

[447] 2 Inst. 148, 315.

[448] It was denied by later writers. See 1 Hale, P. C. 425, 4 Bl. Comm. 188.

[449] Fost. C. L. 287; 4 Bl. Comm. 188. See, also, Fost. C. L. 273, 274; 1 East, P. C. 279; 1 Hale, P. C. 482. Anon., Fitzh. Abr., Corone, Pl. 234, Mikell's Cas. 411.

274. Homicide by Misadventure.

(*a*) *Lawful Acts.*—Excusable homicide *per infortunium,* or by misadventure or accident, is where a person unfortunately kills another in the doing of a lawful act, without any intent to hurt, and without criminal negligence.[450] If a man kills another in doing a *lawful* act in a lawful manner,—that is, without negligence,—the homicide is excusable, "for the act is lawful, and the effect is merely accidental."[451] Such is the case where a man is at work with a hatchet, and the head flies off and kills a bystander;[452] where a workman throws down a piece of timber from a house top after shouting warning;[452a] where laborers are killed by the unexpected careening of an undermined structure;[452b] where a steamboat keeping proper lookout runs down another craft;[452c] where a man, lawfully defending himself, unintentionally kills his assailant, the circumstances not authorizing a killing in self-defense;[452d] or unintentionally kills another;[452e] where a man is lawfully shooting at a mark, without negligence, and undesignedly kills a man;[453] where a parker killed his master in the park at night, mistaking him for a poacher;[453a] where a parent is *moderately* correcting his child, a teacher his pupil, or a master his apprentice, and happens to cause his death;[454] where a person unintentionally

[450] 4 Bl. Comm. 182; Hawk. P. C. c. XI, Mikell's Cas. 552; Levett's Case, Cro. Car. 538, Beale's Cas. 279; Hull's Case, J. Kelyng, 40, Mikell's Cas. 215.

[451] 4 Bl. Comm. 182; Reg. v. Bruce, 2 Cox, C. C. 262, Beale's Cas. 202; Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146. And see Belk v. People, 125 Ill. 584, 17 N. E. 744.

[452] 4 Bl. Comm. 182.

[452a] Hull's Case, J. Kelyng, 40, Mikell's Cas. 215.

[452b] Thomas v. People, 2 Colo. App. 513, 31 Pac. 349.

[452c] Rex v. Green, 7 Car. & P. 156; Rex v. Allen, 7 Car. & P. 153.

[452d] State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417.

[452e] Pinder v. State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

[453] 4 Bl. Comm. 182; 1 East, P. C. 260, 269.

[453a] 1 Hale, P. C. 40, Mikell's Cas. 244.

[454] 4 Bl. Comm. 182; Fost. C. L. 262, Beale's Cas. 185, 315; 1 East, P. C. 260, 269.

kills another while engaged in a *lawful* game or sport, as boxing, wrestling, football, etc., provided he is playing it in a lawful manner;[455] where a property owner unintentionally kills another in the necessary defense of his property;[455a] or where a physician or other person unintentionally causes death by administering a dangerous drug or performing an operation, the circumstances not being such as to show culpable negligence.[456] It is not unlawful to attempt to procure an abortion when in proper professional judgment it is necessary to save the life of the mother, and, if the mother is unintentionally killed in such an attempt, the homicide is excusable.[457] One who, in lawful self-defense against another, unintentionally, and without negligence, kills a third person, is excusable.[458]

(*b*) *Unlawful Acts.*—To render a homicide excusable on the ground of misadventure or accident the accused must have been engaged in a lawful act, or at least in an act that was a mere civil trespass, or that was merely *malum prohibitum,* and not *malum in se.*[459] If a person unintentionally kills another in

[455] 4 Bl. Comm. 182; 1 Hale, P. C. 473; Reg. v. Bruce, 2 Cox, C. C. 262; Reg. v. Young, 10 Cox, C. C. 371 (sparring); Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146 (foot-ball).

If two play at barriers, or run a tilt without the King's commandment, and one kill the other, it is manslaughter; but if by the King's command, it is not a felony, or, at most, *per infortunium.* 11 H. 7, 23; B. Coron. 229; Dalton, Cap. 96; Co. P. C. p. 56; Hale, P. C. 473; Mikell's Cas. 86.

[455a] Hinchcliffe's Case, 1 Lewin, C. C. 161, Mikell's Cas. 446.

[456] 1 Hale, P. C. 429; 4 Bl. Comm. 197; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Rex v. Williamson, 3 Car. & P. 635; Rex v. Van Butchell, 3 Car. & P. 629; Rex v. Long, 4 Car. & P. 398; Reg. v. Macleod, 12 Cox, C. C. 534, Mikell's Cas. 220; Com. v. Thompson, 6 Mass. 134; Rice v. State, 8 Mo. 561; ante, § 264d.

[457] State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776.

[458] Plummer v. State, 4 Tex. App. 310, 30 Am. Rep. 165.

[459] 4 Bl. Comm. 182; Levett's Case, Cro. Car. 538, Beale's Cas. 279; Reg. v. Franklin, 15 Cox, C. C. 163, Beale's Cas. 203, Mikell's Cas. 158; Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204, Mikell's Cas. 160; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417.

doing a criminal act that is *malum in se,* he is certainly guilty of manslaughter,[460] and in some cases of murder.[461] Thus, it is not excusable homicide, but manslaughter, at least, to kill another, though unintentionally, in assaulting and beating him,[462] or in fighting with him beyond necessary self defense,[462a] or in a prize fight, if prize fighting is unlawful,[463] or in any unlawful game or sport.[464] Immoderate correction of a child by a parent, teacher, or master is unlawful, and an assault and battery, and if death is caused thereby, it is manslaughter at least, and it may be murder.[465]

To unintentionally kill another in committing a mere civil trespass, not naturally endangering life, is excusable.[466] And, as we have seen, it is excusable homicide, and not manslaughter, to unintentionally kill another in committing a misdemeanor, if the act is merely *malum prohibitum,* and not naturally dangerous to life.[467]

(*c*) *Negligence.*—If a man is guilty of criminal negligence in doing an act, even though the act may be lawful but for such negligence, and unintentionally kills another, the homicide is not excusable, but is at least manslaughter.[468] For example, while it is lawful to shoot at a mark, and, if there is no negligence, homicide unintentionally committed in doing so is ex-

[460] Ante, § 263.

[461] Ante, §§ 244, 248, 249.

[462] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; Fray's Case, 1 East, P. C. 236, Beale's Cas. 477; ante, § 263b.

[462a] Reg. v. Knock, 14 Cox, C. C. 1.

[463] Ward's Case, 1 East, P. C. 270; ante, § 263b.

[464] 4 Bl. Comm. 183; 1 Hale, P. C. 472; 1 Hawk. P. C. 74; ante, § 263b.

[465] 4 Bl. Comm. 182, 183; 1 Hale, P. C. 473, 474; Reg. v. Hopley, 2 Fost. & F. 202; Grey's Case, J. Kelyng, 64, Beale's Cas. 463, Mikell's Cas. 400; Reg. v. Griffin, 11 Cox, C. C. 402; ante, §§ 244, 263c.

[466] Reg. v. Franklin, 15 Cox, C. C. 163, Beale's Cas. 203, Mikell's Cas. 158; ante, § 263h.

[467] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204, Mikell's Cas. 160; ante, § 263g.

[468] Ante, § 264.

cusable, yet it is manslaughter if the homicide is caused by negligently shooting in the direction of a habitation.[469] The same is true of careless driving, careless running of steamboats or railroad trains, careless use or custody of poison, explosives, and other dangerous agencies, careless performance of a surgical operation, and the like.[470]

275. Killing Wife's Paramour.

The killing by a husband of his wife's paramour is not justifiable or excusable at common law,[471] though in some states it is made so by statute.[472] If the husband sees them in the act, he is guilty of manslaughter at common law, as already shown; and, by the weight of authority, if he does not see them in the act, he is guilty of murder.[473]

(3) Self-Defense.

276. In General.—Homicide in self-defense is either justifiable or excusable. At common law—

1. **Justifiable self-defense is where a person is feloniously assaulted, being without fault himself, and necessarily kills his assailant to save himself from death or great bodily harm, or from some other felony attempted by force or surprise.**
2. **Excusable self-defense is where a person becomes engaged in a sudden affray or combat, and in the course**

[469] Ante, § 264c.

[470] Rex v. Walker, 1 Car. & P. 320; Reg. v. Swindall, 2 Car. & K. 230, 2 Cox, C. C. 141, Beale's Cas. 167; Reg. v. Trainer, 4 Fost. & F. 105; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Rex v. Senior, 1 Mood. C. C. 346, 1 Lewin, C. C. 183; ante, §§ 264b-d.

[471] Pearson's Case, 2 Lewin, C. C. 216; Hooks v. State, 99 Ala. 166, 13 So. 767.

[472] See Price v. State, 18 Tex. App. 474, 51 Am. Rep. 322; Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630.

A past attempt to debauch accused's wife will not excuse. Farmer v. State, 91 Ga. 720, 18 S. E. 987; Jackson v. State, Id., 271, 18 S. E. 298.

[473] Ante, § 260e.

of the affray or combat necessarily, or under reasonably apparent necessity, kills his adversary to save himself from death or great bodily harm.

Conditions of Self-Defense.—To render a homicide justifiable or excusable on the ground of self-defense—

1. **It must reasonably appear that there is imminent danger of death, or of some other felony, or of great bodily harm.**
2. **The danger need not necessarily be real, but it must be believed on reasonable grounds to be real.**
3. **In the case of excusable self-defense, in a sudden affray, the party threatened must retreat as far as he can with safety before taking his adversary's life. Some courts apply the same rule to justifiable self-defense, where a person is feloniously assaulted, being without fault himself, but the better opinion is that retreat is not necessary in such a case.**
4. **The slayer must not have been the aggressor, or otherwise provoked the difficulty.**

277. Justifiable Self-Defense.

As was stated in a previous section, homicide in self-defense may be justifiable, or it may be merely excusable. This is certainly so at common law, though in some states the statutes have done away with the distinction, and have classed all homicide in self-defense as justifiable.[474]

It is clear, under the authorities at common law, that if a man feloniously assaults another, with intent to kill him or to inflict great bodily harm, the person threatened, being without fault himself, may stand his ground and kill his assailant, if it is necessary to do so in order to save himself from death or great bodily harm, and the homicide will be justifiable, as dis-

[474] See Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286, Beale's Cas. 330.

tinguished from excusable, self-defense.[475] In like manner a woman may kill a man to prevent him from committing a rape upon her.[476] And, if necessary, a person may kill another to prevent an attempted robbery.[477] In these cases the homicide is clearly justifiable, because committed in order to prevent a felony.[478]

278. Excusable Self-Defense.

Excusable homicide in self-defense differs from justifiable homicide in self-defense in that the parties are engaged in an affray or mutual combat, by reason of which both are deemed to be in fault, so that the homicide is merely excused, and not justified. It is called homicide *se defendendo,* on a sudden affray. The affray may arise in various ways. Where a person is assaulted without felonious intent, and engages in a combat with his assailant, in the course of which it becomes necessary to kill his adversary in order to save himself from death or great bodily harm, and he does so, after retreating as far as he can with safety, he is regarded, according to the common law, as being to some extent in fault, and the homicide is not justifiable, but it is excusable.[479] Formerly it was punished by forfeiture of goods, and certain other consequences followed on the idea of guilt.[480] Now, however, it is not punishable at all.

[475] 1 Hale, P. C. 40; 4 Bl. Comm. 183, 184; 1 East, P. C. 271; Fost. C. L. 273, Beale's Cas. 326; Anon., Fitzh. Abr., Corone, Pl. 284, Mikell's Cas. 411; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; Pond v. People, 8 Mich. 150.

[476] Ante, § 268a.

[477] Ante, § 268a.

[478] Ante, §§ 268a-e.

[479] 4 Bl. Comm. 186, 187; 1 Hawk. P. C. c. 28, § 24; Id., § XI, Mikell's Cas. 552; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; State v. Ingold, 4 Jones (N. C.) 216, 67 Am. Dec. 283; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Pond v. People, 8 Mich. 150.

Foster calls this self-defense culpable, but, through the benignity of the law, excusable. Fost. C. L. 273, 274.

[480] Ante, § 273.

Except as respects the duty to retreat, the slayer is in the same position as in the case of justifiable self-defense. As was stated above, the affray may arise in various ways. It may arise from resenting and returning a blow, or from resenting insulting words, or from resisting a trespass on land or goods, or from resisting an unlawful arrest. None of these provocations justify or excuse a homicide, and some of them do not even reduce it to manslaughter. If, however, in any of these cases it becomes necessary for one of the parties to take the other's life to save himself from death or great bodily harm, and if he does so, the homicide is excusable, except as explained in the sections following.[481]

279. Imminence of the Danger.

A homicide is not justifiable or excusable on the ground of self-defense unless it is apparently necessary to save the life of the slayer, or prevent some other felony, like rape or robbery, or to save him from great bodily harm. The apprehension of no other danger will either justify or excuse the resorting to so extreme a measure as the taking of life.[482] It is also neces-

[481] 4 Bl. Comm. 186, 187. See White v. Territory, 3 Wash. T. 397, 19 Pac. 37; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Pond v. People, 8 Mich. 150.

[482] Napier's Case, Fost. C. L. 278; Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; Allen v. U. S., 164 U. S. 492; Greschia v. People, 53 Ill. 295; Pierson v. State, 12 Ala. 149; Jackson v. State, 77 Ala. 18; Dolan v. State, 81 Ala. 11, 1 So. 707; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; State v. Wells, 1 N. J. Law, 424, 1 Am. Dec. 211; Com. v. Drum, 58 Pa. 9; Jones v. State, 76 Ala. 8; Logue v. Com., 38 Pa. 265, 80 Am. Dec. 481; Meurer v. State, 129 Ind. 587, 29 N. E. 392; and cases cited in the notes following.

The killing need not have been necessary to save the life of the accused. It is sufficient if it was necessary in order to save him from great bodily harm. State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417.

And a person may use a deadly weapon to defend himself from a public whipping by one greatly his superior physically. State v. Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756.

sary that the danger shall be apparently *imminent* at the time of the homicide, and not merely prospective. A man's bare fear, however well grounded, that another intends to kill him or do him great bodily harm, will not justify or excuse his killing the other, unless there is some overt act indicating a purpose to immediately carry out such intention.[483] Thus, the fact that a dangerous man has threatened to kill another on sight, and that the other has heard of the threat, or mere verbal threats at the time, will not justify him in taking his enemy's life, unless there is some overt act indicating a purpose to immediately put the threat into execution.[484] The fact that he knows that his enemy is armed is not enough, if the latter shows no present intention to use his weapon.[485] But one who has reasonable ground to believe that another intends to do him great bodily harm and that such design will be accomplished, need not wait until his adversary gets an advantage, but may immediately kill him if necessary to avoid the danger.[485a] A homicide can never be justifiable or excusable on the ground

[483] U. S. v. Outerbridge, 5 Sawy. 620, Fed. Cas. No. 15,978; State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417, 10 S. E. 792; State v. Abbott, 8 W. Va. 741; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; Pierson v. State, 12 Ala. 149; Dolan v. State, 81 Ala. 11, 1 So. 707; Jackson v. State, 77 Ala. 18; Stoneman v. Com., 25 Grat. (Va.) 887; Field v. Com., 89 Va. 690, 16 S. E. 865; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417; State v. Sullivan, 51 Iowa, 142, 50 N. W. 572; Greschia v. People, 53 Ill. 295; Logue v. Com., 38 Pa. 265, 80 Am. Dec. 481.

"The danger must be imminent, impending, present, not prospective, not even in the near future." Dolan v. State, 81 Ala. 11, 1 So. 707.

[484] State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417, 10 S. E. 792; State v. Evans, 65 Mo. 574; State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148; Mize v. State, 36 Ark. 653; Bohannon v. Com., 8 Bush (71 Ky.) 481; Parsons v. Com., 78 Ky. 102; Wall v. State, 18 Tex. 682, 70 Am. Dec. 302; State v. Sullivan, 51 Iowa, 142, 50 N. W. 572.

[485] Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; Roberts v. State, 65 Ga. 430; Goodall v. State, 1 Or. 333, 80 Am. Dec. 396, Mikell's Cas. 413; State v. Brittain, 89 N. C. 481; Lander v. State, 12 Tex. 462.

[485a] State v. Matthews, 148 Mo. 185, 49 S. W. 1085.

of self-defense, if, at the time of the killing, the deceased had thrown away his weapon and was turning away.[486] But an intention to withdraw from the conflict in order to deprive a person assailed of his right to kill in self-defense must in some manner be made known to him.[486a]

It is the province of the court to instruct the jury what the law is in relation to the right of self-defense. Whether, under the law as thus laid down, a necessity existed at the time to take life in order to save life or prevent grievous bodily harm, and whether the killing, under the circumstances of the particular case, was prompted by such necessity, or by some other motive, is to be determined by the jury.[486b]

Assault not Threatening Death or Great Bodily Harm.—If a person is assaulted, but not in such a way as to endanger his life or threaten great bodily harm, he may oppose force to force, and if, in the conflict which ensues, his adversary threatens to kill him or to inflict great bodily harm, he may, after retreating as far as safety will permit, kill him to avoid the threatened injury, and in such a case the homicide will be excusable on the ground of self-defense.[487] But a simple assault not apparently endangering life nor threatening great bodily harm will not justify or excuse his killing his assailant or using a deadly weapon. Under such circumstances the homicide will be manslaughter, at least.[488] Though one's right to kill in self-de-

[486] Meurer v. State, 129 Ind. 587, 29 N. E. 392.

[486a] People v. Scott, 123 Cal. 434, 56 Pac. 102. See, also, People v. Button, 106 Cal. 628, 39 Pac. 1073; People v. Hecker, 109 Cal. 451, 42 Pac. 307.

[486b] Erwin v. State, 29 Ohio St. 186.

[487] Ante, § 278.

[488] Reg. v. Hewlett, 1 Fost. & F. 91, Beale's Cas. 329; Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; Com. v. Drum, 58 Pa. 9; Grainger v. State, 5 Yerg. (Tenn.) 459; Davis v. People, 88 Ill. 350; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; Myers v. State, 62 Ala. 599; State v. Rogers, 18 Kan. 78, 26 Am. Rep. 754; Honesty v. Com., 81 Va. 283; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; Smith v.

fense cannot be limited to his ability to distinguish between felonies and misdemeanors.[488a]

Unlawful Arrest.—The same principle applies to the resistance of an unlawful arrest. When an unlawful attempt is made to arrest a man, he may oppose force to force, and, if it becomes necessary in the conflict to kill his assailant to save himself from death or great bodily harm, the homicide will be excusable.[489] But unless this necessity apparently exists, a man cannot kill another or use a deadly weapon merely to prevent an unlawful arrest. If he does so, he is guilty of manslaughter, at least.[490]

State, 142 Ind. 288, 41 N. E. 595; and other cases cited in note 479, supra.

In Napier's Case, Fost. C. L. 278, the defendant was indicted for the murder of his brother, and the circumstances as they appeared in evidence were as follows: The defendant on the night of the homicide came home drunk. His father ordered him to go to bed, which he refused to do, and thereupon a scuffle ensued between them. The deceased, who was in bed, hearing the disturbance, got up and fell upon the defendant, threw him down and beat him upon the ground and held him down, so that he could not escape nor avoid the blows. While they were thus striving together, the defendant gave the deceased a wound with a penknife and killed him. On a special verdict stating these circumstances, and upon a conference of all the judges of England, it was unanimously held that the homicide was not excusable, but was manslaughter, "for there did not appear to be any inevitable necessity, so as to excuse the killing in this manner."

[488a] State v. Sloan, 22 Mont. 293, 56 Pac. 364.

[489] Miers v. State, 34 Tex. Cr. R. 161, 29 S. W. 1074, Mikell's Cas. 429; ante, § 278. See Noles v. State, 26 Ala. 31, 62 Am. Dec. 711.

[490] Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; State v. Cantieny, 34 Minn. 1, 25 N. W. 458; Creighton v. Com., 84 Ky. 103; Keady v. People (Colo.) 74 Pac. 892, 66 L. R. A. 353. But see State v. Oliver, 2 Houst. (Del.) 604; and State v. Davis, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845.

Homicide to prevent an arrest is justifiable, even though there may have been a right to make the arrest, if it is attempted in such a wanton and menacing manner as to threaten the party with loss of life or great bodily harm. Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

280. Acting on Appearances.

Though there are some cases to the contrary,[491] it must now be regarded as settled that it is not necessary that there shall be an actual danger to entitle a person to defend himself. A reasonable appearance of danger is enough, for a man must be permitted to act on appearances, without regard to the unexpressed intention of the person threatening him. So long as he acts reasonably, and in the *bona fide* belief that he will suffer death or great bodily harm unless he takes his assailant's life, he will be excused to the same extent as if the danger were real.[492] Thus, if a man who has threatened to kill another on sight presents a pistol on meeting him, the latter may reasonably suppose he intends to carry out his threat, and, if he kills him in such belief, the homicide is not criminal, though the

[491] See Reg. v. Smith, 8 Car. & P. 160; Reg. v. Bull, 9 Car. & P. 22; State v. Vines, 1 Houst. C. C. (Del.) 424; State v. Hollis, Houst. C. C. (Del.) 24. And see State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417.

[492] Selfridge's Case (Mass.) 160, referred to in Beale's Cas. 331; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286, Beale's Cas. 330; Logue v. Com., 38 Pa. St. 265, 80 Am. Dec. 481; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Schnier v. People, 23 Ill. 17; Steinmeyer v. People, 95 Ill. 383; Enright v. People, 155 Ill. 32, 39 N. E. 561; Barr v. State, 45 Neb. 458, 63 N. W. 856; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173, Mikell's Cas. 433; Pond v. People, 8 Mich. 150; Godwin v. State, 73 Miss. 873, 19 So. 712; Stoneman v. Com., 25 Grat. (Va.) 887; Brown v. Com., 86 Va. 466, 10 S. E. 745; State v. Eaton, 75 Mo. 586; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; People v. Anderson, 44 Cal. 65; People v. Flahave, 58 Cal. 249; People v. Morine, 61 Cal. 367; Amos v. Com., 16 Ky. L. R. 358, 28 S. W. 152; Murray v. Com., 79 Pa. 311; Brumley v. State, 21 Tex. App. 223, 17 S. W. 140; Jordan v. State, 11 Tex. App. 435; Patillo v. State, 22 Tex. App. 586, 3 S. W. 766; Goodall v. State, 1 Or. 333, 80 Am. Dec. 396, Mikell's Cas. 413; Marts v. State, 26 Ohio St. 162; Keith v. State, 97 Ala. 32, 11 So. 914; State v. Jones, 29 S. C. 201, 7 S. E. 296.

For this reason, an instruction that, "to justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the deceased was absolutely necessary," was held to be erroneous. People v. Morine, 61 Cal. 367.

pistol may not be loaded, and the intention may be merely to frighten. So, if a person who has threatened to kill another should, on meeting him, make a movement as if to draw a weapon, the other would not be punishable for killing him, though it might afterwards appear that the deceased was not armed.[493] These cases, however, where there was in fact no intention on the part of the deceased to kill, are all more properly cases of excusable homicide,—excusable on the ground of the mistake of fact.[494]

Reasonable Grounds for Apprehension of Danger.—In a Tennessee case it was held that one who kills another, believing himself in danger of death or great bodily harm, will be justified, although he may act from cowardice, and without any sufficient grounds for his belief that there is danger.[495] This decision, however, cannot be sustained. While a man may act upon appearances, he must act reasonably. "It is not enough that he believed himself in danger, unless the facts and circumstances are such that the jury can say that he had reasonable grounds for his belief."[496] As was said in a Georgia case,

[493] Patillo v. State, 22 Tex. App. 586, 3 S. W. 766, and other cases above cited.

[494] Ante, §§ 68 et seq., 274.

As to homicide by a somnambulist, see Fain v. Com., 78 Ky. 183, 39 Am. Rep. 213, Mikell's Cas. 297, 220, n.

[495] Grainger v. State, 5 Yerg. (Tenn.) 459, 26 Am. Dec. 278. And see Morgan v. State, 3 Sneed (Tenn.) 480.

[496] Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286, Beale's Cas. 330. And see Creek v. State, 24 Ind. 151; Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62; Parker v. State, 55 Miss. 414; Kendrick v. State, 55 Miss. 436; Darling v. Williams, 35 Ohio St. 58; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; Greschia v. People, 53 Ill. 295; State v. Parker, 106 Mo. 218, 17 S. W. 180; Golden v. State, 25 Ga. 527; State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; State v. Abbott, 8 W. Va. 741; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Stoneman v. Com., 25 Grat. (Va.) 887; Field v. Com., 89 Va. 690, 16 S. E. 865; Jones v. State, 76 Ala. 8; People v. Williams, 32 Cal. 281; Goodall v. State, 1 Or. 333, 80 Am. Dec. 396, Mikell's Cas. 413; State v. Morey, 25 Or. 241, 35 Pac. 655, 36 Pac. 573.

In Wesley v. State, supra, it was said: "The mere fear, apprehen-

the law makes no discrimination in favor of a drunkard or a coward, or any particular individual; but the circumstances must be such as to justify the fears of a reasonable man.[497] Former hostile acts or threats, or present verbal threats, are not sufficient ground for apprehending danger, where there is no overt act indicating a present intention to execute the threats.[498]

Considerations in Determining Reasonableness.—Whether or not there were reasonable grounds for the belief of the accused that his life was in imminent danger, and could only be saved by such means as he employed, is to be determined in view of all the circumstances of each particular case, and the jury should take into consideration the excitement and confusion, if any, which would naturally result under such circumstances. On a prosecution for the killing of one of a body of rioters who came to the house of the accused in the nighttime, it was said by the Michigan court: "In estimating the nature and imminence of the danger, in the choice of means to avoid it, or the amount of force or kind of weapon to be used in repelling

sion, or belief, however sincerely entertained by one man, that another designs to take his life, will not excuse or justify the killing of the latter by the former. Where the danger is neither real nor urgent, to render a homicide excusable or justifiable, within the meaning of the law, there must, at the least, be some attempt to execute the apprehended design; or there must be reasonable ground for the apprehension that such design will be executed, and the danger of its accomplishment imminent. A party may have a lively apprehension that his life is in danger, and believe that the grounds of his apprehension are just and reasonable; but if he act upon them, and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been of the reasonableness of the ground upon which he acted. That is a question which the jury alone are to determine."

[497] Golden v. State, 25 Ga. 527.

See, also, State v. Sorenson, 32 Minn. 118, 19 N. W. 738.

[498] State v. Cain, 20 W. Va. 679; Gladden v. State, 12 Fla. 562; Cahill v. People, 106 Ill. 621; People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; Parsons v. Com., 78 Ky. 102; Lewis v. State, 51 Ala. 1; ante, notes, 480-482.

it, the excitement and confusion which would naturally result from the surrounding circumstances, for which the rioters alone were responsible, should not be overlooked. To require of the defendant, while under a high degree of mental excitement, induced by their wrongful and criminal conduct, and without his fault, the same circumspection, and cool, deliberate judgment, in estimating the danger, or the choice of means for repelling it, as we, who are unaffected by the excitement or the danger, may now exercise in contemplating it, would be to ignore the laws of our being, and to require a degree of perfection to which human nature has not yet attained. Of the weight a jury should give to these considerations, no safer standard can be found than their own individual consciousness, and the consideration of what they, with the honest purpose of avoiding the danger, without unnecessarily taking life, might, under the circumstances in which the defendant was placed, be likely to do."[499]

281. Duty to Retreat—Excusable Self-Defense.

It is well settled that a homicide in a sudden affray is not excusable on the ground of self-defense, unless the accused retreats as far as he safely can in order to avoid the violence of the deceased and the necessity to take his life. If he fails to do this, the homicide is manslaughter, at least. "The party assaulted," says Blackstone, "must flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him."[500]

[499] Patten v. People, 18 Mich. 314, 100 Am. Dec. 173, Mikell's Cas. 433. See, also, Pond v. People, 8 Mich. 150; Logue v. Com., 38 Pa. 265, 80 Am. Dec. 481; Greschia v. People, 53 Ill. 295; Bell v. State, 20 Tex. App. 445; Patillo v. State, 22 Tex. App. 586, 3 S. W. 766.

[500] 4 Bl. Comm. 185; 1 Hale, P. C. 483; Fost. C. L. 273, Beale's Cas. 326, 328; Allen v. U. S., 164 U. S. 492; Finch v. State, 81 Ala. 41, 1 So. 565; Pond v. People, 8 Mich. 150; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Dock v. Com., 21 Grat. (Va.) 909; Brown v. Com., 86 Va. 466, 10 S. E. 745; Shorter v. People, 2 N. Y. 193,

He need only retreat, however, when he can do so with safety. If the assault upon him is so fierce as not to allow him to yield a step without manifest danger of death or great bodily harm, he may kill his assailant instantly, and the homicide will be excusable.[501] These are the rules governing excusable self-defense, as distinguished from justifiable self-defense.

Justifiable Self-Defense.—It is clear, under the authorities at common law, that the rule requiring retreat, if possible, does not apply in the case of justifiable self-defense.[502] If a man feloniously assaults another with intent to kill him or to inflict great bodily harm, and the person assaulted is himself without fault, he is not bound to retreat at all, even though he might do so with safety, but he may stand his ground, and kill his assailant, if it be apparently necessary in order to save himself; and the homicide in such case will be justifiable. This distinction between justifiable and excusable self-defense, with respect to the duty to retreat, is clearly recognized by Hale, Foster, East, and other early authorities on the criminal law, and has been recognized and applied in some of the late cases.[503] In a

51 Am. Dec. 286; People v. Constantino, 153 N. Y. 24, 47 N. E. 37; Dolan v. State, 40 Ark. 454; Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493; State v. Rheams, 34 Minn. 18, 24 N. W. 302; State v. Jones, 89 Iowa, 182, 56 N. W. 427; Sullivan v. State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Gilleland v. State, 44 Tex. 356. And see Com. v. Drum, 58 Pa. 9.

[501] 4 Bl. Comm. 185; 1 Hawk. P. C. c. 29, § 14; Creek v. State, 24 Ind. 151; Dock v. Com., 21 Grat. (Va.) 909; Brown v. Com., 86 Va. 466, 10 S. E. 745; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; Com. v. Drum, 58 Pa. 9; State v. Tweedy, 5 Iowa, 433.

[502] As to the distinction between justifiable and excusable self-defense, see ante, §§ 273, 277, 278.

[503] 1 Hale, P. C. 40; 1 East, P. C. 271; Fost. C. L. 273, Beale's Cas. 326; Wallace v. U. S., 162 U. S. 466; Rowe v. U. S., 164 U. S. 546; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52; Page v. State, 141 Ind. 236, 40 N. E. 745; State v. Hudspeth, 150 Mo. 12, 51 S. W. 483; State v. Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; La Rue v. State, 64 Ark. 144, 41 S. W. 53; Duncan v. State, 49 Ark. 543, 6 S. W. 164; State v. Bonofiglio, 67 N. J.

well-considered Ohio case it appeared that the defendant was standing in a shed, where he had a right to be, and that the deceased, after angry words had passed between them, approached in a threatening manner with an axe. The defendant warned him not to enter, but he continued to advance, and when he reached the eave of the shed, perhaps within striking distance of the defendant, the latter shot and killed him. Upon this evidence the court instructed the jury to acquit the defendant if he acted in necessary self-defense, "provided he used all means in his power otherwise to save his own life, or to prevent the intended harm, as retreating as far as he could," etc. The defendant was convicted, but on writ of error the judgment was reversed because the charge required him to retreat, even though the deceased had feloniously assaulted him without fault on his part. The court reviewed the authorities, and properly drew the distinction between justifiable self-defense and excusable self-defense. "A true man," it was said, "who is without fault, is not obliged to fly from an assailant who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[504]

Cases Ignoring This Distinction.—Some of the courts have refused to recognize this distinction, clearly as it is established by authority at common law, and have held that the person assaulted must retreat in all cases, if he can safely do so, though the attack upon him may be felonious, and though he may himself be free from fault.[505]

Law, 239, 52 Atl. 712, 54 Atl. 99, 91 Am. St. Rep. 423. And see Pond v. People, 8 Mich. 150.

A police officer is not required to decline combat when resisted in the performance of his duty, and attempt to place himself out of reach of danger before he will be justified in slaying his assailant. Lynn v. People, 170 Ill. 527, 48 N. E. 964; Smith v. State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; North Carolina v. Gosnell, 74 Fed. 734.

[504] Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733. See, also, Beard v. U. S., 158 U. S. 550, Mikell's Cas. 416; People v. Newcomer, 118 Cal. 263, 50 Pac. 405; State v. Cushing, 14 Wash. 527, 45 Pac. 145.

[505] State v. Donnelly, 69 Iowa, 705, 27 N. W. 369, 58 Am. Rep. 234,

Retreat in One's House.—The rule that a person who is assaulted without felonious intent, or in some states in all cases, is bound to retreat, if he can do so with safety, before taking the life of his assailant to save himself from death or great bodily harm, does not apply where a man is assaulted in his own house. In such a case he is not bound to retreat, even though by doing so he might manifestly secure his safety, but he may stand his ground, and take his assailant's life if it becomes necessary.[506]

282. Effect of the Accused being the Aggressor—Justifiable Self-Defense.

In order that a homicide may be *justifiable* on the ground of self-defense, it is clear that the accused must not have caused the necessity to kill by his own fault. If he was himself in fault in bringing on the difficulty, as where he made the first assault or otherwise provoked the difficulty, whether with or without a felonious intent, the homicide may under some circumstances be excusable,[507] but, strictly and accurately speaking, it cannot be said to be justifiable.

Excusable Self-Defense.—There are some decisions to the effect that one who is himself the aggressor, or who otherwise

Beale's Cas. 338; State v. Rheams, 34 Minn. 18, 24 N. W. 302; Com. v. Drum, 58 Pa. 9; People v. Sullivan, 7 N. Y. 396.

[506] 1 Hale, P. C. 486; Ford's Case, J. Kelyng, 51, Mikell's Cas. 450; Dakin's Case, 1 Lewin, C. C. 166; State v. Middleham, 62 Iowa, 150, 17 N. W. 446; State v. Donnelly, 69 Iowa, 705, 27 N. W. 369, 58 Am. Rep. 234, Beale's Cas. 338; Pond v. People, 8 Mich. 150; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200, Beale's Cas. 348; Eversole v. Com., 95 Ky. 623, 26 S. W. 816; Elder v. State, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220; Palmer v. State, 9 Wyo. 40, 59 Pac. 793, 87 Am. St. Rep. 910; Jones v. State, 76 Ala. 8; State v. Harman, 78 N. C. 515.

A man's place of business is deemed his dwelling, for the purposes of this doctrine. Jones v. State, 76 Ala. 8; Willis v. State, 43 Neb. 102, 61 N. W. 254.

The principle applies as between partners, joint tenants, and tenants in common. Jones v. State, supra.

[507] See the cases cited in the notes following.

brings on or provokes a difficulty, whether by acts or words, will not be excused for afterwards killing his adversary in self-defense, even though he may not have been actuated by malice in bringing on the difficulty.[508] The better opinion, however, is against this view, and in favor of the doctrine that one who commits an assault without malice, or otherwise provokes a difficulty without malice, and thereby brings on a conflict, may withdraw from the conflict, and if he does so in good faith, and in such an unequivocal manner as to show his adversary that he desires to withdraw, and his adversary follows him, and attempts to kill him or do him great bodily harm, he has the same right of self-defense as if he had not originally been the aggressor.[509] If, however, he does not withdraw, or offer to withdraw, he cannot successfully plead self-defense, but will be guilty of manslaughter at least.[510] So where his first at-

[508] State v. Parker, 106 Mo. 218, 17 S. W. 180. See, also, Jackson v. State, 81 Ala. 33, 1 So. 33; Baker v. State, 81 Ala. 38, 1 So. 127; Judge v. State, 58 Ala. 406, 29 Am. Rep. 757; Logue v. Com., 38 Pa. 265, 80 Am. Dec. 481; State v. Neely, 20 Iowa, 108; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417.

[509] 1 Hale, P. C. 428; Fost. C. L. 273, Beale's Cas. 326, 328; 4 Bl. Comm. 185, 186; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470, Beale's Cas. 334; People v. Button, 106 Cal. 628, 39 Pac. 1073, Mikell's Cas. 421; Evans v. State, 44 Miss. 762; Rowe v. U. S., 164 U. S. 546; State v. Smith, 10 Nev. 106; Johnson v. State, 58 Ark. 57, 23 S. W. 7; Vaiden v. Com., 12 Grat. (Va.) 717.

That accused first drew a weapon will not deprive him of the right of self-defense. Fussell v. State, 94 Ga. 78, 19 S. E. 891.

[510] Adams v. People, 47 Ill. 376; Greschia v. People, 53 Ill. 295; State v. Linney, 52 Mo. 40; Logue v. Com., 38 Pa. 265, 80 Am. Dec. 481; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470, Beale's Cas. 334. Compare People v. Batchelder, 27 Cal. 69, 85 Am. Dec. 231.

If a person resists a lawful attempt to arrest him, and kills the officer in the conflict which ensues, he is so much in the wrong that he cannot set up the plea of self-defense, even though the killing may have been necessary to save his life. State v. Garrett, 1 Winst. (N. C.) 144, 84 Am. Dec. 359.

It has also been held that one caught in the act of adultery with another's wife, and attacked by the husband, cannot kill him in self-de

tack deprived deceased of his senses and reasoning powers to the extent that he did not comprehend defendant's withdrawal.[510a] But the exercise of a legal right will rarely be considered a provocation sufficient to deprive one of his right of self-defense, though he has reason to expect a conflict will result, and arms himself accordingly.[510b]

283. Original Assault with Malice.

It has been held by some courts that even when a man assaults another with malice, and afterwards kills him, he may successfully plead self-defense on the ground that the homicide was necessary to save his own life, if he repented before the killing and withdrew from the difficulty in such a way as to clearly show an abandonment of his original purpose, and his adversary, instead of allowing him to withdraw, persisted in following him, and attempting to kill him.[511] This seems to be the proper view, but it is doubtful whether it is supported by authority.[512]

There is certainly no right of self-defense, if the withdrawal is not in good faith, but in such a case the homicide is murder. "If A. hath malice against B., and meeteth him and striketh him, and then B. draweth at A., and A. flyeth back until he come to a wall, and then kills B., this is murder, notwithstanding his flying to the wall; for the craft of flying shall not excuse the malice which he had, nor shall any such device to wreak

fense. Drysdale v. State, 83 Ga. 744, 10 S. E. 358, 20 Am. St. Rep. 340; Reid v. State, 11 Tex. App. 509, 40 Am. Rep. 795.

Compare Wilkerson v. State, 91 Ga. 729, 17 S. E. 990; Franklin v. State, 30 Tex. App. 628, 18 S. W. 468; Varnell v. State, 20 Tex. App. 56.

[510a] People v. Button, 106 Cal. 628, 39 Pac. 1073, Mikell's Cas. 421.

[510b] Thompson v. U. S., 155 U. S. 271; State v. Evans, 124 Mo. 397, 28 S. W. 8; Smith v. State, 25 Fla. 517, 6 So. 482; State v. Matthews, 148 Mo. 185, 49 S. W. 1085.

See, also, Wallace v. U. S., 162 U. S. 466.

[511] Stoffer v. State, 15 Ohio, 47, 86 Am. Dec. 470, Beale's Cas. 334. And see 1 Hale, P. C. 479, 480.

[512] See the cases cited in note 513, infra.

his malice on another, and think to be excused by law, avail him anything, but in such case the malice is enquirable, and, if that be found by the jury, then his flight is so far from excusing the crime that it aggravates it."[513]

There is no right of self-defense if the conduct of the party is not so marked in the matter of time, place, and circumstance as to clearly show his adversary that his danger has passed, and to make his conduct thereafter the pursuit of vengeance, rather than defense against the original assault.[514] Nor is there any right of self-defense if he does not withdraw, or offer to withdraw; and it can make no difference that he cannot withdraw with safety.[515]

Indeed, the weight of authority is in favor of the view that there is no right of self-defense at all in one who has assaulted another with malice. Thus, it is said that if two persons agree to fight a duel, and one of them kills the other, it is murder, though the deceased may have fired the first shot, or given the first blow, and the accused may have retreated as far as he could before killing him. It is murder, says Blackstone, "because of the previous malice and concerted design."[516]

284. Actual Malice at Time of Killing.

It has been held that if the circumstances are such as to justify a man in taking the life of another to save his own, under the rules above stated, and he does so, the fact that he has actual malice against the other will not render him guilty of a felonious homicide.[517]

[513] Anon, J. Kelyng, 58, Beale's Cas. 329. And see Hawk. P. C. c. X, Mikell's Cas. 552; 1 Hale, P. C. 479, 480, 482; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470, Beale's Cas. 334; Greschia v. People, 53 Ill. 295.

[514] Stoffer v. State, supra.

[515] State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396.

[516] 4 Bl. Comm. 185. And see 1 Hawk. P. C. c. 11, § 18; Id., c. 13, § 26; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; Clifford v. State, 58 Wis. 477, 17 N. W. 304. And see Greschia v. People, 53 Ill. 295.

[517] State v. Matthews, 148 Mo. 185, 49 S. W. 1085; Golden v. State, 25

285. Killing Innocent Person to Save One's Own Life.

It has been said that if two persons are in such a situation that the death of one is necessary to save the other, the killing of one by the other to save his own life is excusable, though both are equally innocent,—as in the case mentioned by Lord Bacon, where two shipwrecked men are on a plank which is not able to save them both, and one pushes the other off.[518] This, however, as we have seen, is at least doubtful.[519]

(4) Defense of Property.

286. In General.—Life cannot be taken in defense of one's property, real or personal, unless it is necessary in order to prevent a felony attempted by violence or surprise.

As was shown in a previous section, a man may kill another, if necessary, in order to prevent him from committing a felony by violence or surprise, as burglary, arson, and robbery.[520] But in no other case is a homicide in defense of property either justifiable or excusable. We have seen that it is not justifiable in order to prevent a secret felony like larceny.[521] And, *a fortiori,* is never justifiable or excusable in order to prevent a mere trespass upon property, real or personal.[522] A man, however,

Ga. 527. It was said in this case: "One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into account. This principle is too plain to need amplification."

[518] 4 Bl. Comm. 186; ante, § 82.

[519] Reg. v. Dudley, 15 Cox, C. C. 624, 14 Q. B. Div. 273, Beale's Cas. 357, Mikell's Cas. 131, n.; ante, § 82.

[520] Ante, § 268a.

[521] Ante, § 268d.

[522] Reg. v. Murphy, 1 Craw. & D. 20, Beale's Cas. 318; Reg. v. Archer, 1 Fost. & F. 351; Storey v. State, 71 Ala. 330, Mikell's Cas. 406; State v. Morgan, 3 Ired. 25 (N. C.) 186, Mikell's Cas. 447; Wallace v. U. S., 162 U. S. 466; Davison v. People, 90 Ill. 221; State v. Donyes, 14 Mont. 70, 35 Pac. 455; Utterback v. Com., 105 Ky. 723, 49 S. W. 479, 88 Am. St.

in defense of his property, may use all necessary force short of taking life or inflicting great bodily harm,[523] and, if he unintentionally causes death, the homicide may be excusable as an accident, instead of amounting to manslaughter.[524] Or if it becomes necessary for him to kill his adversary in order to save himself from death or great bodily harm, the homicide will be excusable, if not justifiable.[525]

287. Defense of Habitation.

It has become a maxim of the common law that a man's house is his castle, but this expression is not to be taken as meaning that a man may under any and all circumstances kill in defense of his dwelling house. A man is not bound to retreat from his house. He may stand his ground there, and kill any person who attempts to commit a felony therein, or who attempts to enter by force for the purpose of committing a felony, or of inflicting great bodily harm upon an inmate. In such a case the owner or any member of the family, or even a lodger in the house, may meet the intruder at the threshold, and pre-

Rep. 328; State v. Moore, 31 Conn. 479; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93.

This principle is illustrated in cases where a man sets a spring gun in his house or on his land. He may do so in his dwelling house, so that it will be discharged, and kill one who attempts to break and enter in the night for the purpose of committing a felony, as this is to prevent burglary,—a forcible felony. But a man cannot set a spring gun on his land so that it will kill mere trespassers. Nor can he, at common law, set a spring gun in his shop or warehouse, so as to kill one whot attempts to break and enter, for this is not burglary at common law, but a mere trespass. State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1. Compare Gray v. Combs, 7 J. J. Marsh. (Ky.) 478.

[523] Ante, § 214.

[524] Hinchcliffe's Case, 1 Lewin, C. C. 161, Mikell's Cas. 446. Ante, § 274.

[525] People v. Payne, 8 Cal. 341; State v. Matthews, 148 Mo. 185, 49 S. W. 1085; ante, § 276 et seq. See White v. Territory, 3 Wash. T. 397, 19 Pac. 37.

vent him from entering by any means rendered necessary by the exigency, even to the taking of his life, and the homicide will be justifiable.[526] The doctrine, however, does not justify a homicide merely to prevent a trespass upon the habitation, when it is evident that there is no intention to commit a felony, or to inflict great bodily harm upon an inmate.[527] Of course, in defending his habitation, a man must act upon appearances, and if he acts in the *bona fide* and reasonable belief that the assailant intends a felony or great bodily harm to an inmate, and kills him to prevent his entry, the homicide is not criminal though he was mistaken as to the assailant's intention.[528]

[526] Bract. f. 144b, Mikell's Cas. 450; Ford's Case, J. Kelyng, 51, Mikell's Cas. 450; Cooper's Case, Cro. Car. 544, Beale's Cas. 347; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200, Beale's Cas. 348; State v. Middleham, 62 Iowa, 150, 17 N. W. 446; Saylor v. Com., 97 Ky. 184, 30 S. W. 390; Thompson v. State, 61 Neb. 210, 85 N. W. 62, 87 Am. St. Rep. 453.

The right of defending the habitation extends as well to a guest as to the owner. Crawford v. State, 112 Ala. 1, 21 So. 214.

[527] Cook's Case, Cro. Car. 537; Meade's Case, 1 Lewin, C. C. 184; Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200, Beale's Cas. 348; Carroll v. State, 23 Ala. 28, 36, 58 Am. Dec. 282, Mikell's Cas. 451. See, also, Patten v. People, 18 Mich. 314, 100 Am. Dec. 173, Mikell's Cas. 433; Greschia v. People, 53 Ill. 295; State v. Countryman, 57 Kan. 815, 48 Pac. 137.

"The idea embraced in the expression that a man's house is his castle is not that it is his property, and that, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to protect his shop, but the sense in which the house has a peculiar immunity is that it is sacred for the protection of his person and of his family." Per Barrett, J., in State v. Patterson, supra. A room used as a store in which the proprietor sleeps is not a dwelling. State v. Smith, 100 Iowa, 1, 69 N. W. 269.

In a Michigan case, while it was held that a homicide committed by a man in attempting to compel a riotous assemblage about his dwelling house in the nighttime to leave is not justifiable or excusable, where no violence has been done or attempted by them, either against the house or the inmates, it was held that, if an inmate is ill, and in such a condition that the noise that is being made by the rioters may cause his death, and the rioters are informed or know of this circumstance, or if the noise renders it impossible to inform them, a homicide is justifiable, if necessary to compel them to leave or desist. Patten v. People, 18 Mich. 314, 100 Am. Dec. 173, Mikell's Cas. 433.

[528] State v. Patterson, supra; Smith v. State, 106 Ga. 673, 32 S. E. 851.

Strictly speaking, however, it is not justifiable in such a case, but is merely excusable because of the mistake of fact.

A man may eject a trespasser from his house, but in doing so he is not justified in using any more force than is necessary. If he unnecessarily kicks a trespasser in turning him out, his act is unlawful, and, if death results, he is guilty of manslaughter.[529] And where defendant slays deceased while an invited guest in his own house without any notice to leave, he cannot claim the position of one who slays to protect his castle.[529a]

(5) DEFENSE OF OTHERS.

288. In General.—A person has the same right, but only the same right, to defend one towards whom he occupies a family relation, as he would have to defend himself under the same circumstances. Even a stranger may take life, if necessary, in order to prevent the commission of a felony by violence or surprise.

It has been shown in a previous chapter that a person may be justified in interfering in defense of others than himself.[530] This is true in cases of homicide. A master may kill in defense of his servant to the same extent as he may kill in his own defense, and *vice versa*.[531] The same is true of husband and wife, and parent and child, and of other persons occupying a family relation towards each other.[532] The right of a person

And see Greschia v. People, 53 Ill. 295; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173, Mikell's Cas. 433.

[529] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347.

[529a] State v. McIntosh, 40 S. C. 349, 18 S. E. 1033; Eversole v. Com., 17 Ky. L. R. 1259, 34 S. W. 231.

[530] Ante, § 81.

[531] 1 East, P. C. 289, 290, Beale's Cas. 343; Anon., Year Book 21 Hen. VIII, 39, pl. 50; Pond v. People, 8 Mich. 150; Hathaway v. State, 32 Fla. 56, 13 So. 592.

[532] Reg. v. Rose, 15 Cox, C. C. 540, Beale's Cas. 343. See, also, 1 Hale, P. C. 448; 4 Bl. Comm. 186; Campbell v. Com., 88 Ky. 402, 11 S. W. 290, 21 Am. St. Rep. 348; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173,

to kill in defense of another, however, is subject to the same limitations as the right to kill in self-defense. A man cannot kill another in defense of his parent, child, brother, or servant, etc., unless there is a reasonably apparent necessity for the homicide in order to prevent death or great bodily harm, or in order to prevent some felony, like rape or robbery, attempted by violence or surprise.[533] A husband, father, or brother is not justified in killing another to prevent the seduction or debauching of his wife, daughter, or sister by artifice or fraud, for this may be prevented by other means.[534] It is certain that one may do, in defense of a brother or other member of his family, all that member might do for himself,[534a] and there are cases which go farther and hold that one may protect his brother or other relative from imminent danger, though the protected one is not in a position to urge self-defense.[534b] The weight of authority, however, favors the view that the killing of another's antagonist is not justifiable unless that other could have successfully urged self defense, had he done the killing.[534c] Certainly, if the brothers were both at fault, or if the slayer was fully informed of his brother's fault, the killing is neither justifiable nor excusable;[534d] nor, on principle, could a killing

Mikell's Cas. 433; Bedford v. State, 36 Tex. Cr. R. 477, 38 S. W. 210; Saylor v. Com., 97 Ky. 184, 30 S. W. 390.

[533] People v. Cook, 39 Mich. 236, 33 Am. Rep. 380, Beale's Cas. 345; Hathaway v. State, 32 Fla. 56, 13 So. 592; Guffee v. State, 8 Tex. App. 187, Mikell's Cas. 437; Talbert v. State, 8 Tex. App. 316; State v. Wilson, 10 Wash. 402, 39 Pac. 106.

[534] People v. Cook, supra; Futch v. State, 90 Ga. 472, 16 S. E. 102.

[534a] Bishop, New Cr. Law, § 877; Bush v. People, 10 Colo. 566, 16 Pac. 290; Stanley v. Com., 86 Ky. 440, 6 S. W. 155, 9 Am. St. Rep. 305.

[534b] Guffee v. State, 8 Tex. App. 187, Mikell's Cas. 437; People v. Curtis, 52 Mich. 616, 18 N. W. 385.

[534c] Wood v. State, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71; Utterback v. Com., 105 Ky. 723, 49 S. W. 479, 88 Am. St. Rep. 328; Sherrill v. State, 138 Ala. 3, 35 So. 129; State v. Brittain, 89 N. C. 481.

If the one defended brought on the difficulty he must have in good faith declined further conflict and retreated to the wall. State v. Greer, 22 W. Va. 800; Smurr v. State, 105 Ind. 125, 4 N. E. 445.

[534d] Smurr v. State, 105 Ind. 125, 4 N. E. 445; Karr v. State, 106 Ala. 1,

by a third person be excused if the person killed were acting strictly in self-defense, as this would be sacrificing the innocent to protect the guilty.[535]

As we have seen, any one, even a stranger, may interfere and kill another to prevent the commission of a felony by violence or surprise, as murder, rape, robbery, etc.[536] A lodger in a house may kill another, if necessary, in order to prevent him from committing burglary or arson.[537]

VII. Abortion.

289. Definition.—It is a misdemeanor at common law to procure the miscarriage of a woman after she is quick with child, with or without her consent, unless it is necessary, or reasonably believed to be necessary, to save her life. By the weight of authority it is not an offense at all to cause a miscarriage before the child has quickened, but this has very generally been remedied by statute.

290. At Common Law.

For the purposes of inheritance, an infant in its mother's womb is regarded as a person in being before it has quickened; but in the criminal law it is not recognized, unless by statute, until it has quickened. At common law, therefore, a woman who takes drugs or uses an instrument upon herself, and so causes a miscarriage, before she is quick with child, is not guilty of any crime for which she can be punished. And the rule is the same where a physician or other person procures a miscarriage with the woman's consent. If a woman is not quick with child, one who uses an instrument or administers a drug, without her consent, for the purpose of procuring a

17 So. 328; Mitchell v. State, 22 Ga. 213, 68 Am. Dec. 493; State v. Melton, 102 Mo. 683, 15 S. W. 139; Foster v. State, 8 Tex. App. 248; People v. Travis, 56 Cal. 251.

[535] Stanley v. Com., 86 Ky. 440, 6 S. W. 155, 9 Am. St. Rep. 305.

[536] Ante, § 268.

[537] Cooper's Case, Cro. Car. 544, Beale's Cas. 347.

miscarriage, is guilty of an assault and battery. And if she dies in consequence, he is guilty either of murder or manslaughter, whether she consented or not, on the ground that he has done an act, without lawful purpose, dangerous to life, or at least an unlawful act. But if the woman consents, and does not die, he is guilty of no crime at all. This principle is well settled at common law.[538] And since procuring a miscarriage, with the woman's consent, before the child has quickened, is no offense, it follows that an attempt under such circumstances is not indictable.[539]

After a child has quickened in the womb, it is within the protection of the criminal law, and it is a high misdemeanor for the mother to destroy it by the use of drugs or instruments, so that it is born dead, or for a third person to destroy it, either with or without her consent.[540] If the child dies in the process of delivery, or after delivery, but before an independent circulation has been established, the offense is merely a misdemeanor. If it does not die until after an independent circulation has been established, the offense is murder.[541]

291. Statutory Changes.

Procuring a miscarriage before the child has quickened has very generally been made a crime by statute. It was made a

[538] Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; Com. v. Bangs, 9 Mass. 387; State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248; Abrams v. Foshee, 3 Iowa, 274, 66 Am. Dec. 77; Mitchell v. Com., 78 Ky. 204, 39 Am. Rep. 227.

There are several decisions holding that it is an offense at common law to procure an abortion before the child has quickened. They are not based, however, upon any authority at common law, but proceed upon a consideration of what the law ought to be, which is a question for the legislature, and not for the courts. See Mills v. Com., 13 Pa. 633, Mikell's Cas. 536, followed in State v. Slagle, 83 N. C. 630.

[539] Ante, § 129; State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248.

[540] See the cases above cited. And see 3 Inst. 50; 1 Hale, P. C. 433; 1 Hawk. P. C. c. 31, § 16; Holliday v. People, 9 Ill. 111; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Evans v. People, 49 N. Y. 86.

[541] Ante, § 234b.

felony in the reign of George III. This statute recognized the common-law distinction. It made procuring an abortion after quickening of the child a capital felony, whereas at common law it was a misdemeanor only, and procuring a miscarriage before quickening of the child a felony of a mitigated character. The distinction has also been recognized by some of the statutes in this country in making it a crime to procure an abortion before the child has quickened. Most statutes, however, make no distinction at all.[542] Under a statute making it an offense to administer a drug or use an instrument "with intent to produce a miscarriage of any pregnant woman," it is not necessary that the woman shall be quick with child.[543] And where the statute denounces acts done "with intent to procure the miscarriage of any woman," it is immaterial whether she is *enciente*.[543a]

Under a statute punishing any one who shall use an instrument "with intent to destroy the child of which a woman may be pregnant, and shall thereby destroy such child before its birth," the intent to destroy the child is an essential element of the offense, and an indictment under the statute is fatally defective if it fails to allege such intent.[544] It has been held that such a statute does not include a woman who procures a miscarriage on herself.[544a]

[542] See State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148; Eckhardt v. People, 83 N. Y. 462, 38 Am. Rep. 462; Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910; State v. Howard, 32 Vt. 380; State v. Alcorn, 7 Idaho, 599, 64 Pac. 1014, 97 Am. St. Rep. 252. Under the Michigan statute, the child must have quickened. People v. McDowell, 63 Mich. 229, 30 N. W. 68.

See, generally, as to the statutory offense in the various states, 1 Am. & Eng. Enc. Law (2d Ed.) 188 et seq.

[543] State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148.

But a statute defining such an act as felonious homicide is a nullity, since there can be no homicide without loss of life. State v. Young, 55 Kan. 349, 40 Pac. 659.

[543a] Eggart v. State, 40 Fla. 527, 25 So. 144.

[544] Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340.

[544a] State v. Prude, 76 Miss. 543, 24 So. 871.

292. Justification and Excuse.

It is no offense at common law to procure an abortion, if it is done in order to save the life of the woman, and is necessary, or reasonably believed to be necessary, in order to save her life. It is generally expressly so provided in the statutes punishing abortion. If the exception is not expressly stated, it must be implied, for the statute must be read in the light of the common law.[545] Generally speaking, there must be a criminal intent.[545a] To cause a miscarriage by accident is no offense.[546]

VIII. Rape.

293. Definition.—Rape is a felony at common law. It consists in having unlawful carnal knowledge of a woman by force and without her consent.[546a]

294. Force and Want of Consent.

Rape is defined by East as "the unlawful carnal knowledge, by a man, of a woman, forcibly and against her will,"[547] and by Hawkins as "unlawful and carnal knowledge of a woman by force and against her will."[548] The expression "against her will," however, in these and other definitions, means simply

[545] See State v. Fitzporter, 93 Mo. 390, 6 S. W. 223; Bassett v. State, 41 Ind. 303; State v. Stokes, 54 Vt. 179; Hatchard v. State, 79 Wis. 357, 48 N. W. 380.

Advice of a physician, if acted upon in good faith, is generally a defense. State v. Meek, 70 Mo. 355, 35 Am. Rep. 427. In Wisconsin, however, the advice of two physicians is required by the statute. See Hatchard v. State, 79 Wis. 357, 48 N. W. 380.

[545a] State v. Jones, 4 Pen. (Del.) 109, 53 Atl. 858.

[546] Slattery v. People, 76 Ill. 217.

[546a] It was anciently punished by loss of life or members; viz.—eyes and testicles. Bract. f. 147, Mikell's Cas. 536; 2 Pol. & M. Hist. Eng. Law, 490.

[547] 1 East, P. C. 434.

[548] 1 Hawk. P. C. c. 16, § 2, Beale's Cas. 419. See, also, 2 Inst. 180; Co. Litt. 123b.

"without her consent," and the latter expression has been substituted in modern statutes.[549] Any man who has unlawful carnal knowledge of a woman by force, and without her conscious consent or permission, is guilty of rape, both at common law and under the statutes.[550] All the authorities agree that this offense involves want of consent on the part of the woman. If she consciously consents to the act of intercourse, however tardily or reluctantly, and however persistently she may resist for a time, the act is not rape,[551] provided she is of such an age and condition as to be capable of giving a valid consent.[552]

[549] In a Massachusetts case it was said: "All the statutes of England and of Massachusetts, and all the text-books of authority which have undertaken to define the crime of rape, have defined it as the having carnal knowledge of a woman by force and against her will. The crime consists in the enforcement of a woman without her consent. The simple question, expressed in the briefest form, is, Was the woman willing or unwilling? The earlier more weighty authorities show that the words 'against her will,' in the standard definitions, mean exactly the same thing as 'without her consent,' and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded." Per Gray, J., in Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531, Beale's Cas. 457.

See, also, Gore v. State, 119 Ga. 418, 46 S. E. 671, 100 Am. St. Rep. 182.

[550] In addition to the authorities above cited, see Steph. Dig. Crim. Law, art. 254; Reg. v. Camplin, 1 Den. C. C. 89; State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754; Croghan v. State, 22 Wis. 445; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283, Mikell's Cas. 539.

[551] Reg. v. Barrow, L. R. 1 C. C. 156, Beale's Cas. 455; Reg. v. Hallett, 9 Car. & P. 748; People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349; Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531, Beale's Cas. 457; Whittaker v. State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; State v. Shields, 45 Conn. 263; Mathews v. State, 101 Ga. 547, 29 S. E. 424; People v. Crosswell, 13 Mich. 427, 87 Am. Dec. 774; Charles v. State, 11 Ark. 389; Pleasant v. State, 13 Ark. 360; Brown v. Com., 82 Va. 653; Bean v. People, 124 Ill. 576, 16 N. E. 656; Strang v. People, 24 Mich. 1; Woodin v. People, 1 Park. Cr. R. (N. Y.) 464; Mathews v. State, 19 Neb. 330, 27 N. W. 234.

The act, however, may be performed in so brutal a manner as to amount to an assault and battery, which her consent to the intercourse will not purge. Richie v. State, 58 Ind. 355.

[552] Post, §§ 295, 298.

In many of the cases it has been said that, to make the act rape, the woman must have resisted "to the uttermost."[553] In a New York case it was said that "resistance must be up to the point of being overpowered by actual force, or of inability, from loss of strength, longer to resist, or, from the number of persons attacking, resistance must be dangerous or absolutely useless, or there must be duress or fear of death."[554] Some of the cases, however, decline to recognize the rule requiring the utmost reluctance and resistance.[554a]

295. Women Non Compos Mentis, Insensible, or Asleep.

There is an apparent exception to the rule that force and want of consent are essential to rape in the case of intercourse with women who are insane, idiotic, insensible, or asleep at the time of the act; but the exception is only apparent, for in such cases there can be no consent, and there is sufficient force in accomplishing the act.[554b] If a woman is asleep, or is so insane or imbecile that she does not know the nature of the act, intercourse with her is rape, though she does not resist.[555] For the same reason, unlawful intercourse with a woman who is reduced to a state of insensibility by intoxicating liquors or drugs

[553] People v. Abbot, 19 Wend. (N. Y.) 192; People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349; People v. Crosswell, 13 Mich. 427, 87 Am. Dec. 774; O'Boyle v. State, 100 Wis. 296, 75 N. W. 989.

[554] People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349.

[554a] State v. Sudduth, 52 S. C. 488, 30 S. E. 408; State v. Shields, 45 Conn. 256, Mikell's Cas. 547; Com. v. McDonald, 110 Mass. 405.

[554b] Gore v. State, 119 Ga. 418, 46 S. E. 671, 100 Am. St. Rep. 182.

[555] Reg. v. Fletcher, Bell, C. C. 63, 8 Cox, C. C. 131; Reg. v. Barratt, L. R. 2 C. C. 81; Reg. v. Mayers, 12 Cox, C. C. 311; Harvey v. State, 53 Ark. 425, 14 S. W. 645; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; Gore v. State, 119 Ga. 418, 46 S. E. 671, 100 Am. St. Rep. 182.

The woman must be so insane or imbecile as not to know the nature of the act. See Reg. v. Fletcher, L. R. 1 C. C. 39, 35 Law J. M. Cas. 172; People v. Crosswell, 13 Mich. 427, 87 Am. Dec. 774; Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

is rape, if the liquors or drugs were administered by the accused, or by another with his cognizance.[556]

296. Consent Induced by Intimidation.

Another apparent exception to the rule requiring force and want of consent in rape is in cases where the woman's consent is induced, or resistance prevented, by fear of personal violence threatened by the man. All of the authorities agree that a man is guilty of rape if he so overpowers a woman by threats and an array of force that she does not dare to resist, and has intercourse with her under such circumstances, for there is no real consent in such a case.[557]

297. Consent Induced by Fraud.

Some of the courts have recognized a further exception to the rule requiring force and want of consent in cases in which the woman's consent is obtained by fraud. On this question, however, there is a conflict in the decisions. It has been held that if a woman is fraudulently induced to submit to sexual intercourse, when she does not understand the nature of the act, as where a physician fraudulently induces a girl to submit to intercourse with him by pretending that it is necessary and proper surgical treatment, the act is rape.[558] But by the weight of authority, if a woman consents to sexual intercourse with a

[556] Reg. v. Camplin, 1 Den. C. C. 89, 1 Cox, C. C. 220, 1 Car. & K. 746; Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531, Beale's Cas. 457. See, also, Reg. v. Ryan, 2 Cox, C. C. 115; Anon., 8 Cox, C. C. 134; Reg. v. Fletcher, L. R. 1 C. C. 39, 10 Cox, C. C. 248.

[557] Doyle v. State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159; Rice v. State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245; State v. Shields, 45 Conn. 263; Felton v. State, 139 Ind. 531, 39 N. E. 228; Reg. v. Hallett, 9 Car. & P. 748; Reg. v. Woodhurst, 12 Cox, C. C. 443. Compare Whittaker v. State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856.

[558] Reg. v. Flattery, 13 Cox, C. C. 388, 46 L. J. M. C. 130, Mikell's Cas. 546; Reg. v. Stanton, 1 Car. & K. 415; Reg. v. Camplin, 1 Den. C. C. 89. See, also, Pomeroy v. State, 94 Ind. 96, 48 Am. Rep. 146; Eberhart v. State, 134 Ind. 651, 34 N. E. 637.

man, understanding the nature of the act, the man is not guilty of rape, though her consent may have been obtained by false and fraudulent pretenses.[559] According to this view, most of the courts in which the question has arisen have held that a man is not guilty of rape in having carnal knowledge of a woman by falsely personating her husband.[560] For the same reason, if a woman consents to intercourse in the belief that an illegal marriage with the man is legal, upon his fraudulent representation to that effect, he is not guilty of rape.[561]

298. Carnal Knowledge of Children.

It seems that under the old common law it was not regarded as rape to have carnal knowledge of a child, however young, if she consented.[562] By an early English statute, however, it was made a felony to have carnal knowledge of a child under the age of ten years, whether with or without her consent.[563]

[559] Reg. v. Barrow, L. R. 1 C. C. 156, 11 Cox, C. C. 191, Beale's Cas. 455; Reg. v. Fletcher, L. R. 1 C. C. 39, 10 Cox, C. C. 248; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283, Mikell's Cas. 539; Wyatt v. State, 2 Swan (Tenn.) 394; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; Com. v. Fields, 4 Leigh (Va.) 648; Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

[560] Reg. v. Barrow, L. R. 1 C. C. 156, 11 Cox, C. C. 191, Beale's Cas. 455; Reg. v. Barratt, L. R. 2 C. C. 81; Reg. v. Clarke, Dears. C. C. 397; Rex v. Jackson, Russ. & R. 487; Wyatt v. State, 2 Swan (Tenn.) 394; State v. Brooks, 76 N. C. 1. Contra, People v. Metcalf, 1 Whart. C. C. 378; State v. Shepard, 7 Conn. 54; Reg. v. Dee, 15 Cox, C. C. 579, L. R. 14 Ir. 468. It is otherwise by statute in England and some of our states. 48 & 49 Vict. c. 69, § 4; Mooney v. State, 29 Tex. App. 257, 15 S. W. 724; State v. Williams, 128 N. C. 573, 37 S. E. 952.

[561] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. And see Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

It is otherwise in Texas. Lee v. State, 44 Tex. Cr. R. 354, 72 S. W. 1005, 61 L. R. A. 904.

[562] Reg. v. Read, 1 Den. C. C. 377; Reg. v. Webb, 2 Car. & K. 937; Reg. v. Martin, 9 Car. & P. 213; Reg. v. Meredith, 8 Car. & P. 589.

[563] 18 Eliz. c. 7, § 4, Mikell's Cas. 539; 1 Hale, P. C. 628; 1 East, P. C. 436. See Reg. v. Cockburn, 3 Cox, C. C. 543.

Similar statutes have been enacted in this country.[564] In some states the statute punishes the carnal knowledge of girls of as much as sixteen years of age, or even more, either with or without their consent.[565] In a few cases it has been held that, even independently of any statute, a child under ten years of age is incapable of consenting to sexual intercourse, and that it is rape at common law for a man to have intercourse with her with her consent.[566]

299. The Carnal Knowledge.

(*a*) *Penetration.*—To constitute rape, carnal knowledge is essential. It is necessary, therefore, that there shall be some penetration of the female organ by the male.[567] The slightest penetration, however, is sufficient.[568]

(*b*) *Emission.*—In a case decided in England in 1781, emission was held to be necessary, as well as penetration, on the ground that there could not be carnal knowledge without it.[569] Prior to this decision, emission was not regarded as necessary,[570] and it has since been declared unnecessary by statute.

[564] See Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747; Hays v. People, 1 Hill (N. Y.) 351.

[565] Farrell v. State, 54 N. J. Law, 416, 24 Atl. 723; State v. Wright, 25 Neb. 38, 40 N. W. 596. And see State v. Tilman, 30 La. Ann. 1249, 31 Am. Rep. 236; Lawrence v. Com., 30 Grat. (Va.) 845; State v. Hatfield, 75 Iowa, 592, 39 N. W. 910; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496.

[566] See People v. McDonald, 9 Mich. 149.

[567] 3 Inst. 60; 1 Hale, P. C. 628; Rex v. Allen, 9 Car. & P. 31; Reg. v. Jordan, 9 Car. & P. 118; Hardtke v. State, 67 Wis. 552, 30 N. W. 723; Wesley v. State, 65 Ga. 731; State v. Grubb, 55 Kan. 678, 41 Pac. 951.

[568] 3 Inst. 59; Rex v. Allen, supra; Reg. v. Jordan, supra; Rex v. Russen, 1 East, P. C. 438; Reg. v. Lines, 1 Car. & K. 393; Com. v. Thomas, 1 Va. Cas. 307; Waller v. State, 40 Ala. 325; Stephen v. State, 11 Ga. 225; State v. Hargrave, 65 N. C. 466; People v. Crowley, 102 N. Y. 234, 6 N. E. 384; Word v. State, 12 Tex. App. 174. See note, 80 Am. Dec. 362.

[569] Hill's Case, 1 East, P. C. 439. And see Rex v. Burrows, Russ. & R. 519.

[570] See 1 East, P. C. 436-440.

In this country some of the courts have followed the English case above mentioned;[571] but most of them have recognized the earlier doctrine, and have held penetration, without emission, sufficient, or else statutes have been enacted expressly declaring it unnecessary.[572]

300. Unlawfulness of Intercourse—Husband and Wife.

Since rape is "unlawful" carnal knowledge of a woman, it follows that a man cannot be guilty of this offense by having carnal knowledge of his wife, and it can make no difference that he does so by force and against her will.[573] Nor can a man be guilty of an attempt to rape his wife, or of an assault with intent to rape her.[574] He may, however, be guilty as a principal in the second degree, or as an accessary before the fact, in procuring the rape of his wife by another man, or in aiding or abetting another in committing the offense.[575]

301. Persons upon Whom Rape may be Committed.

As has just been stated, a man cannot rape his wife, since intercourse between husband and wife is not unlawful. Subject to this qualification, any female may be the subject of rape. It is not necessary, as has sometimes been contended, that she shall have reached the age of puberty.[576] Nor is it necessary that she shall have been chaste. The fact that she was not chaste may aid, as a matter of evidence, in showing that she consented, but it does not, as a matter of law, prevent the in-

[571] State v. Gray, 8 Jones (N. C.) 170; State v. Hargrave, 65 N. C. 466; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Blackburn v. State, 22 Ohio St. 102; Noble v. State, 22 Ohio St. 541.

[572] State v. Shields, 45 Conn. 256; Pennsylvania v. Sullivan, Add. (Pa.) 143; Waller v. State, 40 Ala. 325; Comstock v. State, 14 Neb. 205, 15 N. W. 355; Osgood v. State, 64 Wis. 472, 25 N. W. 529; People v. Crowley, 102 N. Y. 234, 6 N. E. 384.

[573] 1 Hale, P. C. 629.

[574] Ante, §§ 129, 210.

[575] Ante, § 191.

[576] 1 Hale, P. C. 630; 1 East, P. C. 435.

tercourse from being rape, if it was in fact accomplished by force and without her consent.[577]

302. Persons Incapable of Committing Rape.

(*a*) *Boys under Fourteen.*—In England, at common law, a boy under fourteen years of age was conclusively presumed to be physically incapable of committing rape, and no evidence could be introduced to show capacity in fact.[578] In this country the same rule has been held by some of the courts.[579] Others have repudiated it, however, on the ground that in this country boys do, as a matter of fact, sometimes reach the age of puberty before they are fourteen, and that, as the reason for the rule does not exist, the rule is not applicable. Most of these courts have held that there is a presumption of incapacity, but that the presumption may be rebutted by affirmatively showing capacity in fact.[580] In Louisiana the court has gone fur-

[577] State v. Long, 93 N. C. 542; Higgins v. People, 1 Hun (N. Y.) 307. Previous voluntary intercourse between the parties was a defense at common law. Reginald's Case, Warwickshire Eyre, 1221, Select Pleas of the Crown, Sel. Soc. Pl. 166, Mikell's Cas. 539.

[578] 1 Hale, P. C. 630; Steph. Dig. Crim. Law, art. 254; Rex v. Eldershaw, 3 Car. & P. 396; Rex v. Groombridge, 7 Car. & P. 583; Reg. v. Philips, 8 Car. & P. 736; Reg. v. Waite [1892] 2 Q. B. 600, 61 Law J. M. Cas. 187, 17 Cox, C. C. 554, Mikell's Cas. 549.

[579] Foster v. Com., 96 Va. 306, 31 S. E. 503, 70 Am. St. Rep. 846, 42 L. R. A. 589; State v. Sam, 1 Winst. (N. C.) 300; State v. Pugh, 7 Jones (N. C.) 61; Stephen v. State, 11 Ga. 225; Williams v. State, 20 Fla. 777; McKinny v. State, 29 Fla. 565, 10 So. 732; Chism v. State, 42 Fla. 232, 28 So. 399.

[580] Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep. 592; Gordon v. State, 93 Ga. 531, 21 S. E. 54; Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36; People v. Randolph, 2 Park. Cr. R. (N. Y.) 174; People v. Croucher, 2 Wheeler, C. C. (N. Y.) 42; Heilman v. Com., 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207; State v. Handy, 4 Harr. (Del.) 566.

The fact that a statute makes a crime complete on proof of penetration only, without proof of emission, does not change this rule. Hiltabiddle v. State, supra.

ther, and has held that there is not even a presumption of incapacity.[581]

(*b*) *Impotency.*—An impotent man, if incapable of copulation, cannot commit rape, but if he is capable of penetration, and merely incapable of emission or procreation, he may commit the offense, for, as we have seen, penetration, without emission, is sufficient.[582]

[581] State v. Jones, 93 La. Ann. 935, 3 So. 57. See, also, State v. Coleman, 54 S. C. 162, 31 S. E. 866.

[582] Nugent v. State, 18 Ala. 521. And see Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep. 592.

CHAPTER VII.

OFFENSES AGAINST THE PROPERTY OF INDIVIDUALS.

I. LARCENY, §§ 303-340.

A. In General, § 303.
B. The Subject of Larceny, §§ 304-313.
C. The Taking in Larceny, §§ 314-320.
D. The Asportation in Larceny, §§ 321-325.
E. The Felonious Intent in Larceny, §§ 326-333.
F. Grand and Petit Larceny, §§ 334-336.
G. Compound Larcenies, §§ 337-340.

II. EMBEZZLEMENT, §§ 341-349.

III. CHEATS AND FALSE PRETENSES, §§ 350-369.

A. Common-Law Cheats, §§ 350-351.
B. False Private Tokens, §§ 352-354.
C. False Pretenses, §§ 355-369.

IV. ROBBERY, §§ 370-379.

V. RECEIVING AND CONCEALING PROPERTY STOLEN, EMBEZZLED, ETC., §§ 380-387.

VI. MALICIOUS MISCHIEF, §§ 388-391.

VII. FORGING AND UTTERING, §§ 392-399.

I. LARCENY.

(A) In General.

303. Definition and Classification.—Larceny is of two kinds, namely:

1. Simple larceny, and
2. Compound larceny.

Simple larceny at common law is the taking and carrying away of the mere personal goods of another of any value from

any place, with a felonious intent to steal the same. This definition includes the following elements:

1. The subject of the offense must be the mere personal goods of another. Other things, however, are made the subject of larceny by statute.
2. The goods must be taken, and the taking must be under such circumstances as to amount technically to a trespass.
3. There must be some asportation or carrying away of the goods.
4. Both the taking and the carrying away must be with a felonious intent,—an intent to steal,—existing at the time.

Grand and Petit Larceny.—By statute in some jurisdictions larceny has been divided, according to the value of the property or other circumstances, into

1. Grand larceny, and
2. Petit larceny.

Compound larcenies are larcenies committed under certain aggravating circumstances. Thus—

1. At common law, robbery, which is larceny from the person or in the presence of another by violence or by putting him in fear, is a compound larceny.
2. By statute in most jurisdictions, it is a compound larceny, punished more severely than simple larceny, to steal—
   (a) From the person of another, or
   (b) From a dwelling house, or certain other places specified in the statute.

(B) The Subject of Larceny.

304. In General.—At common law the subject of larceny must be the mere personal goods of another. Therefore,

1. It must be personal, as distinguished from real property.

2. It must be something which the law recognizes as property and the subject of ownership.

3. It must be of some value, but the least value to the owner is sufficient.

4. It must be the property of another. But a special property in another is sufficient, even as against the general owner; and mere possession is enough as against others than the owner.

305. Real Property.

(*a*) *In General.*—Real property is not the subject of larceny at common law. The property must be personal,—the "mere personal goods" of another.[1] At common law, therefore, it is not larceny, but a mere trespass, to sever and immediately carry away trees, grass, crops, fruit, vegetables, and the like.[2] The same is true of ores and minerals before they have been mined,[3] ice before it has been cut,[4] and turpentine or maple sap before it has been drawn from the trees.[5]

[1] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 1; 2 East, P. C. 587; 4 Bl. Comm. 232.

[2] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; 2 East, P. C. 587; 4 Bl. Comm. 232; Anon., Year Book 11 & 12 Edw. III. 640, Beale's Cas. 488; Anon., Year Book 19 Hen. VIII. 2 pl. 11, Beale's Cas. 490; Carver v. Pierce, Style, 66 Mikell's Cas. 639; Holly v. State, 54 Ala. 238; Bradford v. State, 6 Lea (Tenn.) 634; Bell v. State, 4 Baxt. (Tenn.) 426.

At common law, title deeds and boxes containing them, and other instruments concerning real property, such as a commission out of a court of chancery to settle the boundaries of a manor, were held not to be the subject of larceny, "because they savour of the same nature." 2 East, P. C. 596; 1 Hale, P. C. 510; Rex v. Wody, Year Book 10 Edw. IV, pl. 9, 10, Beale's Cas. 489; Rex v. Westbeer, 2 Strange, 1133, 1 Leach, C. C. 12, Mikell's Cas. 640.

[3] People v. Williams, 35 Cal. 671; State v. Burt, 64 N. C. 619. It makes no difference that the ore has been severed from the land by natural causes, and is lying loose upon it, for this does not change its character as real property. State v. Burt, supra. And see Com. v. Steimling, 156 Pa. 400, 27 Atl. 297, Beale's Cas. 588, Mikell's Cas. 659.

[4] Ward v. People, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144.

[5] See State v. Moore, 11 Ired. (N. C.) 70.

The common-law rule that real property cannot be the subject of larceny has been changed to some extent by statute both in England and in this country. Thus, it is made larceny in some jurisdictions to steal outstanding crops, though the severance and the carrying away may be one continuous act.[6]

(*b*) *Fixtures.*—For the same reason it is not larceny at common law to sever and immediately carry away fixtures,—that is, property which is so annexed to the land by man as to acquire the character of real property, such as the whole or part of a building or fence,[7] or water pipes, gas pipes, doors, mantles, windows, machinery, etc.[8] If a thing is merely used in con-

[6] See Holly v. State, 54 Ala. 238; State v. Stephenson, 2 Bailey (S. C.) 334.

[7] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; 2 East, P. C. 587; Rex v. Millar, 7 Car. & P. 665 (lead from the roof of a building); U. S. v. Wagner, 1 Cranch, C. C. 314, Fed. Cas. No. 16,630 (rails of a fence inserted in posts fixed in the ground); U. S. v. Smith, 1 Cranch, C. C. 475, Fed. Cas. No. 16,325 (logs in a fence). And see the cases cited in the notes following.

[8] 1 Hale, P. C. 510; Langston v. State, 96 Ala. 44, 11 So. 334; State v. Hall, 5 Harr. (Del.) 492; State v. Davis, 22 La. Ann. 77. See, also, Ex parte Wilkie, 34 Tex. 155.

In State v. Davis, supra, it was held that a copper pipe affixed to an engine which was affixed by masonry to a building was realty, and not the subject of larceny. And State v. Hall, supra, and Langston v. State, supra, were to the same effect.

Some of the courts, regarding the rule as technical, have refused to follow it to its logical extent. In Kentucky, for example, chandeliers were held to be the subject of larceny, though they were attached to pipes in a building, and it was conceded that they were so far a part of the realty that they would pass as such on a sale of the building. The court said: "The modern authorities, instead of following the common-law doctrine on the subject, apply it only to things issuing out of or growing upon the land, and such as adhere to the freehold, but not to personal chattels that are constructively annexed thereto." Smith v. Com., 14 Bush (Ky.) 31, 29 Am. Rep. 402. See, also, Jackson v. State, 11 Ohio St. 104.

This decision, as was conceded by the court, was certainly a departure from the common-law rule, and there is no principle upon which it can be sustained. If the common law is defective in this respect, it is for the legislature, not the courts, to supply the remedy.

nection with the realty, and not annexed at all, as in the case of pictures, furniture, keys, and the like, it is personal property, and the subject of larceny.[9] And the same is true of things which are temporarily annexed, and which are intended to be removed, and may be removed without injury to the freehold, as in the case of leather belts connecting the wheels in a sawmill,[10] or wire used in a temporary fence on the public domain.[10a] In some jurisdictions statutes have been enacted making it larceny to take and carry away fixtures with felonious intent.

(*c*) *Severance of Property before Taking—(1) By the Owner or by a Third Person.*—Things which constitute a part of the realty may acquire the character of personalty by being severed by the owner, or by a third person, and they then become the subject of larceny even at common law.[11] After the owner of land has cut down his trees, harvested his crops, or gathered his vegetables or fruit, they are no longer real property, and may afterwards be stolen.[12] The same is true when

[9] Rex v. Hedges, 1 Leach, C. C. 201, 2 East, P. C. 590, note; Rex v. Nixon, 7 Car. & P. 442; Hoskins v. Tarrance, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129, Mikell's Cas. 642.

A key, though in the lock of a door in a house, is personal property, and the subject of larceny. Hoskins v. Tarrance, supra.

[10] Reg. v. Hedges, 1 Leach, C. C. 201, 2 East, P. C. 590, note; Langston v. State, 96 Ala. 44, 11 So. 334; Jackson v. State, 11 Ohio St. 104.

In Reg. v. Hedges, supra, a window frame, not hung or beaded into the window frame, but fastened there by laths nailed across, so as to prevent it from falling out, was held to be the subject of larceny, as such a temporary fastening did not make it a part of the realty. So of a bell in a chapel, if not fixed. Rex v. Nixon, 7 Car. & P. 442.

[10a] Junod v. State (Neb.) 102 N. W. 462.

[11] "Severance of ore, as of a nugget of gold, by natural causes, is not such a severance as to make it personal property, and the subject of larceny. State v. Burt, 64 N. C. 619; ante, § 305, note 3.

[12] 3 Inst. 109; 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; 1 East, P. C. 587; Year Book 19 Hen. VIII. 2 pl. 11, Beale's Cas. 490; State v. Parker, 34 Ark. 158, 36 Am. Rep. 5; Bradford v. State, 6 Lea (Tenn.) 634; Bell v. State, 4 Baxt. (Tenn.) 426.

he has drawn turpentine or maple sap from the tree,[13] cut ice from a river or pond,[14] mined coal or ores,[15] or confined natural gas, water, or oil in pipes.[16] On the same principle, buildings, pipes, and other fixtures are personal property after they have been severed from the realty by the owner, or by a third person, and are then the subject of larceny.[17]

(*2*) *Severance by the Trespasser.*—The severance need not necessarily be by the owner, or by a third person. It may be by the thief himself, provided the severance and the carrying away are separate and distinct acts, and not parts of one continuous transaction.

To constitute larceny, it is not only necessary that the property shall be personal, but it is also necessary, as we shall presently see, that it shall be taken, while of that nature, from the actual or constructive possession of the owner.[18] It necessarily follows that if the severance and carrying away by the trespasser are parts of one continuous transaction, there is no larceny, for there is no time between the severance and the carrying away during which it can be said that the property, in its new character as personalty acquired by reason of the severance, is in the actual or constructive possession of the owner, but from the time it is severed to the time it is carried away it is in the continuous possession of the trespasser.[19]

[13] State v. Moore, 11 Ired. (N. C.) 70.

[14] Ward v. People, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144.

[15] People v. Williams, 35 Cal. 671; State v. Berryman, 8 Nev. 262.

[16] As to water, see Ferens v. O'Brien, 11 Q. B. Div. 21, 15 Cox, C. C. 332.

As to gas, natural or manufactured, see Reg. v. White, 3 Car. & K. 363, Dears. C. C. 303, 6 Cox, C. C. 213, 17 Jur. 536, Beale's Cas. 506; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 796, Beale's Cas. 501; State v. Wellman, 34 Minn. 221, 25 N. W. 395.

[17] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; State v. Hall, 5 Harr. (Del.) 492.

[18] Post, § 315.

[19] 1 Hale, P. C. 510; 4 Bl. Comm. 232; Reg. v. Foley, L. R. 26 Ir. 299, 17 Cox, C. C. 142, Beale's Cas. 581; People v. Williams, 35 Cal. 671; State v. Hall, 5 Harr. (Del.) 492; State v. Berryman, 8 Nev. 262; State

On the other hand, if a trespasser severs property from the realty, thereby converting it into personalty, and leaves it on the land of the owner, relinquishing his possession of it, the owner acquires the constructive possession of it in its new character as personalty, and, if the trespasser returns and carries it away with the necessary felonious intent, he is guilty of larceny.[20]

Time Intervening Between Severance and Asportation.—According to the better opinion, no particular time need elapse between the severance and the carrying away, in order to make them separate and distinct transactions, but it is sufficient if the two acts are so separated as a matter of fact as not to constitute one transaction. All that is necessary is that the property shall have come into the actual or constructive possession of the owner before being finally taken and carried away.[21]

v. Burt, 64 N. C. 619; Bradford v. State, 6 Lea (Tenn.) 634; Bell v. State, 4 Baxt. (Tenn.) 426.

In Ex parte Willke, 34 Tex. 155, it was held that a man is guilty of larceny in severing and carrying away doors from a house, even though he may carry them off immediately after the severance, but no authorities were cited for this departure from the common-law doctrine, and the decision is clearly wrong.

[20] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; 2 East, P. C. 587; 4 Bl. Comm. 232; Reg. v. Foley, L. R. 26 Ir. 299, 17 Cox, C. C. 142, Beale's Cas. 581, Mikell's Cas. 658, note; People v. Williams, 35 Cal. 671; State v. Moore, 11 Ired. (N. C.) 70; Com. v. Steimling, 156 Pa. 400, 27 Atl. 297; Beale's Cas. 588, Mikell's Cas. 659; Bradford v. State, 6 Lea (Tenn.) 634; Bell v. State, 4 Baxt. (Tenn.) 426.

In Reg. v. Foley, supra, the accused cut hay on another's land, and left it lying there. After several days, he returned and carried it away, with a felonious intent. It was held that the severance of the hay made it personal property, that, between the time it was cut and left lying on the land and the time it was carried away, it was in the constructive possession of the owner of the land, and that, when the accused returned and carried it away, he took it, in its new character as personalty, from the owner's possession, and was therefore guilty of larceny.

[21] As to the time intervening between the severance and the carrying away which will make them separate and distinct acts, instead of parts of one continuous transaction, nice distinctions have been made in

The mere fact that an interval of time may elapse between the severance and the carrying away does not make the act larceny, if the trespasser does not relinquish his possession, for, so long as he has possession, the owner cannot acquire it.[22]

Intention to Abandon Property.—It seems to have been held that there must have been an intention to abandon the property between the severance and the carrving away, and that it is not enough merely to show that the severance and the carrying away were separate transactions.[23] This doctrine, however, if it has ever really been held, cannot be sustained. As was said in a leading English case: "Where chattels, after severance, are left on the property of the true owner, no matter what the wrongdoer's intention may be, he cannot escape the common-law doctrine, if his possession is not in fact continuous. Continuity of intention is not the equivalent of continuity of possession."[24]

306. Water and Gas.

Water and gas are the subject of larceny after they have been confined in pipes or otherwise reduced to possession.[25]

some cases. For instance, it was once held that a day must intervene, because of the rule that the law does not recognize fractions of a day. The doctrine, however, is now generally recognized as stated in the text. 2 Bish. New Crim. Law, § 766 (1); Holly v. State, 54 Ala. 238; People v. Williams, 35 Cal. 671; State v. Berryman, 8 Nev. 262; Bradford v. State, 6 Lea (Tenn.) 634.

The trespasser need not go off the land after severance of the thing, and before carrying it away. Bradford v. State, supra. See, also, Com. v. Steimling, 156 Pa. 400, 27 Atl. 297, Beale's Cas. 588, Mikell's Cas. 659.

[22] Reg. v. Foley, L. R. 26 Ir. 299, 17 Cox, C. C. 142, Beale's Cas. 581.

[23] Reg. v. Townley, L. R. 1 C. C. 315, 12 Cox, C. C. 59, 24 L. T. (N. S.) 517, Beale's Cas. 577; Reg. v. Petch, 14 Cox, C. C. 116.

[24] Per Gibson, J., in Reg. v. Foley, L. R. 26 Ir. 299, 17 Cox, C. C. 142, Beale's Cas. 581.

[25] Illuminating gas: Reg. v. White, 3 Car. & K. 363, Dears. C. C. 203, 6 Cox, C. C. 213, Beale's Cas. 506; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706, Beale's Cas. 501; State v. Wellman, 34 Minn. 221, 25 N. W. 395.

Water: Ferens v. O'Brien, 11 Q. B. Div. 21, 15 Cox, C. C. 332.

307. The Subject of Larceny must be Property and the Subject of Ownership.

To be the subject of larceny, the thing taken must be something which the law recognizes as property, and as the subject of ownership. For this reason, treasure trove, a wreck not seized, seaweed not reduced to possession, and things abandoned by the owner were not the subject of larceny at common law.[26]

The same is true of a dead human being, for the law recognizes no right of property therein.[27] It is larceny, however, to steal the coffin in which a dead body has been placed or interred, or to steal the clothes or other articles found upon a dead body or interred with it. They are not regarded as abandoned property, but the title is in the executor or administrator of the deceased, or in the person who buried him.[28]

[26] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 24; 2 East, P. C. 606.

In Reg. v. Clinton, Ir. R. 4 C. L. 6, it was held that drifted and ungathered seaweed, cast on the shore, between high and low water mark, was not the property of the persons who had exclusive ownership of the shore, and that it was not the subject of larceny.

In State v. Taylor, 27 N. J. Law, 117, 72 Am. Dec. 347, Beale's Cas. 498, it was held that planting oysters in the public waters is not an abandonment of them to the public, so as to prevent them from being the subject of larceny, if the bed is so marked as to be capable of identification, and is not a natural oyster bed.

In Reg. v. Edwards, 13 Cox, C. C. 384, 36 L. T. (N. S.) 30, Beale's Cas. 612, Mikell's Cas. 652, three pigs which had been bitten by a mad dog were shot and buried on the owner's land three feet below the surface of the soil, without any intention of digging them up again, or of making any use of them. The defendants, on the same evening, dug them up and sold them. The jury found that there was no abandonment of the property in them by the owner, and convicted the defendant of larceny, and the conviction was sustained.

In Sikes v. State (Tex. Cr. App.) 28 S. W. 688, defendant was convicted of the larceny of two turbine wheels that had been left by the owner for nine years on the right of way of the carrier by whom they had been shipped. Mikell's Cas. 653, note.

[27] Rex v. Haynes, 12 Coke, 113, 2 East, P. C. 652, Mikell's Cas. 662.

[28] 2 Inst. 166; 1 Hawk. P. C. c. 33, § 29; Haynes' Case, 12 Coke, 113, Mikell's Cas. 662; State v. Doepke, 68 Mo. 208, 30 Am. Rep. 785; Wonson v. Sayward, 13 Pick. (Mass.) 402, 23 Am. Dec. 691.

308. Animals.

(*a*) *In General.*—Animals, including fish and birds, are as much the subject of larceny as any other property, if they are such that the law recognizes them as property and the subject of ownership, as in the case of horses, cattle, and domestic fowls.[29]

(*b*) *Animals Ferae Naturae.*—The law, however, does not recognize any right of property in animals *ferae naturae,* or wild animals, including wild fish and birds, so long as they are in their natural state, and it is not larceny to take them in that state.[30]

(*c*) *Animals Reclaimed or Killed.*—But animals of this description may become property, and the subject of larceny, by being tamed or otherwise reclaimed, or by being killed. All of the authorities agree that this is so if they are fit for food or the production of food,[31] as in the cases referred to in the note below.[32]

[29] 1 Hale, P. C. 511; 1 Hawk. P. C. c. 33, § 28; 2 East, P. C. 614; State v. Turner, 66 N. C. 618.

[30] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, §§ 25, 26; 2 East, P. C. 607; 4 Bl. Comm. 235; Anon., Year Book 19 Hen. VIII, 2 pl. 11, Beale's Cas. 490; Anon., Year Book 18 Edw. IV, 8. pl. 7, Mikell's Cas. 638; Reg. v. Townley, L. R. 1 C. C. 315, 12 Cox, C. C. 59, 24 L. T. (N. S.) 517, Beale's Cas. 577; Reg. v. Petch, 14 Cox, C. C. 117, 38 L. T. (N. S.) 788; Warren v. State, 1 G. Greene (Iowa) 106 (coon); Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348 (doves); State v. Krider, 78 N. C. 481 (fish); Pennsylvania v. Becomb, Add. (Pa.) 386.

"Larceny cannot be committed of things that are ferae naturae, unreclaimed, and nullis in bonis, as of deer or conies, though in a park or warren, fish in a river or pond, wild fowl, wild swans, pheasants." 1 Hale, P. C. 510, 511.

[31] 1 Hale, P. C. 511; 1 Hawk. P. C. c. 33, § 26; 2 East, P. C. 607. See Hundson's Case, 2 East, P. C. 611; Blades v. Higgs, 11 H. L. Cas. 621; and the cases cited in the note following.

[32] Tame doves or pigeons, when in an ordinary dove cote or in boxes on a building, though they have free egress, and may be at liberty to come and go, Reg. v. Cheafor, 2 Den. C. C. 361, 5 Cox, C. C. 367, 15 Jur. 1065, Beale's Cas. 492; Rex v. Brooks, 4 Car. & P. 131; Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; Anon., Year Book, 18 Edw. IV, 8 pl. 7;

Killing and Taking must be Separate Acts.—What has been said in dealing with the larceny of things annexed to land by a severance and a subsequent taking and asportation,[33] applies equally to the killing and stealing of animals *ferae naturae*. If the killing and carrying away constitute one continuous act, there is no larceny, for there is no time after the animal is killed, and before it is carried away, during which it can be said to be in the actual or constructive possession of the owner of the land.[34] But if an animal is killed and left on the ground, it becomes the property of the owner of the land, and is constructively in his possession, and, if the trespasser afterwards returns and carries it away, he is guilty of larceny.[35]

(*d*) *Animals of a Base Nature, and not Fit for Food.*—It is said in the early English authorities, and has been held in some of the cases, that animals *ferae naturae* are not the subject of larceny at common law even after they have been killed or reclaimed, if they are of a base nature, and not fit for food or

but not while they are in flight away from the premises, and enjoying their natural liberty, Com. v. Chace, supra. Pea fowls: Anon., Year Book 19 Hen. VIII. 2 pl. 11, Beale's Cas. 490; Com. v. Beaman, 8 Gray (Mass.) 497.

Partridges or pheasants hatched and raised under a hen, so long as they are tame, and with the hen. Reg. v. Shickle, L. R. 1 C. C. 158, 11 Cox, C. C. 189, Beale's Cas. 496; Reg. v. Head, 1 Fost. & F. 350; Reg. v. Cory, 10 Cox, C. C. 23, Beale's Cas. 497; Reg. v. Garnham, 8 Cox, C. C. 451, 2 Fost. & F. 347.

Bees in hives: State v. Murphy, 8 Blackf. (Ind.) 498; Harvey v. Com., 23 Grat. (Va.) 941.

Oysters planted in an oyster bed that is so marked as to be capable of identification, and that is not a natural oyster bed. State v. Taylor, 27 N. J. Law, 117, 72 Am. Dec. 347, Beale's Cas. 498. And see Fleet v. Hegeman, 14 Wend. (N. Y.) 42.

Fish in net: State v. Shaw, 67 Ohio St. 157, 65 N. E. 875, 60 L. R. A. 481.

[33] Ante, § 305c.

[34] Reg. v. Townley, L. R. 1 C. C. 315, 12 Cox, C. C. 59, 24 L. T. (N. S.) 517, Beale's Cas. 577, Mikell's Cas. 654.

[35] Reg. v. Townley, supra; Reg. v. Petch, 14 Cox, C. C. 117, 38 L. T. (N. S.) 788. See Blades v. Higgs, 11 H. L. Cas. 621.

the production of food, though they may be valuable for other purposes.[36] Thus, it was held in England that it was not larceny to take and carry away tame ferrets, though it appeared that they were of value, and that they were actually sold by the taker.[37] And there have been decisions to the same effect in this country.[38] According to the better opinion, however, it is not necessary that the animal shall be fit for food or the production of food, but it is sufficient if it be fit for any other useful purpose.[39] Thus, in England, a tame hawk was held to be the subject of larceny, as it was useful to "princes and great men" in their fowling sports.[40] And in this country it has been held to be larceny to take and carry away a tame mocking bird, which was valuable as a songster,[41] or an otter, which was valuable for its fur.[42]

(*e*) *Dogs.*—At common law, dogs, though they were treated as property to such an extent that, on the death of the owner, they went to his executor or administrator, and to such an extent that the owner could maintain a civil action against one who took or injured them, were not regarded as the subject of larceny, be-

[36] 1 Hale, P. C. 511, 512; 1 Hawk. P. C. c. 33, § 23; 2 East, P. C. 614; Rex v. Searing, Russ. & R. 350, Beale's Cas. 491, Mikell's Cas. 639; Warren v. State, 1 G. Greene (Iowa) 106.

Hawkins enumerated, as within this rule, "dogs, cats, bears, foxes, monkeys, ferrets, and the like." 1 Hawk. P. C., supra.

[37] Rex v. Searing, Russ. & R. 350, Beale's Cas. 491, Mikell's Cas. 639.

[38] See Warren v. State, 1 G. Greene (Iowa) 106, where it was held that a coon was not the subject of larceny. And see Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573, where it was held that a sable or marten was not the subject of larceny, by reason of its base nature, even after being caught in a trap, and while so confined.

[39] State v. House, 65 N. C. 315, 6 Am. Rep. 744. It was said in this case: "We take the true criterion to be the value of the animal, whether for the food of man, for its furs, or otherwise."

[40] 1 Hale, P. C. 512.

[41] Haywood v. State, 41 Ark. 479, Mikell's Cas. 644.

[42] State v. House, 65 N. C. 315, 6 Am. Rep. 744. The skins of deer and bear are the subject of larceny. Pennsylvania v. Becomb, Add. (Pa.) 386.

cause they were regarded as of a base nature;[43] and this doctrine has been recognized by some of the courts in this country, even in late cases.[44] In most jurisdictions, however, dogs are now either expressly declared by statute to be the subject of larceny,[45] or they are held to be so either on the ground that they are recognized as property by statutes taxing them, or on the ground that the statutes defining larceny as the felonious taking and carrying away of "personal property," and statutes defining personal property, are broad enough to include dogs, or on the ground that the reason for the common-law rule is not now applicable.[46]

309. Lost Goods.

Though there have been some decisions to the contrary, it is now well settled in most jurisdictions that lost goods are the subject of larceny.[47] "The owner, by losing them, is not divested of his property in them, nor is his title to them in the

[43] 1 Hawk. P. C. c. 33, § 23; 2 East, P. C. 614; Reg. v. Robinson, Bell, C. C. 34, 8 Cox, C. C. 115, 5 Jur. (N. S.) 203.

[44] Ward v. State, 43 Ala. 161, 17 Am. Rep. 31; State v. Doe, 79 Ind. 9, 41 Am. Rep. 599; State v. Holder, 81 N. C. 527, 31 Am. Rep. 517; State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772; Findlay v. Bear, 8 Serg. & R. (Pa.) 571.

[45] Dogs were made the subjects of larceny in England by the statute of 10 Geo. III. c. 18. And there are similar statutes in some of our states.

[46] Mullally v. People, 86 N. Y. 365, Beale's Cas. 502; People v. Campbell, 4 Park. Cr. R. (N. Y.) 386; Com. v. Hazelwood, 84 Ky. 681, 2 S. W. 489; State v. Brown, 9 Baxt. (Tenn.) 53, 40 Am. Rep. 81; Hurley v. State, 30 Tex. App. 333, 17 S. W. 455; Rockwell v. Oakland Circ. Judge, 133 Mich. 11, 94 N. W. 378. And see State v. McDuffie, 34 N. H. 523, 69 Am. Dec. 516. Compare, as to the effect of taxation, State v. Doe, 79 Ind. 9, 41 Am. Rep. 599.

It has been held that a statute punishing the larceny of "goods and chattels" is merely declaratory of the common law, and does not make dogs the subject of larceny. See Reg. v. Robinson, Bell, C. C. 34, 8 Cox, C. C. 115; Ward v. State, 48 Ala. 161, 17 Am. Rep. 31; State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772.

[47] 2 East, P. C. 606; Ransom v. State, 22 Conn. 153; Tanner v. Com., 14 Grat. (Va.) 635; post, § 319.

least degree impaired. It remains in him absolutely, and to all intents, as before. There is no difficulty in describing the ownership of it, in the indictment, according to the established rules of framing that instrument. The name of the owner must be stated, if it is known, and, if not, it may be alleged to be the property of some person unknown."[48]

310. Property Unlawfully Acquired or Possessed.

The fact that property has been acquired or is possessed unlawfully, or even criminally, does not deprive it of its character as property, or outlaw it, so as to withdraw it from the protection of the criminal law, and prevent it from being larceny to feloniously take and carry it away. Thus, it has been held from a very early day that property may be stolen from one who has himself stolen it, and that the indictment may lay the ownership in him.[49] It is also larceny to feloniously take and carry away intoxicating liquors, or money derived from a sale thereof, though they may have been kept or sold in violation of law;[50] or property used for gaming in violation of law.[51]

[48] Ransom v. State, supra. As to what constitutes larceny of lost property, see post, § 319.

The Tennessee court has made a distinction between lost property and property that has been merely mislaid by the owner, and have held that mislaid property is the subject of larceny. Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644; Pritchett v. State, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468; but that lost property is not, Porter v. State, Mart. & Y. (Tenn.) 226; Pritchett v. State, supra. And see People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462 (Thompson, C. J., dissenting). This distinction, however, is not sound, and there is no reason for it. See post, § 319 et seq., where the larceny of lost property is treated.

[49] Year Book 13 Edw. IV. 3 b; 1 Hale, P. C. 507; Com. v. Rourke, 10 Cush. (Mass.) 397, 399; Ward v. People, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144, Beale's Cas. 595; post, § 313.

[50] Com. v. Rourke, supra; Com. v. Coffee, 9 Gray (Mass.) 139; State v. May, 20 Iowa, 305.

[51] Bales v. State, 3 W. Va. 685.

311. Choses in Action.

At common law it is well settled that, while a mere piece of paper is the subject of larceny, a paper upon which a valid and existing agreement is written is not. The paper then becomes a mere chose in action, or, more properly speaking, mere evidence of a chose in action, and loses its value and existence as property. It is not larceny, therefore, at common law, to take and carry away a promissory note, bank note, bond, or any other writing evidencing a contract.[52] The reason, it has been said, is that "the paper becomes evidence of a right, and ceases to have any existence as anything else," and "though the evidence is stolen, the right remains the same."[53] If the chose in action is so defective as to be void, or if the promissory note or

[52] 2 East, P. C. 597; 4 Bl. Comm. 234; 1 Hawk. P. C. c. 33, § 22; Reg. v. Powell, 2 Den. C. C. 403, 5 Cox, C. C. 396, 16 Jur. 117; Reg. v. Watts, Dears. C. C. 326; 6 Cox, C. C. 304, 18 Jur. 192, Beale's Cas. 493, Mikell's Cas. 647; Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; People v. Griffin, 38 How. Prac. 475; State v. Dill, 75 N. C. 257; Warner v. Com., 1 Pa. 154, 44 Am. Dec. 114; Thomasson v. State, 22 Ga. 499.

The fact that an agreement is not stamped as required by law does not invalidate it, so as to make it the subject of larceny as a mere piece of paper, where the stamp may be put upon it at any time, so as to render it admissible as evidence. Reg. v. Watts, supra.

[53] Per Baron Alderson, in Reg. v. Watts, supra. It has been held in England that a railroad ticket entitling the holder to travel on the railroad is the subject of larceny at common law. Reg. v. Boulton, 3 Cox, C. C. 578; Reg. v. Beecham, 5 Cox, C. C. 181. So, also, of a pawnbroker's ticket. Reg. v. Morrison, Bell, C. C. 158, 8 Cox, C. C. 194, 5 Jur. (N. S.) 604. In this case the ticket was distinguished from a chose in action as being a document importing property in possession of the holder.

It is very doubtful whether these decisions can be sustained at common law. Such tickets are certainly mere evidence of a contract,—mere choses in action,—and seem clearly to be within the general rule. See, in support of this view, State v. Hill, 1 Houst. (Del.) 420; Millner v. State, 15 Lea (Tenn.) 179.

A railroad ticket is within a statute making it larceny to steal "any instrument or writing whereby any demand, right, or obligation is created, * * * or any other valuable writing." Millner v. State, supra.

bank bill has been paid, an indictment may be maintained for stealing the paper on which it is written.[53a]

Statutes have been enacted in most jurisdictions changing this rule of the common law, and making choses in action generally, or particular kinds of choses in action, the subject of larceny. To sustain an indictment under such a statute, the thing taken must come strictly within the terms of the statute.[54] Whether a particular instrument is within a statute depends entirely upon the intention of the legislature, to be determined by a construction of the statute, and in the construction of the statutes the courts have sometimes differed.[55]

The statutes are not to be construed as making it larceny to take invalid or valueless instruments. The instrument must be valid, and must have "a legal entity as a matter of value."[56]

[53a] Though the notes are reissuable, Rex v. Clarke, 2 Leach, C. C. 1036, Russ. & R. 181; Rex v. Vyse, 1 Mood. C. C. 218. See, also, Reg. v. Perry, 1 Den. C. C. 69, 1 Car. & K. 725.

[54] Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; Damewood v. State, 1 How. (Miss.) 262; Johnson v. State, 11 Ohio St. 324; State v. Wilson, 3 Brev. (S. C.) 196; State v. Calvin, 22 N. J. Law, 207.

Postage stamps may be the subject of larceny under the act of congress. Jolly v. U. S., 170 U. S. 402.

[55] In some jurisdictions, for instance, it has been held that an indictment would not lie for stealing bank notes under a statute making it larceny to steal "promissory notes." Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357. In others it has been held that bank notes are promissory notes, within the meaning of the statute. State v. Wilson, 3 Brev. (S. C.) 196.

In State v. Calvin, 22 N. J. Law, 207, it was held that choses in action were not within a statute punishing the stealing of "goods and chattels." See, also, U. S. v. Davis, 5 Mason, 356, Fed. Cas. No. 14,930. But in Corbett v. State, 31 Ala. 329, bank notes or bills were held to be "personal goods," within the meaning of the statute, and in McDonald v. State, 8 Mo. 283, they were held to be "personal property." See, also, U. S. v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827.

The term "effects" in a statute covers bills of exchange, promissory notes, etc. State v. Newell, 1 Mo. 248.

[56] Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; Wilson v. State, 1 Port. (Ala.) 118; People v. Loomis, 4 Denio (N. Y.) 380; State v. Tillery, 1 Nott & McC. (S. C.) 9.

It is sufficient, however, if it is of such a character as to be negotiable and good in the hands of a *bona fide* holder for value.[57]

312. Value.

To be the subject of larceny, the thing taken must be of some value,[58] but the least value is sufficient. It is larceny at common law to steal a piece of paper, or anything else that is property, though it may be of less value than the least known coin.[59] It is enough if the property be of any value to the owner, though it may be of no value whatever to any other person.[60]

313. Ownership and Possession of the Property.

(*a*) *In General.*—To constitute larceny, the goods taken must be the property of another than the accused. This idea is expressed in all the definitions of the offense.[61]

Though a duebill is within a statute punishing the stealing of any order, bill of exchange, promissory note, "or other obligation" for the payment of money, it is not larceny to take and carry away a duebill that has been paid, as it has no force or effect as an obligation after payment. State v. Campbell, 103 N. C. 344, 9 S. E. 410.

[57] Thus, in Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455, under a statute making it larceny to steal bank notes, it was held that bank notes were the subject of larceny after having been redeemed by the bank, as they could be reissued, and would be good in the hands of a bona fide purchaser for value. See, also, Starkey v. State, 6 Ohio St. 266,

[58] Wilson v. State, 1 Port. (Ala.) 118; Collins v. People, 39 Ill. 233; Payne v. People, 6 Johns. (N. Y.) 103 (where it was held that a letter was not the subject of larceny); State v. Tillery, 1 Nott & McC. (S. C.) 9; Wolverton v. Com., 75 Va. 909.

[59] Reg. v. Perry, 1 Den. C. C. 69, 1 Car. & K. 725, 1 Cox, C. C. 222. And see Reg. v. Morris, 9 Car. & P. 349; Reg. v. Rodway, 9 Car. & P. 784.

[60] Reg. v. Morris, supra; State v. Allen, R. M. Charlt. (Ga.) 518. The property need not be of the value of any known coin. Reg. v. Morris, supra; Wolverton v. Com., 75 Va. 909.

[61] For this reason, one who has contracted to sell property to another cannot be guilty of larceny in taking the property, if the contract was made by him under duress, or if it is executory, so that no title has passed. Love v. State, 78 Ga. 66, 3 S. E. 893.

(*b*) *Special Ownership or Possession in Another.*—It is not meant by this, however, that the general ownership must necessarily be in another. A special ownership or possession is enough. Thus, if goods are stolen from one who has himself stolen them, an indictment may be sustained laying the ownership in the thief.[62] Again, a person may be guilty of larceny in taking his own property from one who has a special right of property therein, as from a pledgee or mortgagee, or from an officer having possession by virtue of an execution or writ of attachment, or from any other bailee with a special right of property, and the indictment in such a case may lay the ownership in the pledgee, mortgagee, or officer, etc.[63] When a third person steals goods from a bailee having a special right of property therein, as from a pledgee, carrier, levying officer, etc., it may be treated as larceny either from the general owner or from the bailee, and the indictment may lay the ownership in either.[64] This principle does not apply to property in the hands of a servant. He has the bare custody, and not the possession, the possession being constructively in the master. If property in the hands of a mere servant is taken, it is a larceny from the master, and the ownership must be laid in the master.[65]

[62] 1 Hale, P. C. 507; Year Book 13 Edw. IV. 3 b; Anon., Keilwey, 160 pl. 2, Mikell's Cas. 663; Ward v. People, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144, Beale's Cas. 595, Mikell's Cas. 663; Com. v. Rourke, 10 Cush. (Mass.) 397, 399.

[63] 1 Hale, P. C. 513; 1 Hawk. P. C. c. 33, § 30; 2 East, P. C. 558; Anon., Year Book, 7 Hen. VI. 42, pl. 18, Mikell's Cas. 665; Reg. v. Webster, 9 Cox, C. C. 13, Beale's Cas. 676; People v. Stone, 16 Cal. 369; People v. Thompson, 34 Cal. 671; Adams v. State, 45 N. J. Law, 448, Beale's Cas. 679; Palmer v. People, 10 Wend. (N. Y.) 165, 25 Am. Dec. 551; People v. Long, 50 Mich. 249, 15 N. W. 105; Henry v. State, 110 Ga. 750, 36 S. E. 55, Mikell's Cas. 665. See post, § 331.

[64] In addition to the cases cited in the note preceding, see State v. Mullen, 30 Iowa, 203; Com. v. O'Hara, 10 Gray (Mass.) 469; State v. Gorham, 55 N. H. 152; Owen v. State, 6 Humph. (Tenn.) 330.

[65] Com. v. Morse, 14 Mass. 217; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551.

(*c*) *Joint Tenants and Tenants in Common—Partners.*—One of several joint tenants or tenants in common of property cannot commit larceny in taking the property, whatever his intent may be, "because one tenant in common taking the whole doth but what by law he may do."[66] The same is true of a partner.[67] It is otherwise by express statutory provision in some jurisdictions.

(*d*) *Husband and Wife.*—At common law, because of the unity of husband and wife, a wife cannot commit larceny by taking and carrying away her husband's property;[68] and the rule is not changed by the fact that she has committed adultery, for this does not destroy the relation of husband and wife.[69]

[66] 1 Hale, P. C. 513; Rex v. Willis, 1 Mood. C. C. 375, Mikell's Cas. 672. See Bonham v. State, 65 Ala. 456. It is so by the express provision of the Texas statute, unless the person from whom the property is taken is entitled to the exclusive possession. See Bell v. State, 7 Tex. App. 25; Fairy v. State, 18 Tex. App. 314. A part owner, however, may be guilty in taking the property from the possession of a third person, who is chargeable with its safe keeping. Rex v. Bramley, Russ. & R. 478, Mikell's Cas. 670.

[67] See the authorities cited in the note preceding.

A partner (as a member of an unincorporated society) may be guilty of larceny in taking funds from a copartner, where the latter has charge of the funds, and is bound to account for them. Reg. v. Webster, 9 Cox, C. C. 13, Beale's Cas. 676.

[68] 1 Hale, P. C. 513; 1 Hawk. P. C. c. 33, § 19; 2 East, P. C. 558; Anon., Fitzh. Abr., Corone, 455, Mikell's Cas. 668; Reg. v. Tollett, Car. & M. 112, Beale's Cas. 533; Reg. v. Kenny, 2 Q. B. Div. 307, 13 Cox, C. C. 397, Mikell's Cas. 669; Rex v. Willis, 1 Mood. C. C. 375, Mikell's Cas. 672; Reg. v. Featherstone, Dears. C. C. 369, 6 Cox, C. C. 376; State v. Banks, 48 Ind. 197; Lamphier v. State, 70 Ind. 317, 324.

"'The wife cannot commit felony of the goods of her husband, for they are one person in law." 1 Hale, P. C. 513.

According to Hawkins, the reason for this doctrine is "because a husband and wife are considered as one person in law, and the husband by endowing the wife at the marriage with all his worldly goods, gives her a kind of interest in them." 1 Hawk. P. C. c. 33, § 19.

Where the husband's interest in his wife's personal property is abolished he may be convicted of the larceny of her money. Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418. Contra, Thomas v. Thomas, 51 Ill. 162; State v. Parker, 3 Ohio. Dec. (reprint) 551.

Nor can a husband commit larceny in taking and carrying away separate property of his wife.[70]

Third Persons Aiding Wife or Taking with Her Consent.—Because of this principle, it has been held in some of the cases that a third person is not guilty of larceny in aiding a wife to take and carry away her husband's property, whatever his intent may be,[71] nor, according to some of the authorities, by himself taking and carrying away the husband's property with the wife's consent, or when it is delivered to him by her,[72] unless he is living in adultery with the wife, or is eloping with her with intent to do so, in which case it has been held that he is guilty.[73]

[69] Reg. v. Kenny, supra. There is dictum to the contrary in Reg. v. Featherstone, supra.

[70] 2 Bish. New Crim. Law, § 872 (2); Thomas v. Thomas, 51 Ill 162. It has been held in Illinois that the married woman's act has not so far changed the relation of husband and wife as to render it possible for a man to steal his wife's separate property. Thomas v. Thomas, supra.

The contrary is true in Indiana, Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418, and a man may be guilty of larceny of property which the constitution makes her sole and separate property. Hunt v. State (Ark.) 79 S. W. 769, 65 L. R. A. 71.

[71] Reg. v. Avery, Bell, C. C. 150, 8 Cox, C. C. 184; Lamphier v. State, 70 Ind. 317, 324.

[72] 1 Hale, P. C. 514; 2 East, P. C. 558; 1 Hawk. P. C. c. 33, § 19; Rex v. Harrison, 1 Leach, C. C. 47, 2 East, P. C. 559; People v. Swalm, 80 Cal. 46, 22 Pac. 67.

[73] Reg. v. Tollett, Car. & M. 112, Beale's Cas. 533; Reg. v. Flatman, 14 Cox, C. C. 396; Reg. v. Harrison, 12 Cox, C. C. 19; Reg. v. Mutters, Leigh & C. 511, 10 Cox, C. C. 50; Reg. v. Thompson, 1 Den. C. C. 549, 4 Cox, C. C. 191; Reg. v. Featherstone, Dears. C. C. 369, 6 Cox, C. C. 376; Lamphier v. State, 70 Ind. 317, 325. The adulterer, however, must participate in the taking and carrying away of the property. Reg. v. Taylor, 12 Cox, C. C. 627; Reg. v. Rosenberg, 1 Car. & K. 233, 1 Cox, C. C. 21.

It has been held that an adulterer who takes possession of none of the husband's goods except the wearing apparel of the wife is not guilty of larceny. Reg. v. Fitch, Dears. & B. 187, 7 Cox, C. C. 269, 3 Jur. (N. S.) 524. And see Lamphier v. State, 70 Ind. 317, 325. Reg. v. Tollett, Car. & M. 112, Beale's Cas. 533, is to the contrary.

The true doctrine, however, on this point, is that the liability of a man who takes and carries away another's property with the consent of the owner's wife, or when it is delivered to him by her, or who aids her in doing so, does not depend upon the fact that he has committed, or intends to commit, adultery with her, but upon whether the circumstances are such that the husband's consent to the taking may be presumed, and that, if he knows that the husband does not assent, he may be guilty of larceny, though he has not committed adultery with the wife, and does not intend to do so.[74] If he has committed adultery with her, or is eloping with her with intent to do so, he is guilty because the assent of the husband under such circumstances cannot be presumed.[75]

(C) The Taking in Larceny.

314. Manner of Taking Possession.—To constitute larceny the property must be taken;[76] but, except as hereafter stated, it need not be taken in any particular manner or by any particular means. The taking may be—

1. **By the hands of the thief.**
2. **By means of an inanimate agency.**
3. **By means of an innocent human agent.**
4. **It need not be secretly.**
5. **It must not be from the person by violence or putting in fear, for this is robbery.**

The taking in larceny is generally by the hand of the thief, so that he acquires actual possession of the property. But it

[74] Rex v. Tolfree, 1 Mood. C. C. 243; Reg. v. Berry, Bell, C. C. 95, 8 Cox, C. C. 117, 5 Jur. (N. S.) 228; People v. Cole, 43 N. Y. 508; People v. Schuyler, 6 Cow. (N. Y.) 572.

[75] Reg. v. Berry, Bell, C. C. 95, 8 Cox, C. C. 117, 5 Jur. (N. S.) 228; People v. Schuyler, 6 Cow. (N. Y.) 572.

[76] An indictment for larceny always uses this word. It charges that the accused "did feloniously take, steal, and carry away" the property. To take an article feloniously is accomplished by simply laying hold of, grasping, or seizing it animo furandi, with the hands or otherwise. Gettinger v. State, 13 Neb. 308, 14 N. W. 403.

need not be so. A man may take constructive possession, so as to be guilty of larceny, by employing some inanimate agency. For example, he may steal gas from a gas company by fraudulently attaching a pipe to the pipes of the company, and thus drawing the gas into his house and consuming it, without its passing through the meter;[77] or he may steal a hog by dropping corn along the ground, and thereby enticing it from the premises of the owner into his own inclosure.[78]

The taking may also be by the hand of an innocent human agent, as an insane person, or a child of tender years, or a person who is ignorant of the facts.[79] Thus, a man may steal a trunk by fraudulently changing the baggage checks at a railroad station, and thereby causing the trunk to be removed by the employes of the railroad company from the possession of the true owner, and put into his own possession. It has been held in such a case that the larceny is complete as soon as there is the least removal of the trunk by the company.[80] A person is also guilty of larceny if, intending to steal property, he fraudulently takes out a writ of replevin or other legal process, upon a false affidavit, and without color of title, and thereby obtains possession.[81]

[77] Reg. v. White, 3 Car. & K. 363, Dears. C. C. 203, 6 Cox, C. C. 213, Beale's Cas. 506, Mikell's Cas. 679; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706, Beale's Cas. 501. And see the other cases cited ante, § 306.

A person may steal property from a slot machine by dropping into the slot a piece of metal other than money. Reg. v. Hands, 16 Cox, C. C. 188, Beale's Cas. 614.

[78] Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67, Beale's Cas. 511. And see State v. Wisdom, 8 Port. (Ala.) 511.

[79] 3 Chit. Crim. Law, 925; Rex v. Pitman, 2 Car. & P. 423; Com. v. Barry, 125 Mass. 390, Beale's Cas. 508; Cummins v. Com., 5 Ky. L. R. 200, Mikell's Cas. 682; Sikes v. State (Tex. Cr. App.) 28 S. W. 688; Lane v. State, 41 Tex. Cr. R. 558, 55 S. W. 831; State v. Hunt, 45 Iowa, 673.

[80] Com. v. Barry, supra.

[81] 1 Hale, P. C. 507; 1 Hawk. P. C. c. 33, § 12; Rex v. Chissers, T. Raym. 275, Beale's Cas. 515.

Stealth and Secrecy not Necessary.—Property is generally stolen secretly, but this is not at all necessary. If it is taken openly, this fact may have great weight in showing that there was no felonious intent; but, if it appears that there was in fact a felonious intent, an open taking is as much larceny as a secret taking.[82]

Violence or Putting in Fear.—The property must not be taken from the person of the owner by violence or by putting in fear, for in such a case the offense is robbery.[83]

315. Trespass in Taking Possession—In General.—To constitute larceny, the act of taking possession must involve a trespass. The property, therefore, must be taken—

1. From the possession of the owner, actual or constructive, and

2. Without his consent.

At common law, it is well settled that larceny cannot be committed without a trespass. The taking, therefore, must be under such circumstances as to amount technically to a trespass. There must be such a taking, said an English judge, as would give rise to an action of trespass *de bonis asportatis*.[84] To amount to a trespass, and therefore to constitute larceny, the property must be taken from the actual or constructive possession of the owner,[85] and it must be taken without his consent. One who is himself in lawful possession of goods cannot com-

[82] See Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699; Clemmons v. State, 39 Tex. Cr. R. 279, 45 S. W. 911.

[83] Long v. State, 12 Ga. 293, 318. See post, § 370 et seq.

[84] Reg. v. Smith, 2 Den. C. C. 449, 5 Cox, C. C. 533; 1 Hawk. P. C. 142, Mikell's Cas. 684. And see Rex v. Raven, J. Kelyng, 24, Beale's Cas. 631; Reg. v. Reeves, 5 Jur. (N. S.) 716, Mikell's Cas. 708, and other cases more specifically cited in the notes following.

[85] Pyland v. State, 4 Sneed (Tenn.) 357. We shall use the word "owner" throughout our treatment of this subject, but, as we have seen, the person from whom property is stolen may be described as the "owner" in the indictment, though he has not the general ownership. See ante, § 313b.

mit a trespass in converting them to his own use, however fraudulent his intent may be, and therefore he cannot commit larceny in doing so. Nor can trespass or larceny be committed by taking goods with the free consent of the owner to part with his property therein, if the taking does not go beyond the consent. These principles will be applied in the sections following.

316. Conversion by Persons Having Lawful Possession.

(*a*) *In General.*—Since a trespass cannot be committed unless the property is taken from the actual or constructive possession of the owner, and without his consent, it follows that one who has lawfully acquired the possession of property with the owner's consent, and without a felonious intent or fraud, does not commit larceny by afterwards fraudulently converting it to his own use. There is no larceny when he acquires possession, for there is then neither a felonious intent, which is an essential element of larceny,[86] nor a trespass, which is also essential; and there is no larceny when he converts the property, for there is then no trespass. It may therefore be laid down as a general rule that one who lawfully takes possession of property by the direction or with the consent of the owner cannot commit larceny by afterwards converting it to his own use, provided he has done nothing to terminate his right to possession.[87] We are

[86] Post, § 326.

[87] Rex v. Raven, J. Kelyng, 24, Beale's Cas. 631; Leigh's Case, 1 Leach, C. C. 411, n., 2 East, P. C. 694, Beale's Cas. 632, Mikell's Cas. 731; Rex v. Banks, Russ. & R. 441, Beale's Cas. 632; Reg. v. Thristle, 3 Cox, C. C. 573, Beale's Cas. 633; Reg. v. Pratt, 6 Cox, C. C. 373, Beale's Cas. 635; Reg. v. Matthews, 12 Cox, C. C. 489, Mikell's Cas. 333; Rex v. Dingley, Show. 53, Leach, C. C. 835. Mikell's Cas. 684; Reg. v. Reeves, 5 Jur. (N. S.) 716, Mikell's Cas. 708; Reg. v. Reynolds, 2 Cox, C. C. 170; Reg. v. Hey, 3 Cox, C. C. 583; State v. England, 8 Jones (N. C.) 399, 80 Am. Dec. 334; State v. Fann, 65 N. C. 317; Hill v. State, 57 Wis. 377, 15 N. W. 445; Abrams v. People, 6 Hun (N. Y.) 491; Watson v. State, 70 Ala. 13; People v. Smith, 23 Cal. 280; and cases cited in the notes following. See, also, Murphy v. People, 104 Ill. 528.

speaking here of *possession,* as distinguished from the bare custody. As we shall presently see, a man may part with the custody of his goods and retain the constructive possession, and in such a case a different rule applies.

(*b*) *Conversion by Bailees.*—This principle applies in all cases of bailment. A bailee cannot be guilty of larceny at common law in fraudulently converting the property to his own use, if he had no fraudulent intent when he acquired possession, and has done nothing before the conversion to terminate the bailment, for, as his possession is lawful, there is no trespass.[88] Thus, one who hires or borrows a horse or other property without any fraudulent intent does not commit larceny in appropriating it to his own use during the continuance of the bailment.[89] The same is true of a watchmaker or other mechanic who obtains possession of property for the purpose of repairing it, etc., and afterwards converts it to his own use,[90] and of a carrier, pledgee, warehouseman, or any other bailee.[91]

(*c*) *Possession Obtained with Felonious Intent.*—This rule does not apply in any case if a felonious intent existed at the time the property was obtained. If a person obtains the posses-

[88] See the cases above cited.

[89] Rex v. Raven, J. Kelyng, 24 Beale's Cas. 631; Rex v. Banks, Russ. & R. 441, Beale's Cas. 632; Rex v. Meeres, 1 Show. 50, Mikell's Cas. 730; Watson v. State, 70 Ala. 13; People v. Smith, 23 Cal. 280. And see Rex v. Pear, 2 East, P. C. 685, Beale's Cas. 648; and Rex v. Semple, 1 Leach, C. C. 420, Mikell's Cas. 742.

[90] Reg. v. Thristle, 3 Cox, C. C. 573, Beale's Cas. 633.

Where a man received materials to be made up into coats and returned, and, after making the coats, sold them, and converted the proceeds, it was held that he was not guilty of larceny unless he intended to steal at the time he received the materials. Abrams v. People, 6 Hun (N. Y.) 491, Mikell's Cas. 733. And see Reg. v. Saward, 5 Cox, C. C. 295, Mikell's Cas. 771.

[91] Leigh's Case, 1 Leach, C. C. 411 n., 2 East, P. C. 694, Beale's Cas. 632, Mikell's Cas. 731; Reg. v. Matthews, 12 Cox, C. C. 489, Mikell's Cas. 333; Reg. v. Evans, Car. & M. 632, Mikell's Cas. 732; Rex v. Savage, 5 Car. & P. 143; Rex v. Fletcher, 4 Car. & P. 545; Reg. v. Hey, 3 Cox, C. C. 582; State v. England, 8 Jones (N. C.) 399, 80 Am. Dec. 334; State v. Fann, 65 N. C. 317.

sion of property by delivery from the owner with fraudulent intent, existing at the time, of converting it to his own use, the owner intending to part with the possession only, he is guilty of larceny.[92] By reason of his fraudulent intent his taking of the property is wrongful, and a trespass, and there is therefore a concurrence of trespass and felonious intent.

This principle applies to a borrowing or deposit of money, if the same money is to be returned, so that the borrower or depositary obtains merely the *possession,* and not the *property.*[93]

[92] Rex v. Pear, 2 East, P. C. 685, Beale's Cas. 648; Reg. v. Bunce, 1 Fost. & F. 523, Beale's Cas. 651; Rex v. Moore, 1 Leach, C. C. 314, Beale's Cas. 658; Rex v. Sharpless, 1 Leach, C. C. 92, Beale's Cas. 611; Leigh's Case, 1 Leach, C. C. 411, n., 2 East, P. C. 694, Beale's Cas. 632, Mikell's Cas. 731; Reg. v. Buckmaster, 16 Cox, C. C. 339, Beale's Cas. 663; Rex v. Semple, 1 Leach, C. C. 420, Mikell's Cas. 742; Rex v. Patch, 1 Leach, C. C. 238, Mikell's Cas. 778; State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, Beale's Cas. 593; Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474, Beale's Cas. 653; Pennsylvania v. Campbell, Add. (Pa.) 232, Mikell's Cas. 685; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; State v. Gorman, 2 Nott & McC. (S. C.) 90, 10 Am. Dec. 576; People v. Smith, 23 Cal. 280; State v. Lindenthall, 5 Rich. (S. C.) 237, 57 Am. Dec. 743; State v. Humphrey, 32 Vt. 569, 78 Am. Dec. 605; U. S. v. Rodgers, 1 Mackey (D. C.) 419; State v. Woodruff, 47 Kan. 151, 27 Pac. 842; People v. McDonald, 43 N. Y. 61, Mikell's Cas. 701; Justices v. People, 90 N. Y. 12; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864; State v. McRae, 111 N. C. 665, 16 S. E. 173; Starkie v. Com., 7 Leigh (Va.) 752; Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418. Compare Felter v. State, 9 Yerg. (Tenn.) 397.

In State v. Lindenthall, supra, it was held that larceny was committed by one who obtained possession of goods under pretense of taking them to another for examination, and possible purchase, but with real intent to steal them, and who afterwards converted them to his own use.

Green goods trick: Crum v. State, 148 Ind. 401, 47 N. E. 833. Betting on sham race: Doss v. People, 158 Ill. 660, 41 N. E. 1093, 49 Am. St. Rep. 180.

Fraudulent intent may be inferred from the fact of his converting the property immediately. Com. v. Rubin, 165 Mass. 453, 43 N. E. 200.

[93] Rex v. Moore, 1 Leach, C. C. 314; Reg. v. Bunce, 1 Fost. & F. 523; Stinson v. People, 43 Ill. 397; State v. Copeman (Mo.) 84 S. W. 942; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546.

Some of the courts have applied the principle to cases in which a person hands another money to go out and get changed, or to purchase property, holding that in such a case the latter is a bailee intrusted with the possession, and that, if he fraudulently intends, at the time of receiving the money, to convert it to his own use, and does so, he is guilty of larceny.[94]

(*d*) *Possession Obtained by Fraud, but Without Felonious Intent.*—If a bailee is guilty of fraud in obtaining the property, he is guilty of trespass, in contemplation of law, though his intent may not then be felonious; and this trespass continues so long as he has possession. It follows that, if he afterwards forms and carries out a felonious intent, he is guilty of larceny.[95]

(*e*) *Termination of Right to Possession before Conversion*—(*1*) *In General.*—The rule that a bailee who has lawfully acquired possession cannot commit larceny by a subsequent conversion applies only when the property is converted during the bailment. If the bailment terminates for any reason, the possession vests constructively in the owner, and an appropriation after that time involves a trespass, and may be larceny. Thus, an employe in a store, if he be regarded as a bailee of the goods during business hours, and not a mere servant having the bare custody, is guilty of larceny if he enters the store after business hours, and carries away the goods *animo furandi.*[96]

In Loomis v. People, supra, the defendant took the prosecutor into a saloon, and began to shake dice with a confederate. After apparently winning once, he induced the prosecutor to lend him $90, saying that he was sure to win, and would return the money. He lost the money to his confederate, and they left the saloon. It was held that this was larceny, as the prosecutor parted with the possession merely, and not with the right of property.

[94] Com. v. Barry, 124 Mass. 325; Com. v. Flynn, 167 Mass. 460, 45 N. E. 924, 57 Am. St. Rep. 472; Justices v. People, 90 N. Y. 12, 43 Am. Rep. 135 (repudiating Reg. v. Thomas, 9 Car. & P. 741).

See, also, Verberg v. State, 137 Ala. 73, 34 So. 848, 97 Am. St. Rep. 17.

[95] State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, Beale's Cas. 593.

[96] Com. v. Davis, 104 Mass. 548.

The same principle has been applied to a bank teller going into the bank and taking money from the vault after business hours.[97]

(*2*) *Termination of Right to Possession by Act of Bailee.*—If a bailee, after obtaining possession without felonious intent or fraud, does any act which will have the effect in law of terminating his right to possession, and after this feloniously converts the goods to his own use, he is guilty of larceny, for after the termination of the bailment he no longer has any special property in the goods or lawful possession, but stands in the same position as a servant having the mere charge or custody of them,[98] the legal possession being in the owner.[99] Thus, if a man hires or borrows a horse to ride to A., and rides to B., or if he hires or borrows a horse for one day and wrongfully keeps it for two, he thereby terminates the bailment; and if he forms and carries out, at B. or on the road to B., or on the second day, as the case may be, a felonious intent to convert the property to his own use, he is guilty of larceny.[100]

(*3*) *Breaking Bulk.*—And on the same principle, if a carrier or other bailee of goods breaks bulk, as where he opens a box or trunk and takes goods or money therefrom with felonious intent, he is guilty of larceny.[101]

[97] Com. v. Barry, 116 Mass. 1.

While the cases cited in this and the preceding note may be referred to as illustrating the principle stated in the text, they were not decided on correct grounds, for they were not cases of bailment at all. A mere clerk in a store or a teller in a bank is a mere servant, as he has the mere custody, not the possession, of the goods or money intrusted to him, and an appropriation by him, even during business hours, would be larceny. Post, § 317.

[98] Post, § 317.

[99] Carrier's Case, Year Book 13 Edw. IV. 9, pl. 5, Beale's Cas. 638, Mikell's Cas. 734; Reg. v. Poyser, 2 Den. C. C. 233, Beale's Cas. 643; Langley v. Bradshawe, Rolle Abr. 73, pl. 16, Mikell's Cas. 737; Reg. v. Saward, 5 Cox, C. C. 295, Mikell's Cas. 771; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Com. v. James, 1 Pick. (Mass.) 375, Beale's Cas. 645.

[100] Tunnard's Case, 1 Leach, C. C. 214, note, Beale's Cas. 640; Reg. v. Haigh, 7 Cox, C. C. 403.

[101] Carrier's Case, Year Book 13 Edw. IV. 9, pl. 5, Beale's Cas. 638

(*f*) *Delivery of Possession by Mistake.*—The rules we have just been considering apply where the possession of property is delivered by mistake. Whether a conversion by the person to whom it is delivered constitutes larceny depends upon his intent when he obtains possession. If property intended for one person is delivered to another by mistake, he acquires the posses-

Mikell's Cas. 734; Rex v. Brazier, Russ. & R. 337, Mikell's Cas. 741; Rex v. Howell, 7 Car. & P. 325, Mikell's Cas. 742; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Robinson v. State, 1 Cold. (Tenn.) 120, 78 Am. Dec. 487; Nichols v. People, 17 N. Y. 114.

In Robinson v. State, supra, a man was intrusted with a closed trunk to keep for another, and he opened it, and took money from it. It was held that he was guilty of larceny, though it would have been otherwise if he had sold the trunk without opening it, and appropriated the proceeds. See, also, State v. England, 8 Jones (N. C.) 399, 80 Am. Dec. 334.

It has been held that if a carrier or other bailee, intrusted with a number of separate packages or articles, converts an entire package or article to his own use, he is not guilty of larceny, on the ground that there is no breaking of bulk, so as to terminate the bailment before the conversion. Rex v. Madox, Russ. & R. 92, Beale's Cas. 641, Mikell's Cas. 738; Rex v. Pratley, 5 Car. & P. 533; Reg. v. Cornish, 1 Dears. 425. There are decisions, however, to the contrary. Rex v. Howell, 7 Car. & P. 325, Mikell's Cas. 742; Com. v. Brown, 4 Mass. 580; Nichols v. People, 17 N. Y. 114. At any rate, such conversion terminates the bailment, and it is larceny to afterwards convert one of the other packages or articles. The rule is laid down in an English case, that if a bailee converts to his own use some of the goods intrusted to him, and afterwards converts the remainder, he commits larceny, as the first conversion terminates the bailment. Reg. v. Poyser, 2 Den. C. C. 233, Beale's Cas. 643.

If a miller, or the proprietor of a grain elevator, is given grain to grind or to keep and return, and he separates a part for his own use, and afterwards converts it, he is guilty of larceny. Com. v. James, 1 Pick. (Mass.) 375, Beale's Cas. 645. And if a bag of wheat is delivered to a warehouseman for safe custody, and he takes all of the wheat out of the bag, and disposes of it, he is guilty of larceny, the same as if he took out only a part. Rex v. Brazier, Russ. & R. 337, Mikell's Cas. 741.

A cabinet maker who is intrusted with a bureau or desk to repair commits larceny if he opens a secret drawer, and takes money therefrom. Cartwright v. Green, 8 Ves. 405.

sion, and only the possession. If he acquires possession innocently, his subsequent conversion of the property, *animo furandi*, on discovery of the mistake, is not larceny, but he is guilty of larceny if he knows of the mistake when he receives the property, and takes it then *animo furandi*.[102] The same is true when a person, in paying or lending money to another, gives him by mistake more money than is intended.[103] There are some decisions in conflict with this rule, but they cannot be sustained.[104]

317. Conversion by Persons Having the Bare Custody.

(*a*) *In General.*—There is a well-settled distinction in law between the possession of goods and the mere charge or custody, and this distinction plays an important part in the law of larceny. The owner of goods may deliver them to another in such a manner, or under such circumstances, as to give the other the bare custody, without changing the possession in the eye of the law. The possession in such a case remains constructively in the owner, and, if the person having the custody converts the goods to his own use with felonious intent, he takes them from

[102] Rex v. Mucklow, 1 Mood. C. C. 160, Beale's Cas. 547; Reg. v. Little, 10 Cox, C. C. 559; Reg. v. Flowers, 16 Cox, C. C. 33, Beale's Cas. 574; Cooper v. Com., 110 Ky. 123, 60 S. W. 938, 52 L. R. A. 136.

[103] Reg. v. Middleton, L. R. 2 C. C. 38, Beale's Cas. 617; Reg. v. Flowers, 16 Cox, C. C. 33, Beale's Cas. 574; Reg. v. Hehir [1895] 2 Ir. 709, 18 Cox, C. C. 267, Mikell's Cas. 747; Wolfstein v. People, 6 Hun (N. Y.) 121, Beale's Cas. 629; Bailey v. State, 58 Ala. 414; State v. Ducker, 8 Or. 394, 34 Am. Rep. 590; Cooper v. Com., 110 Ky. 123, 60 S. W. 938; Jones v. State, 97 Ga. 430, 25 S. E. 319; Bailey v. State, 58 Ala. 414; Thompson v. State (Tex. Cr. App.) 55 S. W. 330.

[104] In several cases, for example, it has been held that, when money or property is delivered to a person by mistake, the taking is not complete, and he does not acquire possession, until he discovers the mistake, and that he is guilty of larceny if he then forms and carries out an intent to appropriate the property or money to his own use. Reg. v. Ashwell, 16 Cox, C. C. 1, Beale's Cas. 566; State v. Ducker, 8 Or. 394. These decisions, however, are contrary to the well-settled principles shown in the preceding sections, and are opposed to the weight of authority. See Reg. v. Flowers, 16 Cox, C. C. 33, Beale's Cas. 574.

the constructive possession of the owner, and commits a trespass and larceny. And it can make no difference, in such a case, when the felonious intent was first formed.[105]

(*b*) *Larceny by Servants—(1) Delivery by Master to Servant as Such.*—Illustrations of this distinction generally arise in the case of servants. When a master delivers goods to his servant to be used or worked by him in the master's business, or to be taken care of for him, he does not part with the possession. The servant has the bare custody or charge, and the possession remains constructively in the master. It follows that, if the servant fraudulently converts the goods to his own use, he takes them from the constructive possession of the master, and is guilty of a trespass and larceny; and, unlike in a case of bailment, it can make no difference when the felonious intent was first conceived. It is well settled, therefore, that it is larceny for a butler to fraudulently appropriate to his own use his master's plate, or a farm hand or hostler his master's horses, or a mere clerk in a store or office his master's goods or money, of which he has the bare custody, no matter at what time his intent to do so is first formed.[106] The same principle applies

[105] Anon., Lib. Ass., 137, pl. 39, Beale's Cas. 514; Anon., J. Kelyng, 35, Beale's Cas. 515, Mikell's Cas. 761; Rex v. Chissers, T. Raym. 275, Beale's Cas. 515; Reg. v. Slowly, 12 Cox, C. C. 269, Beale's Cas. 516; Rex v. Bass, 1 Leach, C. C. 251, Beale's Cas. 531; Reg. v. Jones, Car. & M. 611, Mikell's Cas. 764; Crocheron v. State, 86 Ala. 64, 5 So. 649, and other cases cited in the notes following.

[106] 1 Hale, P. C. 506; Anon., J. Kelyng, 35, Beale's Cas. 515, Mikell's Cas. 761; Rex v. Paradice, 2 East, P. C. 565, Mikell's Cas. 762; Robinson's Case, 2 East, P. C. 565; Rex v. Harvey, 9 Car. & P. 353; Rex v. Bass, 1 Leach, C. C. 251, Beale's Cas. 531; Rex v. Lavender, 2 East, P. C. 566, Beale's Cas. 532; State v. Self, 1 Bay (S. C.) 242; State v. Schingen, 20 Wis. 74; People v. Wood, 2 Park. Cr. R. (N. Y.) 22; U. S. v. Clew, 4 Wash. C. C. 700, Fed. Cas. No. 14,819; State v. Jarvis, 63 N. C. 556; Crocheron v. State, 86 Ala. 64, 5 So. 649; Oxford v. State, 33 Ala. 416; Powell v. State, 34 Ark. 693; Marcus v. State, 26 Ind. 101; Gill v. Bright, 6 T. B. Mon. (Ky.) 130; Jenkins v. State, 62 Wis. 49, 21 N. W. 232.

For a time in England there was doubt and a conflict of opinion on this question. See Year Book 3 Hen. VII. 12, pl. 9, Beale's Cas. 523,

when a master delivers goods or money to his servant to be used in the course of his employment, though they are to be consumed in such use, or parted with by the servant for the master, as where money is delivered to a servant by the master to buy goods or get changed, or property is delivered to him to be sold or to be delivered to a third person, or a check is delivered to him to get cashed. In such cases the servant, until he has carried out the master's instructions, has the bare custody.[107]

(*2*) *Delivery by Master to Servant as Bailee.*—Property may be delivered by a master to his servant under such circumstances as to give the servant the possession, as distinguished from the bare custody, and so make him a bailee, so far as the law of larceny is concerned. If he receives the property honestly, and without any intent to convert it to his own use, his subsequent change of intent and appropriation of the property, while the bailment continues, cannot constitute larceny, but if his intent is felonious when he receives it, or if he does anything to terminate the bailment, and change his possession into a bare custody, and then converts the property, he is guilty of larceny.[108] Such a case arises when property is delivered by a master to his servant, not as such, and for the purpose of the

Mikell's Cas. 761; Year Book 21 Hen. VII. 14, pl. 21, Beale's Cas. 524. But the law was settled in accordance with the text by the statute of 21 Hen. VIII. c. 7. This statute has been said to be merely declaratory of the common law. Rex v. Wilkins, 1 Leach, C. C. 523, Mikell's Cas. 762, note. Even if it be not so regarded, it is old enough, and sufficiently applicable to the conditions existing in the United States, to be regarded as a part of our common law. See Com. v. Ryan, 155 Mass. 523, 30 N. E. 364.

In Indiana, by statute, such a conversion by a servant is embezzlement, and not larceny. Jones v. State, 59 Ind. 229; State v. Wings, 89 Ind. 204.

[107] Rex v. Bass, 1 Leach, C. C. 251, Beale's Cas. 531; Rex v. Lavender, 2 East, P. C. 566, Beale's Cas. 532; Reg. v. Goode, Car. & M. 582, Mikell's Cas. 766; State v. Schingen, 20 Wis. 74. Rex v. Watson, 2 East, P. C. 562, Beale's Cas. 532, to the contrary, is clearly erroneous. See Rex v. Lavender, supra.

[108] Ante, § 316.

master, but for the purposes of the servant, as where a horse is hired or loaned to him for use in his own business or for a pleasure trip.[109] There are some cases in which it has been held, in terms or in effect, that if a master delivers money to his servant to be expended by him for goods, or to be paid over to a third person, or to get changed, and not to be returned, the servant acquires the possession as bailee, and not merely the custody, and that he is not guilty of larceny in fraudulently converting it to his own use unless he intended to do so when he received it, or unless he has previously done something to determine his possession and revest it constructively in the master.[110] This doctrine has been repudiated, however, both in this country and in England, and it may be regarded as settled that the servant has the bare custody only, and commits larceny in appropriating the property, no matter when he first conceived the felonious intent.[111] The same is true where goods are delivered to a servant by his master to be delivered to a third person.[112]

(*3*) *Delivery by Third Person to Servant.*—When goods are delivered by a third person to a servant for his master, and the servant afterwards fraudulently appropriates them to his own use, whether he is guilty of larceny, assuming the existence of the other elements of the offense than trespass, depends upon whether, before the appropriation, the goods had come into the constructive possession of the master, so as to render the servant a mere custodian. If the servant puts the goods in the place where it is his duty as servant to put them for the master,

[109] State v. Fann, 65 N. C. 317.

A person employed merely as a field hand on a farm, working by the day, week or month, has no charge of his master's money, and, if his master intrusts him with money to keep for him, he receives it as bailee, and not as servant. State v. Fann, 65 N. C. 317.

[110] See Year Book 21 Hen. VII. 14, pl. 21; Beale's Cas. 524; Rex v. Watson, 2 East, P. C. 562.

[111] Rex v. Lavender, 2 East, P. C. 566, Beale's Cas. 532.

[112] Rex v. Bass, 1 Leach, C. C. 251, Beale's Cas. 531.

intending to put them there for the master, they are from that moment in the master's constructive possession, though he has never had actual possession, and a subsequent taking of them by the servant with felonious intent is larceny.[113] But if he converts the goods before he has put them in the place where his duty as servant requires him to put them for the master, he does not take them from the constructive possession of the master, and is not guilty of a trespass, nor larceny.[114] Thus, if a master sends his servant with a wagon after goods, to be delivered by a third person, and the servant puts them into a wagon intending to carry them to the master, they are then in the constructive possession of the master, and a subsequent conversion by the servant, *animo furandi,* is larceny; but if he receives the goods into his hands, and converts them before putting them into the wagon, it is not larceny.[115] So, when a servant receives money in payment for goods sold for his master, and puts it at once into his pocket, *animo furandi,* he is not guilty of larceny; but it is otherwise if he puts the money into his master's safe or money drawer, intending to do so for the master, and afterwards takes it out and converts it.[116] If a servant is given money or property by the master to be delivered to a third person, as property to sell for him, or money to get changed or to buy goods, or a check to get cashed, he has, as

[113] Reg. v. Reed, 6 Cox, C. C. 284, Beale's Cas. 536; Reg. v. Norval, 1 Cox, C. C. 95, Beale's Cas. 535; Waite's Case, 2 East, P. C. 570, 571, 1 Leach, C. C. 28, 35, note; Bazeley's Case, 2 East, P. C. 571, 574, 2 Leach, C. C. 835, 843, note, Beale's Cas. 525; Reg. v. Wright, Dears. & B. C. C. 431, 441; Reg. v. Masters, 3 Cox, C. C. 178.

[114] Dyer, 5a; Beale's Cas. 524; Bazeley's Case, 2 East, P. C. 571, 574, 2 Leach, C. C. 835, 843, note, Beale's Cas. 525; Bull's Case, 2 East, P. C. 572, 2 Leach, C. C. 841, 843, note, Mikell's Cas. 686; Rex v. Sullens, 1 Mood. C. C. 129, Mikell's Cas. 688; Rex v. Headge, Russ. & R. 160, Beale's Cas. 706; Rex v. Hawtin, 7 Car. & P. 281; Com. v. King, 9 Cush. (Mass.) 284; Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, Beale's Cas. 543, Mikell's Cas. 695, note.

[115] Reg. v. Reed, 6 Cox, C. C. 284, Beale's Cas. 536, Mikell's Cas. 692; Reg. v. Norval, 1 Cox, C. C. 95, Beale's Cas. 535.

[116] Bull's Case, 2 East, P. C. 572, 2 Leach, C. C. 841, 843, note.

we have seen, the mere custody of the property, money, or check, and if he converts it he is guilty of larceny.[117] This is not necessarily true, however, of the proceeds of the property or check, or the change for the money. Being delivered by a third person for the master, they are not in his constructive possession until the servant has so deposited them as to become a mere custodian under the rules above stated, and, if he converts them before then, it is not larceny.[118]

The mere physical presence of the money or property in the place where it is the servant's duty to put it is not conclusive of the question whether he has ceased to have the possession and has become a mere custodian for the master. His intent in depositing it must also be considered. If he intended to put it there for the master, and in discharge of his duty as servant, the constructive possession is afterwards in the master. But if he makes up his mind not to turn it over to the master, but to appropriate it to his own use, and puts it even in the proper place of deposit only temporarily, and with the intention of taking it out again at a more favorable opportunity, he does not surrender the possession, and when he afterwards converts it to his own use he does not commit larceny.[119]

(*c*) *Delivery of Bare Custody to Others than Servants.*— The distinction between parting with the possession and parting with the bare custody is not limited to the case of goods in the hands of a servant, but applies in many other cases. It applies, for example, to the bed linen, silver, etc., of an innkeeper, or of a private person in the hands of a guest. The guest has the bare custody, and commits a trespass and larceny if he felonious-

[117] Ante, § 317b (2).

[118] Rex v. Sullens, 1 Mood. C. C. 129; Rex v. Winnall, 5 Cox, C. C. 326; Rex v. Hartley, Russ. & R. 139; Reg. v. Keena, L. R. 1 C. C. 113, 11 Cox, C. C. 123; Rex v. Gale, 13 Cox, C. C. 340; State v. Foster, 37 Iowa, 404; Johnson v. Com., 5 Bush (Ky.) 430; Com. v. King, 9 Cush. (Mass.) 284.

[119] Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, Beale's Cas. 543, Mikell's Cas. 695, note.

ly converts the property to his own use.[120] So, if a person delivers goods or money to another merely to be examined or dealt with in some way in his presence, and then returned, and not with intent to vest any right of possession in the other, the other has the bare custody, and may be guilty of larceny in converting the goods to his own use. And it can make no difference that his intention was honest when he received the goods or money into his hands.[121] Such cases arise when a merchant hands a customer goods to examine with a view to purchasing, or to take upon paying for them, and he feloniously carries them away;[122] where money is handed to a person with the understanding that he is to take out a certain amount as a loan or in payment for goods, and return the change, and he keeps the whole amount;[123] where a person requests change for a bill, and,

[120] 1 Hale, P. C. 506; Anon., Lib. Ass. 137, pl. 39, Beale's Cas. 514; Com. v. Lannan, 153 Mass. 287, 26 N. E. 858, 25 Am. St. Rep. 629, Beale's Cas. 521.

[121] It was said in Com. v. O'Malley, 97 Mass. 584, Beale's Cas. 518, that "if the owner puts his property into the hands of another, to use it or do some act in relation to it, in his presence, he does not part with the possession, and the conversion of it, animo furandi, is larceny." See Rex v. Sharpless, 1 Leach, C. C. 92, Beale's Cas. 611.

[122] Rex v. Chissers, T. Raym. 275, Beale's Cas. 515; Reg. v. Slowly, 12 Cox, C. C. 269, Beale's Cas. 516; Com. v. Wilde, 5 Gray (Mass.) 83; Rex v. Sharpless, 1 Leach, C. C. 92, Beale's Cas. 611. See post, § 318c (2).

[123] Com. v. O'Malley, 97 Mass. 584, Beale's Cas. 518; Com. v. Flynn, 167 Mass. 460, 45 N. E. 924, 57 Am. St. Rep. 472; Fitzgerald v. State, 118 Ga. 855, 45 S. E. 666; Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435, Beale's Cas. 519.

There are some cases in which it has been held that if a person gives another, not his servant, money to go out and get changed for him, or to buy goods for him, and return the goods and change, and the other, having received the money without felonious intent, afterwards forms such intent, and converts the money to his own use, he is not guilty of larceny. Reg. v. Thomas, 9 Car. & P. 741, Mikell's Cas. 763; Reg. v. Reynolds, 2 Cox, C. C. 170. The better opinion, however, is that, in such a case, the bare custody only is parted with; that the person receiving the money is pro hac vice in the position of a mere servant, and that he is therefore guilty of larceny. See Hilde-

on receiving the change, refuses to hand over the bill;[124] where the holder of a note or bond hands it to the maker or obligor, or to another, merely to examine or indorse a payment, and the other destroys it or refuses to return it.[125] Many other illustrations of this principle are to be found in the reports.[126]

318. Consent of the Owner to Part with the Property.

(*a*) *In General.*—In considering the consent of the owner to part with the *possession* of his property, it was shown that ordinarily a bailee cannot be guilty of larceny if he had no felonious intent when he obtained possession, but that it is otherwise if he then had such intent.[127] These cases are to be distinguished from cases in which the owner consents to part with the *property* in the goods, as distinguished from the *possession;* that is, with the title or ownership. The rule is well settled that, if the owner's intention is to part with the right of property in goods in delivering them to another, and the delivery is absolute, and not conditional, the other cannot be guilty of larceny. And it can make no difference in such a case that the property is obtained with fraudulent intent, and by means of false pretenses. As was said in an Ohio case: "Where the owner intends to transfer, not the possession merely, but also the title to the property, although induced thereto by

brand v. People, supra; Murphy v. People, 104 Ill. 528; Justices v. People, 90 N. Y. 12; Reg. v. Smith, 1 Car. & K. 423.

[124] State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455. And see Reg. v. McKale, 11 Cox, C. C. 32.

[125] People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655, Mikell's Cas. 767; Reg. v. Rodway, 9 Car. & P. 784; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670.

[126] People v. Johnson, 91 Cal. 265, 27 Pac. 663; Com. v. Lannan, 153 Mass. 287, 26 N. E. 858, Beale's Cas. 521; People v. McDonald, 43 N. Y. 61, Mikell's Cas. 701; People v. Montarial, 120 Cal. 691, 53 Pac. 355, Mikell's Cas. 772; Reg. v. Johnson, 5 Cox, C. C. 372; Levy v. State, 79 Ala. 259; State v. Fenn, 41 Conn. 590; Huber v. State, 57 Ind. 341.

[127] Ante, § 316.

the fraudulent pretenses of the taker, the taking and carrying away do not constitute larceny. The title vests in the taker, and he cannot be guilty of larceny. He commits no trespass. He does not take and carry away the goods of another, but the goods of himself."[128] This, as a general principle, is too well settled to admit of controversy, but there has been difficulty in applying the rule, and in determining whether, in a particular case, the intention was to part with the property or merely with the possession, and there is some conflict in the decisions resulting from a failure to properly draw the distinction.

The principle has been applied in numerous cases in which goods have been obtained by false pretenses. Thus, it has been held not to be larceny for a person to obtain property by falsely pretending to have been sent by another person for it,[129] or for a person to obtain property on the pretense of purchasing it, and on a promise to pay for it, which he does not intend to perform,[130] or to purchase property and pay for it with forged

[128] Kellogg v. State, 26 Ohio St. 16. And see Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474, Beale's Cas. 653, where it is said: "If, by trick or artifice, the owner of property is induced to part with the * * * naked possession to one who receives the property animo furandi, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but the right of property also, the offense of the party obtaining them will not be larceny, but that of obtaining goods by false pretenses." See, also, Rex v. Atkinson, 2 East, P. C. 673, Beale's Cas. 660; Rex v. Moore, 2 East, P. C. 679; Reg. v. Riley, 1 Cox, C. C. 98; Rex v. Robson, Russ. & R. 413, Mikell's Cas. 783; Reg. v. Solomons, 17 Cox, C. C. 93, Beale's Cas. 668; Reg. v. Bunce, 1 Fost. & F. 523, Beale's Cas. 651; Reg. v. Prince, L. R. 1 C. C. 150, Beale's Cas. 660; Reg. v. Williams, 7 Cox, C. C. 355; Reg. v. McKale, 11 Cox, C. C. 32; Reg. v. Twist, 12 Cox, C. C. 509; Reg. v. Hollis, 15 Cox, C. C. 345; Wilson v. State, 1 Port. (Ala.) 118; Kelly v. People, 6 Hun (N. Y.) 509; Ross v. People, 5 Hill (N. Y.) 294; People v. Sumner, 33 App. Div. 338, 53 N. Y. Supp. 817, Mikell's Cas. 787; Steward v. People, 173 Ill. 464, 50 N. E. 1056.

[129] Rex v. Adams, Russ. & R. 225.

[130] Rex v. Harvey, 1 Leach, C. C. 467.

bills.[131] And there are many other similar cases.[132] The principle applies equally to the obtaining of money by false pretenses. Thus, it has been held not to be larceny to obtain money from a bank or individual on a forged or counterfeit order or letter;[133] to make a pretense of finding a valuable article and sell it to another, it being in fact worthless;[133a] to make a pretense of putting three shillings into a purse and trade it for one shilling;[134] to obtain money in payment of a sham bet, by pretending that the bet was fair and was lost.[135] So, if a man fraudulently induces another to lend him money, the other not expecting to get the same money back, but intending to part with his property therein, he is not guilty of larceny, though he may have obtained the money by false pretenses.[136]

[131] Rex v. Parkes, 2 Leach, C. C. 614, 2 East, P. C. 671, Mikell's Cas. 774. See, also, Reg. v. Bunce, 1 Fost. & F. 523, Beale's Cas. 651.

Obtaining a loan of money by fraudulently depositing spurious pieces in the form and semblance of gold coin as security is not larceny. Kelly v. People, 6 Hun (N. Y.) 509.

[132] See Rex v. Jackson, 1 Mood. C. C. 119, where a pawnbroker was induced to surrender a pledge by giving him a package falsely represented to contain property, to be held instead; and Jacob of Bedford's Case, Sel. Pl. Jewish Exch. (Sel. Soc.) 125, Mikell's Cas. 773, where money was obtained on a fraudulent pretense of selling plates fused from coin clippings.

[133] Reg. v. Prince, L. R. 1. C. C. 150, Beale's Cas. 660; Rex v. Atkinson, 2 East, P. C. 673, Beale's Cas. 660.

[133a] Reg. v. Wilson, 8 Car. & P. 111, Mikell's Cas. 779.

[134] Reg. v. Solomons, 17 Cox, C. C. 93, Beale's Cas. 668; Reg. v. Williams, 7 Cox, C. C. 355, Mikell's Cas. 786.

[135] Rex v. Nicholson, 2 Leach, C. C. 610, 2 East, P. C. 669, Mikell's Cas. 781; Hindman v. State (Ark.) 81 S. W. 836.

[136] Rex v. Summers, 3 Salk. 194, 2 East, P. C. 668; Rex v. Atkinson, 2 East, P. C. 673, Beale's Cas. 660; Lewer v. Com., 15 Serg. & R. (Pa.) 93; Kellogg v. State, 26 Ohio St. 16; Ennis v. State, 3 G. Greene (Iowa) 67; Welsh v. People, 17 Ill. 339; Wilson v. State, 1 Port. (Ala.) 118.

Thus, in Rex v. Atkinson, supra, it was held that it was not larceny to obtain money by sending a forged letter asking for a loan.

In Kellogg v. State, supra, the accused, by falsely pretending that he had a freight bill to pay, and that he did not wish to pay it in gold, which he represented that he had, induced the prosecutor to let

(*b*) *Delivery by Servant or Agent.*—Whether or not it is larceny to obtain goods from a servant or agent of the owner, who in delivering them intends to part absolutely with the property in the goods, depends upon the extent of the servant's or agent's authority. If he has general authority to part with his master's or principal's property, his act in doing so is the master's or principal's act, and his consent the master's or principal's consent, and the person so obtaining the property is not guilty of larceny if he would not have been guilty had the delivery been

him have $280 in currency, with which to make the payment. He promised to repay the money when he should go to the bank, where he said he had the money, and he gave the prosecutor what he falsely represented to be $280 in gold, to be held as security. He then ran off with the money. It was held, correctly, that this was not larceny, as the prosecutor intended to part with the property in the money, and not merely with the possession.

There are some cases in conflict with those cited above, but they cannot be sustained. One of these is People v. Rae, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102. In this case it appeared that the defendant, while a passenger on a railroad train, obtained from the prosecutor, who was a fellow passenger, $160, with which to pay a pretended express charge. In order to obtain the money, he falsely represented that he would go to the baggage car and get some money, and repay the loan, handing over a bogus United States bond as security in the meantime. It was held that he was guilty of larceny, on the ground that the prosecutor did not intend "to part with his ownership of the money." It is clear, however, that this is just what he did intend, for he made a straight out and out loan of the money, with the intention of having the defendant pay it out on his own pretended indebtedness, and the defendant was therefore guilty of obtaining the money by false pretenses and not of larceny. Two of the six judges dissented, and it will be seen, on an examination of the cases cited in support of the decision,—Com. v. Berry, 124 Mass. 325, and Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123,—that neither of them sustain it. The case is not like those hereafter referred to, in which money or property is delivered conditionally, with intent that the "property" shall not pass until the condition is performed, as where money is delivered for goods to be delivered in return, or to be changed, or when goods are handed over for ready money, which is not paid. See post, § 318c (2). Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178, was a case of conditional delivery, and this distinguishes it from People v. Rae, supra.

by the master or principal himself.[137] On the other hand, if the servant or agent in consenting to part with the property exceeds his authority, his consent is not the master's or principal's consent, and does not prevent the obtaining of the property from being larceny.[138] For this reason it has frequently been held that if a master or principal intrusts his servant or agent with goods to be delivered to a person only on payment by him of a certain price, the latter is guilty of larceny if he fraudulently and with felonious intent induces the servant or agent to deliver the goods without payment, or on payment in counterfeit money or worthless check.[139] The same is true where a servant or agent has authority to deliver goods to one person only, and is fraudulently induced to deliver them to another.[140] And one who, with intent to steal, takes another's property from an irresponsible person in temporary possession is guilty of larceny, as in a case of lost goods.[140a]

[137] In Rex v. Jackson, 1 Mood. C. C. 119, a pawnbroker's servant, with general authority to transact his master's business, was induced by the false pretenses of a pledgor to surrender property which had been pledged. It was held that the servant's consent to part with the property was the same as his master's consent, and prevented the obtaining of the property from being larceny.

In Reg. v. Prince, L. R. 1 C. C. 150, Beale's Cas. 660, the obtaining of money from the cashier of a bank upon a forged order was held not to be larceny, because the consent of the cashier, who had general authority in the business, to part with the money, was the consent of the bank.

[138] Reg. v. Little, 10 Cox, C. C. 559, Beale's Cas. 657; Rex v. Small, 8 Car. & P. 46; Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551; State v. McCartey, 17 Minn. 76; Reg. v. Stewart, 1 Cox, C. C. 174, Mikell's Cas. 776; and cases cited in the notes following.

[139] Reg. v. Stewart, 1 Cox, C. C. 174, Mikell's Cas. 776; Rex v. Small, 8 Car. & P. 46; Rex v. Webb, 5 Cox, C. C. 154; Rex v. Robins, Dears. C. C. 418, Beale's Cas. 655; Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551.

[140] Reg. v. Little, 10 Cox, C. C. 559, Beale's Cas. 657; Reg. v. Kay, Dears. & B. 231, 7 Cox, C. C. 289, Mikell's Cas. 690; Wilkin's Case, 2 East, P. C. 673.

[140a] Rice v. State, 118 Ga. 48, 44 S. E. 805, 98 Am. St. Rep. 99.

(*c*) *Taking in a Way not within the Consent*—(*1*) *In General.*—In order that the owner's consent to part with his property may prevent the taking from being larceny, the consent must be as broad as the taking, for, if the taking goes beyond the consent, there is the necessary trespass.[141] It follows that, if the consent is to taking in a particular manner only, a taking in any other manner will be larceny, if the other elements of the offense exist. Thus, it has been held that if a man puts out a slot machine, and invites the public to take goods from it by dropping in a piece of money, one who obtains the goods fraudulently by dropping in a piece of metal other than money is guilty of larceny.[142] And if a tobacconist places a box of matches on his counter, to be used only by customers in lighting their cigars, one who takes and carries away the whole box with felonious intent is guilty of a trespass and larceny.[143]

(*2*) *Conditional Delivery.*—The same principle applies where the owner of goods delivers them to another to become his, and to be carried away by him, only upon the performance by him, at the time, of some condition. If the other person carries away the goods, *animo furandi,* without performing the condition, he is guilty of a trespass and larceny, for there is no consent to such a taking. Thus, where goods are delivered to a person in a store or elsewhere, with the understanding that he may take them on payment of the price, and he carries them off *animo furandi,* without paying for them, he is guilty of larceny.[144] The rule also applies where money is delivered in payment of goods, and the other party keeps it and refuses to deliver the

[141] See Reg. v. Hands, 16 Cox, C. C. 188, Beale's Cas. 614.

[142] Reg. v. Hands, 16 Cox, C. C. 188, Beale's Cas. 614.

[143] Mitchum v. State, 45 Ala. 29, Beale's Cas. 616, Mikell's Cas. 711.

[144] Rex v. Chissers, T. Raym. 275, Beale's Cas. 515; Rex v. Slowly, 12 Cox, C. C. 269, Beale's Cas. 516; Rex v. Sharpless, 1 Leach, C. C. 92, Beale's Cas. 611; Reg. v. Cohen, 2 Den. C. C. 249, Mikell's Cas. 769; Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551; Wilson v. State, 1 Port. (Ala.) 118; Com. v. Wilde, 5 Gray (Mass.) 83; U. S. v. Rodgers, 1 Mackey (D. C.) 419. See, also, People v. Rae, 66 Cal. 423.

goods.[145] "In all such sales," said an English judge in a leading case, "the delivery of the thing sold, or of the money, the price of the thing sold, must take place before the other; i. e., the seller delivers the thing with one hand while he receives the money with the other. No matter which takes place first, the transaction is not complete until both have taken place. If the seller delivers first before the money is paid, and the buyer fraudulently runs off with the article, or if, on the other hand, the buyer pays first, and the seller fraudulently runs off with the money without delivering the thing sold, it is equally larceny."[146]

On precisely the same principle, it is larceny for a man to whom a promissory note is handed, in order that he may indorse a payment of interest upon it, to carry it off, *animo furandi*,[147] or for a man to whom money is handed to be changed to run off with it or keep it, *animo furandi*, and refuse to give the change, though the intention may be that he shall keep part of it as payment for goods purchased or as a loan, for there is no consent to part with the money without receiving the change.[148] The same is true where a person requests change for a bill, and when it is handed to him keeps it and refuses to deliver the bill.[149] Other cases in which this principle has been applied will be found in the note below.[150]

[145] Reg. v. Russett [1892] 2 Q. B. Div. 312, Beale's Cas. 671.

[146] Per Kelly, C. B., in Rex v. Slowly, 12 Cox, C. C. 269, Beale's Cas. 516.

[147] People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655, Mikell's Cas. 767.

[148] Rex v. Oliver, 2 Russ. Crimes, 170; Reg. v. McKale, 11 Cox, C. C. 32; Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435, Beale's Cas. 519; Walters v. State, 17 Tex. App. 226, 50 Am. Rep. 128; Com. v. O'Malley, 97 Mass. 584, Beale's Cas. 518.

[149] State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455. See, also, Com. v. Barry, 124 Mass. 325.

[150] Where a person induces another to deliver money to him on the pretense of making a bet, and keeps it after pretending to have won,

Time of Forming Intent to Steal.—The delivery in these cases not only does not give the party any right of ownership before performance of the condition, but, as we have already seen, it gives no legal possession or right of possession, but the bare custody only, and it can make no difference, therefore, that there was no felonious intent when the property was handed over.[151]

(*d*) *Consent under Duress.*—If the owner of goods is induced to part with them by duress, there is no consent at all in the eye of the law, and the person so obtaining them, if he does so

the bet not having been bona fide, but a mere trick, he is guilty of larceny, for the other only consents to put up the money and part with it on a bona fide bet. Reg. v. Buckmaster, 16 Cox, C. C. 339, Beale's Cas. 663; Rex v. Robson, Russ. & R. 413, Mikell's Cas. 783; Rex v Horner, 1 Leach, C. C. 270; Miller v. Com., 78 Ky. 15, 39 Am. Rep. 194; Defrese v. State, 3 Heisk. (Tenn.) 53, 8 Am. Rep. 1; People v. Shaw, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372; U. S. v. Murphy, MacA. & M. 375, 48 Am. Rep. 754; State v. Skilbrick, 25 Wash. 555, 66 Pac. 53, Mikell's Cas. 785. See, also, Stinson v. People, 43 Ill. 397; Grunson v. State, 89 Ind. 533; Loomis v. People, 67 N. Y. 322.

In Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178, the facts were as follows: The prosecutor was seated in a railway train with one G., a stranger to him. One S., also a stranger to him, entered, wearing a badge, and falsely pretending to be an express agent, and told G. that he must pay some charges on his baggage. G. offered him a check. S. said he could not cash it, but asked the prosecutor to cash it, and to hold it until they reached a certain city, promising to cash it there for him. The prosecutor gave him the money, and G. and S. immediately rushed from the train, taking both the money and the check. It was very properly held a case of larceny, on the ground that the delivery of the money was conditional upon receiving the check in return. Had the check been handed over to the prosecutor, it would have been simply a case of obtaining money under false pretenses. It is this that distinguishes the case from People v. Rae, 66 Cal. 423, 6 Pac. 1, referred to on a preceding page as a wrong decision. See ante, p. 464, note.

In Grunson v. State, supra, the court uses language tending to show that it might have held as it did, irrespective of the failure to hand over the check, but it based the decision squarely on this feature of the case, and all that is said beyond this is mere dictum.

[151] Ante, § 317.

animo furandi, is clearly guilty of larceny, though the duress may not be sufficient to render him guilty of robbery.[152]

(*e*) *Delivery of Property by Mistake.*—When a person delivers property to another by mistake, as where he delivers to one person property intended for another, or delivers by mistake more money than he intends, he does not consent to part with the property. The other acquires the possession only, and not the title, and if he knows of the mistake when he receives the property, and receives it with a fraudulent intent to appropriate it to his own use, he is guilty of a trespass and larceny.[153]

319. Finding and Appropriation of Lost Goods.

(*a*) *In General.*—We have seen in a previous section that lost goods are the subject of larceny. It must not be supposed, however, that every appropriation of lost goods is larceny. Whether it is or not depends upon whether there is a trespass and at the same time a felonious intent. The finder of lost goods may take possession of them with a fraudulent intent to appropriate them to his own use, or he may take possession of them without a fraudulent intent and afterwards conceive and carry out such an intent. Again, he may, at the time of taking possession, know or have reasonable means of knowing who the owner is, or he may not then have such knowledge or means

[152] Reg. v. MacGrath, L. R. 1 C. C. 205, 11 Cox, C. C. 347, Mikell's Cas. 792; Reg. v. Hazell, 11 Cox, C. C. 597; Reg. v. Lovell, 8 Q. B. Div. 185, Beale's Cas. 612; State v. Bryant, 74 N. C. 124.

In Reg. v. MacGrath, supra, the accused, who was acting as auctioneer at a mock auction, knocked down some cloth to a woman who, as he knew, had not bid for it. She refused to take the cloth, or to pay for it, whereupon the accused told her that she could not leave the place until she should do so. She paid the money under this duress, and because she was afraid. It was held that the accused was guilty of larceny, because the money was taken against the woman's will.

[153] Reg. v. Middleton, L. R. 2 C. C. 38, Beale's Cas. 617, Mikell's Cas. 794; Reg. v. Little, 10 Cox, C. C. 559, Beale's Cas. 657; Wolfstein v. People, 6 Hun (N. Y.) 121, Beale's Cas. 629; Bailey v. State, 58 Ala. 414; State v. Ducker, 8 Or. 394, 34 Am. Rep. 590; ante, § 316 (f).

of knowledge. Whether he is guilty of larceny in appropriating the goods depends upon the circumstances.

The following rules are established by the weight of authority:

(*b*) *Possession Taken with Felonious Intent.*—(1) Though lost goods may have been taken possession of in the first instance with felonious intent, and not merely with intent to assume temporary control, and return them to the owner, the finder is not guilty of larceny, however morally wrong his conduct may be, if at the time of taking possession he did not know who the owner was, and had no reasonable means of knowledge. The fact that he subsequently discovered the owner, and then failed and refused to surrender the goods, does not render him guilty.[154] The reason is that there is no trespass in such a case, for the possession cannot be said to have been obtained against the will of the owner, "*quia dominus rerum non apparet, ideo cujus sunt incertum est.*"[155]

(2) On the other hand, where a felonious intent thus exists at the time of taking possession, it is a trespass and larceny if the finder either actually knows the owner or has reasonable means of knowing him, as where there are marks upon the property, known to him, by which the owner can be ascertained, or where

[154] 3 Inst. 108; 1 Hale, P. C. 506; Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Beale's Cas. 551, Mikell's Cas. 720; Reg. v. Preston, 2 Den. C. C. 357, 5 Cox, C. C. 390, Beale's Cas. 557; Hunt v. Com., 13 Grat. (Va.) 757, 70 Am. Dec. 443; Tanner v. Com., 14 Grat. (Va.) 635; Bailey v. State, 52 Ind. 466, 21 Am. Rep. 182; Wolfington v. State, 53 Ind. 343; State v. Dean, 49 Iowa, 73, 31 Am. Rep. 143; Perrin v. Com., 87 Va. 554, 13 S. E. 76; People v. Cogdell, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; State v. Conway, 18 Mo. 321. And see Rex v. Mucklow, 1 Mood. C. C. 160, Beale's Cas. 547.

[155] 3 Inst. 108; 1 Hale, P. C. 506; Hunt v. Com., 13 Grat. (Va.) 757, 70 Am. Dec. 443.

If a statute requires the finder of lost goods to advertise them, it is larceny for him to fraudulently appropriate them to his own use without advertising them. State v. Jenkins, 2 Tyler (Vt.) 377.

there are other circumstances which reasonably suggest the ownership.[156]

[156] Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Beale's Cas. 551, Mikell's Cas. 720; Reg. v. Preston, 2 Den. C. C. 357, 5 Cox, C. C. 390, Beale's Cas. 557; Reg. v. Peters, 1 Car. & K. 245; Brooks v. State, 35 Ohio St. 46, Mikell's Cas. 724; Hunt v. Com., 13 Grat. (Va.) 757, 70 Am. Dec. 443; Com. v. Titus, 116 Mass. 42, 17 Am. Rep. 138, Beale's Cas. 563; Bailey v. State, 52 Ind. 466, 21 Am. Rep. 182; State v. Weston, 9 Conn. 526, 25 Am. Dec. 46; State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; People v. Swan, 1 Park. Cr. R. (N. Y.) 9. And see Reg. v. Rowe, Bell, C. C. 93, Beale's Cas. 562.

"If the finder, from the circumstances of the case, must have known who was the owner, and, instead of keeping the chattel for him, means, from the first, to appropriate it to his own use, he does not acquire it by rightful title, and the true owner might maintain trespass." Merry v. Green, 7 Mees. & W. 623, Beale's Cas. 548, Mikell's Cas. 715.

Thus, it has been held larceny for the purchaser of a bureau to appropriate to his own use a purse containing money, which he found in a secret drawer, Merry v. Green, 7 Mees. & W. 623, Beale's Cas. 548, Mikell's Cas. 715; for a carpenter to appropriate money found by him in a secret drawer of a bureau sent to him to be repaired, Cartwright v. Green, 2 Leach, C. C. 952, 8 Ves. 405; for a coachman to appropriate goods left in his coach by a passenger, whom he could readily have ascertained, Wynne's Case, 2 East, P. C. 664, 1 Leach, C. C. 413; for the purchaser of a trunk to appropriate goods put there by the seller for safe-keeping, and left there by mistake, Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790; or for a servant to appropriate a ring or other property of his mistress, dropped in the house or garden, Reg. v. Peters, 1 Car. & K. 245, and State v. Cummings, 33 Conn. 260.

If a person goes to a stall in the market, or to a shop or store, and leaves his purse or other property, the proprietors or their employes have no right to appropriate the same to their own use, without waiting a reasonable time for the owner to return for it, as the circumstances are such as to show that in all probability a customer has left it, and that he will return to claim it; and, if they take it animo furandi, they are guilty of larceny. Reg. v. West, Dears. C. C. 402, 6 Cox, C. C. 415, Beale's Cas. 561; State v. McCann, 19 Mo. 249; Lawrence v. State, 1 Humph. (Tenn.) 227, Mikell's Cas. 728; People v. McGarren, 17 Wend. (N. Y.) 460. See, also, Reg. v. Rowe, Bell, C. C. 93, Beale's Cas. 562.

In some of the cases above cited, the court said that the property was merely mislaid, and not lost, and that the rules as to the conver-

(*c*) *Possession Taken without Felonious Intent.*—(3) When a felonious intent does not exist in the mind of the finder at the time of taking possession, as where he takes possession with intent to restore the property to the owner, which he may lawfully do, a subsequent change of intent and appropriation of the property cannot make him guilty of larceny, even though, at the time of originally taking possession, he may have known, or had reasonable means of knowing, the owner. The reason is that, as the possession has been lawfully acquired, there is no trespass. It is like any other case of conversion by a bailee who has lawfully acquired possession.[157]

(*d*) *Time of Acquiring Possession.*—(4) The finder of lost property does not take possession of it, within the meaning of these rules, merely by taking it up to look at it, but his possession dates from the time he takes possession so as to know what it is.[158]

sion of lost property did not apply. The true reason for such decisions, however, is that the property, though lost by the owner (as it certainly is, if he does not know where he has mislaid it), is found by the person appropriating it under such circumstances as to show that the owner, whoever he may be, will probably return, and so be ascertained.

That estray cattle are not within the rule as to lost goods, see Rex v. Phillips, 2 East, P. C. 659; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507; People v. Kaatz, 3 Park. Cr. R. (N. Y.) 129; State v. Martin, 28 Mo. 530. And see Reg. v. Finlayson, 3 New South Wales Sup. Ct. 301, Beale's Cas. 565.

[157] Hunt v. Com., 13 Grat. (Va.) 757, 70 Am. Dec. 443; Tanner v. Com., 14 Grat. (Va.) 635; Ransom v. State, 22 Conn. 153; Starck v. State, 63 Ind. 285; Milburne's Case, 1 Lewin, C. C. 251, Mikell's Cas. 728.

In Ransom v. State, supra, which was a prosecution for stealing a pocketbook and bank notes, which had been lost on the highway, the judge instructed the jury that, if the defendant, at the time he found the property, knew, or had the means of knowing, the owner, and did not restore it to him, but converted it to his own use, he was guilty of larceny. It was held that the instruction was erroneous, because, if the defendant, at the time he took possession of the property, meant to act honestly with regard to it, no subsequent felonious intention to convert it to his own use could make him guilty of larceny.

[158] Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Beale's Cas.

320. Continuing Trespass.

(*a*) *In General.*—To constitute larceny, it is not only necessary that there shall be a trespass, but, as will be hereafter explained, it is also necessary that there shall be a felonious intent, and they must always concur in point of time. It is not always necessary, however, in order that there may be such a concurrence of trespass and felonious intent, that there shall be such an intent at the time the property is first taken. If a man wrongfully takes another's property without his consent, he commits a trespass, however innocent his intention may be. The trespass continues during every moment in which he holds the property without right; and, if he afterwards forms and carries out the felonious intent to steal it, there is then the concurrence of trespass and felonious intent necessary to make out the crime of larceny.[159]

(*b*) *Taking Property by Mistake.*—This doctrine applies where a person by mistake takes the property of another without his consent, the property not being lost nor delivered to him by the owner. If, after discovery of his mistake, he forms and carries out a felonious intent to steal, he is guilty of larceny. The taking by mistake in such a case is a trespass, and the trespass continues up to the time when the mistake is discovered and the property converted.[160]

551, Mikell's Cas. 720; Reg. v. Preston, 2 Den. C. C. 357, 5 Cox, C. C. 390, Beale's Cas. 557.

[159] Reg. v. Riley, Dears. C. C. 149, 6 Cox, C. C. 88, Beale's Cas. 591; Reg. v. Finlayson, 3 New South Wales Sup. Ct. 301, Beale's Cas. 565; State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, Beale's Cas. 593; Com. v. White, 11 Cush. (Mass.) 483, Mikell's Cas. 708; Com. v. Rubin, 165 Mass. 453, 43 N. E. 200; Weaver v. State, 77 Ala. 26; Dozier v. State, 130 Ala. 57, 30 So. 396.

In so far as Rex v. Holloway, 5 Car. & P. 524, Mikell's Cas. 707, is opposed to this principle it cannot be regarded as law.

[160] In Reg. v. Riley, Dears. C. C. 149, 6 Cox, C. C. 88, Beale's Cas. 591, the defendant, in driving a flock of lambs, drove with them by mistake one which belonged to another, and when he discovered his mistake he converted the lamb to his own use. This was held to be

These cases must be distinguished from cases in which the goods taken are lost goods, the owner of which is not known nor pointed out by marks on the goods, or other circumstances, for in such a case there is no trespass at all.[161] They must also be distinguished from cases in which the owner of property delivers it by mistake, and in which there is no trespass at all unless the other party knows of the mistake at the time.[162] Likewise, where one takes another's property without trespass at a time when he is too intoxicated to form an intent, a subsequent appropriation of it will not be theft.[162a]

(*c*) *Obtaining Possession by Fraud.*—The doctrine of continuing trespass also applies where goods are delivered by the owner, if the possession is obtained through fraud, and the owner does not intend to part with the property in the goods. Though there may have been no felonious intent, or intent to steal, at the time of obtaining the possession, there has been a trespass because of the fraud in obtaining possession, and the trespass continues to the time of the conversion. According to this doctrine the felonious intent need not have existed at the time of original taking, when such taking was fraudulent.[163] There are very few cases in the reports in which the doctrine of

larceny on the ground that driving the lamb off without the owner's consent, though by mistake, was a trespass, which continued up to the time of the conversion. See, also, Reg. v. Finlayson, 3 New South Wales Sup. Ct. 301, Beale's Cas. 565.

[161] Ante, § 319. See the opinions in Reg. v. Riley, supra.

[162] Ante, § 316f.

[162a] Cady v. State, 39 Tex. Cr. R. 236, 45 S. W. 568.

[163] In State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, Beale's Cas. 593, the defendant, without any present intention of theft, obtained possession of another's team by falsely and fraudulently pretending that he wanted to drive it to a certain place, and to be gone a specified time, when in fact he intended to go to a more distant place, and to be absent a longer time; and, while thus in possession, he converted the team to his own use with felonious intent. He was held guilty of larceny, on the ground that he committed a trespass in obtaining the horse fraudulently, and the trespass continued until he formed and carried out the intent to steal it.

continuing trespass has been applied where possession was obtained by fraud, for the reason that in most cases the intent to steal also existed at the time the possession was obtained.[164]

(*d*) *Continuous Possession of Stolen Property.*—If a man steals property he commits a trespass, and he is guilty of a continuous trespass and asportation during every moment in which he retains possession. As was said in a Maine case: "The doctrine of the common law is that the legal possession of stolen goods continues in the owner, and every moment's continuance of the trespass and felony amounts in legal consideration to a new caption and asportation."[165] Upon this principle, a person stealing goods in one county or state and carrying them into another is deemed guilty of larceny in any county or state where he may carry them.[166] For the same reason, if goods are stolen before a statute takes effect, and are retained in the possession of the thief until afterwards, he may be indicted and punished for larceny under the statute.[167]

(D) The Asportation in Larceny.

321. In General.—To constitute larceny there must be some asportation or carrying away of the property. But there is a sufficient asportation if the property be entirely removed from the place it occupied, and be under the dominion and control of the trespasser, though only for an instant.

322. An Asportation is Necessary.

Another essential element of larceny at common law is the asportation of the property. There must not only be a taking or caption of the property, but the property must also be to some extent carried away. As was said by the Alabama court:

[164] Ante, § 316e.

[165] State v. Somerville, 21 Me. 14, 19, 38 Am. Dec. 248.

[166] Anon., Year Book 7 Hen. IV. 43, pl. 9, Beale's Cas. 595; 1 Hale, P. C. 507; 1 Hawk. P. C. c. 32, § 52; 2 East, P. C. 771; Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455. For other cases, see post, § 499.

[167] State v. Somerville, 21 Me. 14, 38 Am. Dec. 248.

"There must be such a caption that the accused acquires dominion over the property, followed by such an asportation or carrying away as to supersede the possession of the owner for an appreciable period of time. Though the owner's possession is disturbed, yet the offense is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody and control."[168]

Illustrations.—For this reason it has been held not to be larceny merely to set up a package on end, though with intent to steal it, no further control being acquired;[169] or to turn over a barrel of goods from the end to the side with such intent, when nothing further is done towards carrying it away;[170] or to touch or disturb a pocketbook or money in another's pocket or drawer, without removing it at all from the place it occupies in the pocket or drawer;[171] or to trap an animal or merely entice or chase or kill it, when it is not taken into the possession or control of the trespasser;[172] or to compel or induce a

[168] Thompson v. State, 94 Ala. 535, 10 So. 520, 33 Am. St. Rep. 145, Beale's Cas. 513; Molton v. State, 105 Ala. 18, 16 So. 795, 53 Am. St. Rep. 97. See, also, Rex v. Farrell, 1 Leach, C. C. 322, note; Rex v. Cherry, 1 Leach, C. C. 237, note, 2 East, P. C. 556, Mikell's Cas. 673; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67, Beale's Cas. 511; Com. v. Luckis, 99 Mass. 431, 96 Am. Dec. 769.

By express provision of the Code no asportation is necessary in Texas. Pen. Code, art. 880. Clemmons v. State, 39 Tex. Cr. R. 279, 45 S. W. 911, Mikell's Cas. 681, note.

[169] Rex v. Cherry, 1 Leach, C. C. 237, note, 2 East, P. C. 556, Mikell's Cas. 673.

[170] State v. Jones, 65 N. C. 395.

[171] Com. v. Luckis, 99 Mass. 431, 96 Am. Dec. 769.

[172] Rex v. Williams, 1 Mood. C. C. 107; State v. Wisdom, 8 Port. (Ala.) 511; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67, Beale's Cas. 511; State v. Alexander, 74 N. C. 232, Mikell's Cas. 681; Wolf v. State, 41 Ala. 412; Molton v. State, 105 Ala. 18, 16 So. 795; State v. Seagler, 1 Rich. (S. C.) 30, 42 Am. Dec. 404; Williams v. State, 63 Miss. 58; People v. Murphy, 47 Cal. 103.

In Edmonds v. State, supra, it was held not to be larceny to entice a hog for 20 yards on the owner's premises by dropping corn, and then strike it with an axe, and abandon it. Compare post, § 323.

In State v. Gilbert, 68 Vt. 188, 34 Atl. 697, it was held that if de-

person to lay down or drop his money or goods, with intent to steal them, where the trespasser is apprehended or prevented, or leaves before taking them up;[173] or to attempt to snatch money from another's hand and knock it to the ground, without picking it up.[174] And if a man seizes and attempts to carry away property, but is prevented from doing so by reason of its being attached by a chain to the person of the owner or to the counter in a store, there is not sufficient asportation to constitute larceny, for he does not acquire entire control even for an instant.[175]

323. The Slightest Asportation Sufficient.

While, as is shown by the cases above referred to, some asportation is essential, it is not necessary that the property shall be carried to any particular distance, or that possession and control shall be retained for any particular length of time. The slightest asportation is sufficient. The trespasser must acquire complete control over the property, but the slightest entire removal of it from the place it occupies, and a temporary control of it, even for a moment, is enough. It has been said that removal to the distance of "a hair's breadth" is sufficient.[176]

fendant, before killing it, moved the steer from the place where he found it, he was guilty. Accord: Wilburn v. Terr. 10 N. M. 402, 62 Pac. 968; Lundy v. State, 60 Ga. 143. Cf. Kemp v. State, 89 Ala. 52, 7 So. 413.

[173] Rex v. Farrell, 1 Leach, C. C. 322, note.

[174] Thompson v. State, 94 Ala. 535, 10 So. 520, 33 Am. St. Rep. 145, Beale's Cas. 513.

[175] Wilkinson's Case, 1 Leach, C. C. 321, note, 2 East, P. C. 556, Mikell's Cas. 673.

[176] See Rex v. Walsh, 1 Mood. C. C. 14, Beale's Cas. 505; Reg. v. Simpson, 1 Dears. C. C. 421, Mikell's Cas. 675; Eckels v. State, 20 Ohio St. 508; Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; State v. Jones, 65 N. C. 395; State v. Craige, 89 N. C. 475; State v. Gazell, 30 Mo. 92; Gettinger v. State, 13 Neb. 308, 14 N. W. 403. And see the cases cited in the note following.

"The felony," said the Ohio court, "lies in the very first act of re-

Illustrations.—Thus, although to upset a barrel from the end to the side, or merely to set a package up on end, is not a sufficient asportation,[177] it has been held larceny to lift a bag from the bottom of the boot of a coach, with intent to steal it, every part of the bag being entirely removed from the place it occupied, though there was no further removal;[178] or to remove a package from one end of a wagon to the other;[179] or to lift a sword partly from the scabbard.[180]

So, while merely to touch or disturb a pocketbook or money in another's pocket or drawer is not a sufficient asportation to constitute larceny,[181] it is otherwise if the pocketbook or money be seized by the thief, and removed from the place it occupied, though he is detected and drops it before he has entirely removed it from the pocket or drawer.[182]

And, while it is not larceny to entice an animal on the owner's premises with intent to steal it, if no control over it is

moving the property. Therefore, the least removing of the entire thing taken, with an intent to steal it, if the thief thereby, for the instant, obtain the entire and absolute possession of it, is a sufficient asportation, though the property be not removed from the premises of the owner, nor retained in the possession of the thief." Eckels v. State, supra.

"Although the whole of the article taken be not removed from the whole space which the whole article occupied before it was taken, yet, if every part thereof be removed from the space which that particular part occupied just before it was so taken, such removal is a sufficient asportation." State v. Chambers, supra.

177 Ante, § 322.

178 Rex v. Walsh, 1 Mood. C. C. 14, Beale's Cas. 505.

179 Rex v. Coslet, 1 Leach, C. C. 236, 2 East, P. C. 556.

180 Rex v. Walsh, 2 Russ. Crimes, 153.

181 Ante, § 322.

182 Rex v. Thompson, 1 Mood. C. C. 78, Mikell's Cas. 674; Eckels v. State, 20 Ohio St. 508; Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; Files v. State, 36 Tex. Cr. R. 206, 36 S. W. 93, Mikell's Cas. 675.

In State v. Green, 81 N. C. 560, where a drawer containing money had been removed from a safe, and the money handled, it was held that there had been a sufficient asportation to constitute larceny.

entirely acquired,[183] it is otherwise if an animal is enticed into an inclosure of the enticer, or if it is led by him, or by an innocent third person by his direction, for any distance, however slight, even though it be not led from the owner's premises.[184] Other cases are referred to in the note below.[185]

[183] Ante, § 322.

[184] Rex v. Pitman, 2 Car. & P. 423; Wisdom's Case, 8 Port. (Ala.) 511, 519; State v. Gazell, 30 Mo. 92.

In Rex v. Pitman, supra, the accused had caused the hostler at an inn to lead another's horse from the stable, feloniously intending to mount and ride away, and it was held that the asportation was sufficient.

In State v. Gazell, supra, the accused himself led the horse for a short distance on the owner's premises, with intent to steal it, and a conviction was sustained.

It has been held that driving or moving an animal, before killing it, preparatory to stealing its carcass is a sufficient asportation. State v. Gilbert, 68 Vt. 188, 34 Atl. 697; Wilburn v. Terr., 10 N. M. 402, 62 Pac. 968; and that in skinning it there must have been sufficient moving of it to constitute an asportation. Lundy v. State, 60 Ga. 143; Kemp v. State, 89 Ala. 52, 7 So. 413.

[185] The asportation has been held sufficient in the following cases:

Breaking open a box of shoes on board a ship, taking out the shoes and concealing them on a vessel. Nutzel v. State, 60 Ga. 264.

Taking a lady's earring from her ear and immediately dropping and losing it in her hair. Latier's Case, 1 Leach, C. C. 320, 2 East, P. C. 557.

Taking a watch from the owner's pocket, and drawing the chain through the button hole, though the key caught on the button of another hole. Reg. v. Simpson, Dears. C. C. 421, Mikell's Cas. 675 (a doubtful case).

Drawing liquor into a can. Reg. v. Wallis, 3 Cox, C. C. 67, Mikell's Cas. 678.

Putting into sacks grain found in a granary. State v. Hecox, 83 Mo. 531.

Removing grain from the owner's garner in a mill to the adjoining garner of the accused. State v. Craige, 89 N. C. 475, 45 Am. Rep. 698.

Taking goods from trunk and putting in basket to carry away. Loving v. Com., 107 Ky. 575, 55 S. W. 434.

Breaking a large cast iron wheel and removing the parts. Gettinger v. State, 13 Neb. 308, 14 N. W. 403.

324. Manner of Asportation.

If there is a sufficient asportation under the rules stated above, it is altogether immaterial how it is effected. The carrying away is generally by the hand of the trespasser, but it need not necessarily be so. Thus, as was shown in a previous section, an animal may be stolen by driving or enticing it away;[186] and asportation may be effected entirely by mechanical agencies, as by fraudulently connecting a private pipe with the pipes of a water or gas company, and consuming or using the water or gas;[187] or it may be effected by means of an innocent human agent.[188]

325. Return of Goods.

As soon as there has been a sufficient asportation under the rules stated in the preceding sections, the larceny is complete, if there is also the requisite felonious intent; and, in the absence of statutory provision, the guilt of the trespasser cannot be affected in any way by his abandoning or returning the goods.[189]

(E) The Felonious Intent in Larceny.

326. In General.—To constitute larceny at common law there must be what is technically called a "felonious" intent, or "animus furandi," and this intent must exist both in the taking and in the carrying away. By this it is meant that there must be:

1. A fraudulent intent, and not a mistake or bona fide claim of right.

[186] State v. Wisdom, 8 Port. (Ala.) 511; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67, Beale's Cas. 511; ante, §§ 314, 323.

[187] Reg. v. White, 3 Car. & K. 363, Dears. C. C. 203, 6 Cox, C. C. 213, Beale's Cas. 506, Mikell's Cas. 679; ante, § 314, note 77.

[188] Rex v. Pitman, 2 Car. & P. 423; Com. v. Barry, 125 Mass. 390, Beale's Cas. 508; Sikes v. State (Tex. Cr. App.) 28 S. W. 688; State v. Hunt, 45 Iowa, 673; ante, § 314.

[189] 2 East, P. C. 557; State v. Scott, 64 N. C. 586; ante, § 66.

2. **And an intent to deprive the owner permanently of his property in the goods, or of their value or a part of their value.**
3. **Some of the authorities require that the taking shall be lucri causa,—that is, for the sake of gain; but by the weight of authority this is not necessary.**

327. Fraudulent Intent Necessary.

All of the authorities agree that the intent must be fraudulent. As the taking in larceny involves a trespass, so the intent involves fraud.[190] If one takes another's goods by accident or mistake, he commits a trespass and is liable in a civil action, but he is not guilty of larceny.[191] Nor is a man guilty of larceny in taking another's property under a *bona fide* claim of ownership or right, however unfounded the claim may be in law.[192]

[190] Bract. f. 134b, Mikell's Cas. 637; Reg. v. Holloway, 2 Car. & K. 946, Mikell's Cas. 637; The Fisherman's Case, 2 East, P. C. 661, Mikell's Cas. 807; Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; McCourt v. People, 64 N. Y. 583; Keely v. State, 14 Ind. 36; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269.

[191] Long v. State, 11 Fla. 295; Hall v. State, 34 Ga. 208; Billard v. State, 30 Tex. 367, 94 Am. Dec. 317; Donahoe v. State, 23 Tex. App. 457, 5 S. W. 245; Criswell v. State, 24 Tex. App. 606, 7 S. W. 337; People v. Devine, 95 Cal. 227, 30 Pac. 227; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269.

It is not larceny for a person to take property by the direction or with the consent of one whom he believes to be the owner, but who is not. State v. Matthews, 20 Mo. 55. See Mead v. State, 25 Neb. 444.

[192] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; Rex v. Jackson, 1 Mood. C. C. 119; Reg. v. Wade, 11 Cox, C. C. 549; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269; State v. Matthews, 20 Mo. 55; People v. Schultz, 71 Mich. 315, 38 N. W. 868; People v. Husband, 36 Mich. 306; People v. Slayton, 123 Mich. 397, 82 N. W. 205, 81 Am. St. Rep. 211; Dean v. State, 41 Fla. 291, 26 So. 638; Phelps v. People, 55 Ill. 334; Baker v. State, 17 Fla. 406; State v. Leicham, 41 Wis. 565; State v. Barrackmore, 47 Iowa, 684; Ross v. Com. (Ky.) 20 S. W. 214; Winn v. State, 17 Tex. App. 284.

Of course the claim must be bona fide. See McDaniel v. State, 8

328. Intent to Deprive the Owner of His Property.

(*a*) *In General.*—Even when there is a fraudulent intent, and the trespasser knows that the property belongs to another, the taking is not necessarily larceny. There must, in addition to this, be an intent to deprive the *owner*[192a] of his property, and to deprive him of it *permanently*.[193] It is not larceny, therefore, to take another's property in jest or from idle curiosity, intending to return it, though such a taking is wrongful and a trespass.[194] Nor is it larceny to take another's property with intent to use or keep it *temporarily*, and then return it or put it where it will reach the owner's possession again.[195]

Smedes & M. (Miss.) 401, 418; People v. Long, 50 Mich. 249, 15 N. W. 105.

[192a] Where a bailee has wrongfully sold the property it is not larceny for him to filch it from the buyer for the purpose of returning it to the owner. Gooch v. State, 60 Ark. 5, 28 S. W. 510.

[193] Rex v. Crump, 1 Car. & P. 658, Beale's Cas. 685; Rex v. Dickinson, Russ. & R. 420, Beale's Cas. 684; Reg. v. Holloway, 2 Car. & K. 942, 1 Den. C. C. 370, 3 Cox, C. C. 241, Beale's Cas. 692, Mikell's Cas. 637; State v. South, 28 N. J. Law, 28, 75 Am. Dec. 250; State v. York, 5 Harr. (Del.) 493; Witt v. State, 9 Mo. 671; Johnson v. State, 36 Tex. 375; State v. Self, 1 Bay (S. C.) 242; Keety v. State, 14 Ind. 36.

[194] Reg. v. Godfrey, 8 Car. & P. 563; Devine v. People, 20 Hun (N. Y.) 98; Johnson v. State, 36 Tex. 375.

[195] Thus, it has repeatedly been held that it is not larceny to take another's horse, when the intent is merely to ride it some distance, and then return it, or abandon it at such a place that it will return, or be recaptured by the owner. Rex v. Philipps, 2 East, P. C. 662, Mikell's Cas. 808; Rex v. Crump, 1 Car. & P. 658, Beale's Cas. 685; Dove v. State, 37 Ark. 261; State v. York, 5 Harr. (Del.) 493; Umphrey v. State, 63 Ind. 223; Johnson v. State, 36 Tex. 375; Schultz v. State, 30 Tex. App. 94, 16 S. W. 756; State v. Self, 1 Bay (S. C.) 242; Leland v. State, 82 Miss. 132, 33 So. 842.

Many other illustrations of this principle are to be found in the reports. Thus, in Rex v. Dickinson, Russ. & R. 420, Beale's Cas. 684, it was held that a man was not guilty of larceny in taking a girl's bonnet and other articles of apparel, where he did so merely for the purpose of inducing her to come to a hay mow, so that he could have intercourse with her. There was a like decision in Cain v. State, 21 Tex. App. 662, 2 S. W. 888, where the accused had taken a woman's jewelry, not with intent to deprive her of it permanently, but to pre-

These cases must be distinguished from cases in which there is no intent to return the property when it is taken. If property is taken with the felonious intent, its subsequent return to the owner, or its abandonment and recovery by him, does not make his offense any the less larceny.[196]

(*b*) *Dealing in a Way Likely to Deprive the Owner of His Property.*—Since a man is presumed to have intended the natural consequences of his acts, it may well be inferred that one who has taken another's property intended to deprive him of it permanently, if he so disposed of it or dealt with it that as a natural consequence the owner would be so deprived of it. Thus it has been held that if one takes another's property without his consent, and abandons it at a place from which it is not likely to be returned to the owner or recaptured by him, it may be inferred that he intended to deprive the owner of it permanently, though he may testify that he only intended to use it temporarily.[197] The presumption, of course, is one of fact, and not of law, and is subject to rebuttal.

(*c*) *Intent to Sell to Owner or to Return for Reward.*—When it is said that there must be an intent to deprive the owner permanently of his property, it is not meant that the intent must

vent her from going out to a place of amusement.

See, also, Wilson v. State, 18 Tex. App. 270, 51 Am. Rep. 309, where it was held that the accused who had broken into a shop, and taken a brace therefrom with intent to use it to break into a house, and then leave it, which they did, were not guilty of larceny. And see Reg. v. Reeves, 5 Jur. (N. S.) 716, Mikell's Cas. 707, and State v. Gilmer, 97 N. C. 429, 1 S. E. 491, where it was held that to take property from an intoxicated person with intent merely to take care of it for him was not larceny. And Rex v. Holloway, 5 Car. & P. 524, Mikell's Cas. 707, where poachers took a gamekeepers' gun away from him under the impression that he might use it upon them. See U. S. v. Durkee, 1 McAll. 196, Fed. Cas. No. 15,009.

[196] See State v. Davis, 38 N. J. Law, 176, 20 Am. Rep. 367. And see ante, § 66.

[197] See State v. Ward, 19 Nev. 297, 10 Pac. 133; Reg. v. Trebilcock, 7 Cox, C. C. 408, Beale's Cas. 688; Reg. v. Hall, 3 Cox, C. C. 245, Beale's Cas. 696; and cases cited in the notes following.

necessarily be to keep the specific property from him. It is sufficient if the intent be to deprive him of its value or a part of its value.[198] For example, it has been held larceny to take a railroad ticket with intent to use it for a journey, though by such use the railroad company gets possession of the ticket again.[199] The same is true where the intent is to sell the property back to the owner as the property of the taker or of some third person,[200] or to return it only on the payment of an expected reward.[201] Some of the decisions seem to be at variance with this doctrine, but it is supported by the great weight of authority.[202]

[198] "When a person takes property of another with intent to deprive the owner of a portion of the property taken, or of its value, such intent is felonious, and the taking is larceny." Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

For the employe of a silversmith to take manufactured spoons from his employer and deposit unmanufactured silver of equal weight but less value is larceny. Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089.

[199] Reg. v. Beecham, 5 Cox, C. C. 181, Beale's Cas. 697.

[200] Reg. v. Hall, 3 Cox, C. C. 245, Beale's Cas. 696; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507. And see Reg. v. Manning, 6 Cox, C. C. 86.

[201] Reg. v. Spurgeon, 2 Cox, C. C. 102, Beale's Cas. 685; Reg. v. Peters, 1 Car. & K. 245; Reg. v. O'Donnell, 7 Cox, C. C. 337, Mikell's Cas. 815; Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507; Slaughter v. State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242. Compare Reg. v. Gardner, 9 Cox, C. C. 253, Beale's Cas. 686.

[202] In Reg. v. Holloway, 1 Den. C. C. 370, 3 Cox, C. C. 241, 2 Car. & K. 942, Beale's Cas. 692, the accused was indicted for the larceny of some dressed skins of leather. A special verdict was returned, showing that he took the skins, not with intent to sell or dispose of them, but to bring them in and charge them as his own work, and get paid by his master for them. The skins had been dressed by another workman, and not by the accused. It was held not to be larceny. This case has been doubted and disapproved in later cases, both in England and in this country, and perhaps would not now be followed. See Reg. v. Poole, 1 Dears. & B. C. C. 347; Rex v. Webb, 1 Mood. C. C. 431, Mikell's Cas. 811; Reg. v. Richards, 1 Car. & K. 532, Mikell's Cas. 813; Fort v. State, 82 Ala. 50, 2 So. 477; Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506.

(*d*) *Intent to Pawn.*—If a man takes another's goods with intent to pawn them, and does so, he is clearly guilty of larceny if he does not intend to redeem and return them.[203] And he is guilty even if he does intend to redeem and return them, if he does not show ability to do so, or at least a fair and reasonable expectation of ability.[204] If he shows such ability or expectation, it seems that he is not guilty.[205]

(*e*) *Intent to Apply in Payment of Debt.*—To take another's property with intent to apply it in payment of a debt due from him is larceny.[206]

329. Effect of Custom.

As we have seen in a previous section, custom cannot justify an act which, in the absence of custom, would be a crime. A person, therefore, who takes another's property without his consent, knowing that it belongs to the other, and intending to deprive him of it permanently, is guilty of larceny, notwithstanding a custom in the community to take property under similar circumstances.[207]

330. Lucri Causa.

Some of the courts have held that to constitute larceny there must be what is technically called "*lucri causa,*"—that is, expectation of gain or benefit to the thief; and that it is not

[203] State v. Lindenthall, 5 Rich. (S. C.) 237, 57 Am. Dec. 743.

[204] Reg. v. Phetheon, 9 Car. & P. 552, Mikell's Cas. 811, note. Reg. v. Trebilcock, 7 Cox, C. C. 408, Beale's Cas. 688, Mikell's Cas. 811, note.

[205] Reg. v. Wright, 9 Car. & P. 554, note, Mikell's Cas. 810. But see Reg. v. Trebilcock, supra.

[206] Com. v. Stebbins, 8 Gray (Mass.) 492; Gettinger v. State, 13 Neb. 308, 14 N. W. 403, Mikell's Cas. 818, n.

[207] Thus, in Lancaster v. State, 3 Cold. (Tenn.) 340, 91 Am. Dec. 288, it was held that a taking of property was none the less larceny because of a prevalent opinion in the community, and a custom based thereon, applicable to the taking in question, that a contending party in the Civil War had a right to reimburse itself for losses occasioned by the other. And see ante, § 84, and cases there cited.

enough that he fraudulently intends to deprive the owner of his property.[208] According to this view, it has been held that merely to kill an animal and throw it into a ditch, or to take the bridle from another's horse, and property from his saddle and cast it on the highway, or take an execution from an officer to prevent his serving it, or to take a wagon and break it to pieces, merely for the purpose of injuring the owner, and not to benefit the trespasser, is not larceny, but merely malicious mischief,—a misdemeanor.[209]

This doctrine, however, is not sustained by the weight of authority. Most of the courts hold that a *lucri causa* is not necessary, but that a fraudulent intent to deprive the owner permanently of his property is all that is required.[210] Even where

[208] 2 East, P. C. 553; Reg. v. Godfrey, 8 Car. & P. 563; U. S. v. Durkee, 1 McAll. 196, Fed. Cas. No. 15,009.

East defined larceny as "the fraudulent or wrongful taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." 2 East, P. C. 524.

U. S. v. Durkee, supra, was a case where the accused took muskets to prevent their being used upon himself, and conviction was denied on the ground of want of lucri causa. Bishop says: "A better reason for this just decision would have been that his motive was not to deprive the owner of his ownership in them." 2 Bish. New Cr. Law, § 847. See, also, Rex v. Holloway, 5 Car. & P. 524, Mikell's Cas. 707.

Where a traveler met a fisherman with fish, who refused to sell him any, and he by force and putting in fear took away some of his fish and threw him money much above the value of it, judgment was respited because of the doubt whether the intent were felonious on account of the money given. The Fisherman's Case, 2 East, P. C. 661, Mikell's Cas. 807. See, also, Mason v. State, 32 Ark. 238; Beckham v. State (Tex. Cr. App.) 22 S. W. 411.

[209] Anon., 2 East, P. C. 662, Mikell's Cas. 807; Reg. v. Bailey, L. R. 1 Cr. Cas. 347, 12 Cox, C. C. 129, Mikell's Cas. 824; and the cases above cited.

[210] State v. Ryan, 12 Nev. 401, 28 Am. Rep. 802; State v. Wellman, 34 Minn. 221, 25 N. W. 395; Delk v. State, 63 Miss. 77, 60 Am. Rep. 46 (overruling McDaniel v. State, 8 Smedes & M. 401, 418); Williams v. State, 52 Ala. 411 (overruling State v. Hawkins, 8 Port. [Ala.] 461, 33 Am. Dec. 294); Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; Best

a *lucri causa* is regarded as necessary, there need not be expectation of pecuniary gain. Any benefit or advantage is sufficient.[211]

331. Taking by General from Special Owner.

It has been shown in a previous section that the person having the general property in goods may be guilty of larceny in taking them from the possession of one who has a special property in them. For example, the owner of goods which have been mortgaged or pledged or taken by an officer on execution may commit larceny in taking them from the mortgagee or the officer.[212] In these as in other cases the taking must be with felonious intent. It must be fraudulent and with intent to charge the special owner with their value.[213] It is not larceny if the goods are taken under a *bona fide* claim of right, however unfounded.[214]

332. Concurrence of Intent and Trespass and Asportation.

As we have already seen at some length, a taking of the

v. State, 155 Ind. 46, 57 N. E. 534; Jordan v. Com., 25 Grat. (Va.) 943. There are numerous English cases to the same effect.

Thus, in Reg. v. Privett, 2 Car. & K. 114, 1 Den. C. C. 193, Mikell's Cas. 814, it was held larceny for a servant to clandestinely take his master's oats, though he did so to give them to his master's horses, and though he was not answerable for the condition of the horses. See, to the same effect, Reg. v. Handley, Car. & M. 547; Rex v. Morfit, Russ. & R. 307, Beale's Cas. 683. And in Reg. v. Jones, 2 Car. & K. 236, 1 Den. C. C. 188, Mikell's Cas. 818, it was held larceny to take and burn a letter addressed to another. See, also, Rex v. Cabbage, Russ. & R. 292, Beale's Cas. 682, Mikell's Cas. 809; Wynn's Case, 1 Den. C. C. 365; Reg. v. White, 9 Car. & P. 344.

[211] See Reg. v. Jones, 2 Car. & K. 236, 1 Den. C. C. 188, Mikell's Cas. 818.

[212] Ante, § 313b.

[213] Rex v. Wilkinson, Russ. & R. 470, Beale's Cas. 674; Adams v. State, 45 N. J. Law, 448, Beale's Cas. 679; Palmer v. People, 10 Wend. (N. Y.) 165; People v. Stone, 16 Cal. 369; People v. Thompson, 34 Cal. 671; People v. Long, 50 Mich. 249, 15 N. W. 105; People v. Schultz, 71 Mich. 315, 38 N. W. 868.

[214] See the cases above cited.

property by a trespass and an asportation are essential ingredients of larceny. Both of these ingredients must be accompanied by the felonious intent.[215]

333. Change of Intent.

When a man has taken and carried away property with the requisite felonious intent, the larceny is complete, and his guilt attaches. In the absence of statutory provisions, the fact that he subsequently changes his mind and returns the property, or abandons it so that it is recovered by the owner, or pays for it, will not make him any the less guilty.[216] But, of course, the fact that the property is returned or abandoned may be considered as evidence in determining the intent with which it was taken.

(F) Grand and Petit Larceny.

334. In General.—By the statute of Westminster I. c. 15, larceny was divided into "grand" and "petit" larceny. It was made grand larceny where the value of the property exceeded twelve pence, and petit larceny where the property was of that value or less. In this country there are statutes in some states making such a distinction, but differing from the statute of Westminster and from each other with respect to value. Both grand and petit larceny were felonies under this statute, but under our statutes petit larceny is generally a misdemeanor only.

The Distinction is Statutory.—It has been said by an eminent writer, and in some of the cases, that *at common law* larceny is divided into grand and petit larceny;[217] but this is not true if

[215] Rex v. Holloway, 5 Car. & P. 524, Mikell's Cas. 707; ante, §§ 114, 316, 317, 318, 320.

[216] State v. Davis, 38 N. J. Law, 176, 20 Am. Rep. 367; ante, §§ 66, 325. In some states it is expressly provided by statute that the voluntary return of stolen property shall mitigate the offense, and render the thief liable to a less severe punishment.

[217] 1 Whart. Crim. Law (10th Ed.) 862a; Ex parte Bell, 19 Fla. 608; State v. Gray, 14 Rich. (S. C.) 174.

it is intended to refer to the common law of England. The distinction is based upon the statute of Westminster I. c. 15, above mentioned.[218] The distinction has been abolished in England.[219] In this country the statute of Westminster is a part of our common law, except where it has been superseded by our own statutes.[220] In some states no such distinction is made. In others it is expressly declared by statutes varying to some extent, as above stated, from the statute of Westminster, and from each other, with respect to the value of the property.[221] In some states the stealing of particular kinds of property,—as a horse, for example,—and the stealing from the person of another, or in a dwelling house, etc., is made grand larceny, sometimes without regard to the value of the property.[222]

The elements of petit larceny are precisely the same as the elements of grand larceny, except with respect to the value of the property. "Wherever an offense would amount to grand larceny, if the thing stolen were above the value of twelve pence (or other value, according to the particular statute), it is petit larceny if it be but of that value, or under."[223]

335. Determination of Value.

In ordinary cases there is no difficulty in ascertaining the value of property for the purpose of determining whether larceny is grand or petit larceny, but difficult questions have arisen in some cases. The inquiry should be as to the market value,

[218] 1 Hale, P. C. 530, Mikell's Cas. 826. And see 1 Hawk. P. C. c. 33, § 34; 2 East, P. C. 736, Mikell's Cas. 827.

[219] By 7 & 8 Geo. IV. c. 29; 24 & 25 Vict. c. 96, § 4.

[220] See State v. Gray, 14 Rich. (S. C.) 174.

[221] Thus, in Virginia, the value, to constitute "grand," as distinguished from "petit," larceny, must be over $5 if from the person, and $50 in other cases. Code, § 3707. In California, it must be over $50. Pen. Code, §§ 487, 488. In South Carolina, it must be $20, or more. Crim. St. § 160.

[222] Pen. Code Cal. § 487; Crim. St. S. C. § 148. See State v. Spurgin, 1 McCord (S. C.) 252.

[223] 1 Hawk. P. C. c. 33, § 34.

if the property has a market value, and not the value to the owner.[224] Where there is no market value, the valuation should be a reasonable one.[225]

If two persons stole goods above the value of twelve pence from the same person at the same time it was held to be grand larceny in both,[226] but it was otherwise if the acts of each were several at several times, and the goods taken at each time were of the value of twelve pence or under.[227] And if a person stole goods at different times, so that the larcenies were separate and distinct acts, even though from the same person, he was held not to be guilty of grand larceny if the property taken at any one time was not above the value of twelve pence, though all the property might be above that value.[228]

336. Felony or Misdemeanor.

Under the statute of Westminster, both grand larceny and petit larceny were felonies, though petit larcenies were not so severely punished.[229] In this country, where the statutes make such a distinction, petit larceny is generally a misdemeanor only.[230]

[224] State v. Doepke, 68 Mo. 208, 30 Am. Rep. 785, Mikell's Cas. 827, n.

[225] 2 East, P. C. 736, Mikell's Cas. 827, n.; State v. Doepke, supra.

[226] 2 East, P. C. 740; 1 Hale, P. C. 530.

[227] 2 East, P. C. 740; 1 Hale, P. C. 530.

[228] 2 East, P. C. 740; Rex v. Petrie, 1 Leach, C. C. 294; Rex v. Birdseye, 4 Car. & P. 386, Mikell's Cas. 828. Compare 1 Hale, P. C. 530, 531.

There is no presumption in favorem vitae that several articles were stolen at different times so that there were several petit larcenies. Rex v. Jones, 4 Car. & P. 217, Mikell's Cas. 827.

[229] 1 Hale, P. C. 530; 1 Hawk. P. C. c. 33, § 36; 2 East, P. C. 736; 4 Bl. Comm. 229; Drennan v. People, 10 Mich. 169; Ward v. People, 3 Hill (N. Y.) 395.

In England, after the statute of Westminster, the punishment for grand larceny was death and forfeiture of goods, subject to the benefit of clergy. The punishment for petit larceny was forfeiture of goods and whipping, or some other corporal punishment less than death. 1 Hale, P. C. 530.

[230] See State v. Setter, 57 Conn. 466, 18 Atl. 782.

(G) Compound Larcenies.

337. Definition.—Compound larceny is larceny committed under certain aggravating circumstances, by reason of which it is punished more severely than simple larceny. Thus—

1. **At common law, robbery is a compound larceny,—a felonious taking and carrying away of the property of another from his person or in his presence, by violence or by putting him in fear.**
2. **By statute in most jurisdictions larceny under certain circumstances is made a compound larceny. The principal statutory compound larcenies are:**
   - **(a) Larceny from the person of another, not by violence or putting in fear.**
   - **(b) Larceny from particular places, as a dwelling house, house, shop, vessel, etc., not accompanied by a breaking and entry with intent to steal, as in burglary.**

338. Robbery.

The only common-law compound larceny is robbery. If larceny is committed by stealing from the person or in the presence of another, and is accomplished by violence or by putting him in fear, it becomes robbery, and not merely larceny. Robbery is treated and punished as a distinct felony, and will therefore be considered separately in another place.[231]

339. Larceny from the Person.

(*a*) *Statutes Requiring a Private Stealing.*—The English statute of 8 Eliz. c. 4, § 2, deprived of the benefit of clergy, to

In New York petit larceny is a misdemeanor. Pen. Code, § 535; People v. Finn, 87 N. Y. 533.

In North Carolina, the distinction between grand and petit larceny has been abolished, and all larceny has been reduced to the grade of petit larceny. See State v. Gaston, 73 N. C. 93, 21 Am. Rep. 459; State v. Stroud, 95 N. C. 626.

[231] Post, § 370.

which simple larceny was subject, the felonious taking of money, goods, or chattels "from the person of any other, *privily, without his knowledge,*" in any place whatsoever.[232] And there are some statutes in this country punishing larceny under such circumstances as a distinct crime.[233] A taking from the person of another openly, and with his knowledge, is not within such a statute.[234] A sudden snatching of property, where there is no such resistance and violence as is necessary to establish robbery,[235] is a private or secret taking, within the meaning of the statute.[236]

(b) Statutes not Requiring a Private Taking.—The present English statute omits the words "privily, without his knowledge," found in the statute of Elizabeth, and punishes generally a stealing "from the person" of another; and the same is true of most of the statutes in this country.[237] Under these statutes it is not necessary that the property be stolen secretly and without the other's knowledge, but the offense is committed when the taking is open and with his knowledge.[238]

[232] As this statute did not create a new offense, but merely deprived a person convicted of larceny from the person of the benefit of clergy, and as petit larceny did not stand in need of the benefit of clergy, it was considered that the statute did not apply to petit larceny from the person. 4 Bl. Comm. 241; 1 Hale, P. C. 529; 2 East, P. C. 701.

This reasoning does not apply to our statutes, though they sometimes do require that the property shall be of a certain value, or over. See Code Va. 1887, § 3707, as amended in 1893-94 (Supp. 1898, § 3707).

[233] See Pen. Code Ga. § 175; Pen. Code Tex. arts. 879, 880.

[234] Brown's Case, 2 East, P. C. 702. And see Fanning v. State, 66 Ga. 167; Woodard v. State, 9 Tex. App. 412.

[235] Post, § 374.

[236] Steward's Case, 2 East, P. C. 702; Danby's Case, Id.; Reg. v. Walls, 2 Car. & K. 214; Fanning v. State, 66 Ga. 167; Clemmons v. State, 39 Tex. Cr. R. 279, 45 S. W. 911.

[237] See 24 & 25 Vict. c. 96, § 40; Code Va. 1887, § 3707, as amended in 1893-94 (Supp. 1898, § 3707).

[238] Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699; Com. v. Dimond, 3 Cush. (Mass.) 235; Johnson v. Com., 24 Grat. (Va.) 555.

Bishop cites Moye v. State, 65 Ga. 754, as holding that such a statute contemplates a secret taking without the knowledge of the owner; but

(*c*) *Taking "from the Person."*—The statutes expressly require that the taking shall be "from the person," but, except where it is otherwise expressly provided,[239] the property need not be attached to the person, or actually on the person, but it is sufficient if it be at the time under the protection of the person.[240] It *must* be under the protection of the person, and it is not always enough to show that it was in his presence. Thus, where a man went to bed with a prostitute, leaving his watch in his hat on the table, and the woman stole the watch while he was asleep, it was held not to be larceny from the person, but larceny in the dwelling house.[241]

(*d*) *Persons Drunken or Asleep.*—It has been contended that the statutes contemplate a taking *from the care* of a person, and that the offense, therefore, cannot be committed from one who is asleep or drunken to insensibility, as such a person is

he evidently failed to examine the statute under which that case was decided. The Georgia statute does not appear in the report of the case, but an examination of it would have shown that, like the statute of Elizabeth, it in terms punishes larceny from the person of another "privately, and without his knowledge." Pen. Code Ga. § 175.

[239] By express provision of the Texas statute, the taking must be actually from the person, and a taking of property in the mere presence of the owner is not enough. Pen. Code Tex. art. 880; Woodard v. State, 9 Tex. App. 412.

[240] It was so held in Reg. v. Selway, 8 Cox, C. C. 235, Beale's Cas. 700, under the English statute punishing larceny "from the person." In this case, it appeared that the prosecutor, who was paralyzed, received, while sitting on a sofa in his room, a violent blow on the head from one of the defendants, while the other went to a cupboard in the same room, and stole a cash box therefrom. It was held that it was a question for the jury whether the cash box was at the time under the protection of the prosecutor, and that, if so, a charge of stealing from the person would be sustained.

See, also, Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699, where it was held that a taking of property in the presence of the owner (the property having been knocked from his hand, and taken by the accused from the ground) was, in point of law, a taking from the person.

[241] Rex v. Hamilton, 8 Car. & P. 49. See, to the same effect, Com. v. Smith, 111 Mass. 429.

incapable of exercising care; and some of the earlier cases were in favor of this view.[242] No such doctrine, however, is now recognized, but it is held that the offense may be committed as well when the victim is asleep or drunk as when he is awake and sober.[243] A watch in the pocket of a sleeping or drunken man is certainly under the protection of his person. In the English cases it has been held that a person who is asleep or drunk may be within the protection of the statute,[244] but some of the judges have held that the statute does not apply where the victim has voluntarily become drunk, without being induced to do so by the craft or cunning of the accused.[245]

(*e*) *Asportation.*—To constitute larceny from the person, there must be some asportation, as in the case of simple larceny and robbery, unless the statute, as in Texas, expressly declares that an asportation is not necessary.[246]

(*f*) *Intent.*—It is also necessary that there shall be a felonious intent,—the same intent as in simple larceny at common law.[247]

(*g*) *Robbery Distinguished.*—Larceny from the person is distinguished from robbery in that in robbery the taking is accomplished by violence or by putting in fear, while in larceny

[242] See 2 East, P. C. 703, 704; Rex v. Hamilton, 8 Car. & P. 49.

[243] See Branny's Case, 1 Leach, C. C. 241, note, where the victim was drunk; and Thompson's Case, 1 Leach, C. C. 443, 2 East, P. C. 705; Willan's Case, 1 Leach, C. C. 495, 2 East, P. C. 705.

[244] See the cases cited in the note preceding.

[245] Rex v. Gribble, 1 Leach, C. C. 240, 2 East, P. C. 706; Rex v. Kennedy, 2 Leach, C. C. 788, 2 East, P. C. 706.

These cases were decided on the ground that the statute "was intended to protect the property which persons, by proper vigilance and caution, should not be enabled to secure," and that "it did not extend to persons who, by intoxication, had exposed themselves to the dangers of depredation, by destroying those faculties of the mind by the exercise of which the larceny might probably be prevented." Rex v. Gribble, supra.

[246] The cases on this point will be found under simple larceny and robbery. See ante, §§ 321-325; post, § 370 et seq.

See Pen. Code Tex. art. 763; Flynn v. State, 42 Tex. 301.

[247] Ante, § 326 et seq.

from the person this element is wanting. If the owner of property resists an attempt to take it, and the resistance is overcome, there is, as we shall see, sufficient violence to make the offense robbery.[248] And the same is true if there is personal injury in the taking, as where a person is knocked down and then robbed, or an earring is torn from a woman's ear with sufficient violence to tear the ear.[249] But if a person's pocket is picked, or property is suddenly snatched from his hand, or head, no more force being used than is necessary to the mere act of snatching, the offense is not robbery, but larceny from the person.[250]

340. Larceny from Particular Places.

(*a*) *In General.*—At common law, to steal in a dwelling house or other particular place is merely simple larceny, and is not distinguished from other simple larcenies,[251] in the absence of a breaking and entry with intent to steal, which, as we shall see, is burglary.[252] The statute of 12 Anne, c. 7, enacted in 1713,[253] deprived of the benefit of clergy, to which simple larceny was subject, any person who should feloniously steal money, goods or chattels, wares or merchandise, of the value of forty shillings or more, being in any dwelling house, or outhouse thereunto belonging, although such house or outhouse should not be broken, and though neither the owner nor any other person should be in the house at the time. This statute has been repealed, but the present statute punishes larceny in a dwelling house as a distinct offense, and more severely than

[248] Post, § 370 et seq.

[249] Id.

[250] Reg. v. Walls, 2 Car. & K. 214; Steward's Case, 2 East, P. C. 702; Danby's Case, Id.; Fanning v. State, 66 Ga. 167.

[251] 2 East, P. C. 623, Mikell's Cas. 829. Thus, East defines larceny as the taking and carrying away of the mere personal goods of another "from any place," etc. 2 East, P. C. 553.

[252] See post, § 400.

[253] There were also earlier statutes punishing larceny in particular places. See 2 East, P. C. 623 et seq

simple larceny.[254] There are similar statutes in this country. Statutes have also been enacted, both in England and in this country, punishing larceny in other places than a dwelling house,—as from a "house," a "shop," a "warehouse," an "office," a "building," a "vessel," etc.[255]

(*b*) *The Place.*—To bring a case of larceny within such a statute as this, the place must come strictly within the terms of the statute. Thus, it has been held that a statute punishing larceny in an "office" does not apply to larceny in the passenger room of a railroad station, though it adjoins a separate inclosed place where books are kept and tickets sold;[256] and a statute punishing larceny in a "house" does not apply to larceny in a tent.[257]

To come within a statute punishing larceny in or from a dwelling house, the house must be used and occupied as a dwelling. It must be such a house as is the subject of burglary; and, if it is such a house, it is within the statute.[258]

[254] The statute of 24 & 25 Vict. c. 96, § 60, prescribes a particular punishment for stealing, "in any dwelling house," any money, chattel, or valuable security, to the value in the whole of £5. Section 61 punishes such stealing when the thief shall, "by any menace or threat, put any one being therein in bodily fear."

[255] 24 & 25 Vict. c. 96, §§ 62-64; Pen. Code Minn. §§ 417, 418.

[256] Com. v. White, 6 Cush. (Mass.) 181.

[257] Callahan v. State, 41 Tex. 43.

[258] 2 East, P. C. 643; Rex v. Davis, 2 East, P. C. 499; Henry v. State, 39 Ala. 679. As to what is necessary to render a house the subject of burglary, see post, § 401 et seq.

In People v. Horrigan, 68 Mich. 491, 36 N. W. 236, it was held that the statute applied where one room in the basement of a house was occupied by a man as a regular dwelling place, though the upper part was used for offices. And in State v. Leedy, 95 Mo. 76, 8 S. W. 245, it was held that a hotel in which the keeper lived was his dwelling house, and that one who stole his shoes from the office was guilty of larceny in a dwelling house.

In State v. Clark, 89 Mo. 423, 1 S. W. 332, it was held that the term "dwelling house" did not include a basement or cellar with only an outside door, used for the storage of ice and beer, though there were rooms above it, occupied by families as a residence, where there was no internal communication between it and the rooms above, and the families living above had no interest in it, or control over it. It

When a statute punishes larceny in "a house," or in "any house," it does not mean a dwelling house, but applies to larceny in a store, or a bank, or any other house, for whatever purpose it may be used, and whether it is occupied by any person or not.[259] Such a statute creates an offense against the property, and not, as in burglary, against the habitation.[260]

To constitute larceny from a "storehouse," or "warehouse," the building must be used as a storehouse, or warehouse, as the case may be. It is not enough that it was built for such a purpose.[261]

(*c*) *The Property must be under the Protection of the House.* —Some of the statutes punish larceny "in" the house, while others punish larceny "from" the house; but it has been said that they mean the same thing.[262] Under both the property must be under the protection of the house.[263] For this reason it has

would be otherwise if the family living above also owned or used the cellar.

[259] Stanley v. State, 58 Ga. 430. A tent is not a "house." See note 257, supra.

[260] Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885.

[261] Jefferson v. State, 100 Ala. 59, 14 So. 627.

A "warehouse" is a place for the reception and storage of goods and merchandise. See Lynch v. State, 89 Ala. 18, 7 So. 829. A cellar used for the deposit of goods intended for removal and sale was held a "warehouse," within the meaning of an English statute. Reg. v. Hill, 2 Mood. & R. 458. "A warehouse," in the Kentucky statute, was held to mean any house, not an office or shop, in which goods, wares, or merchandise are usually deposited for safe-keeping or for sale, and the term was held to include a granary used for storage of farming utensils and the like. Ray v. Com., 12 Bush (Ky.) 397. And see Hagan v. State, 52 Ala. 373. It is not larceny from a warehouse to take a trunk at a railroad station from a passage way extending between the baggage room and the reception room, and under a common roof with them, but not inclosed on any side. Lynch v. State, 89 Ala. 18, 7 So. 829.

[262] Martinez v. State, 41 Tex. 126.

[263] Rex v. Owen, 2 Leach, C. C. 572, 2 East, P. C. 645, Mikell's Cas. 829; Com. v. Smith, 111 Mass. 429, Beale's Cas. 703; Com. v. Lester, 129 Mass. 101, Beale's Cas. 705; Martinez v. State, 41 Tex. 126; Henry v. State, 39 Ala. 679.

been held that it is not larceny in a dwelling house to steal clothes from the railing or banisters of a piazza attached to a dwelling house;[264] nor larceny from a house to steal property which is hanging outside of a store door on a piece of wood nailed to the door and projecting towards the street.[265]

Property is not under the protection of the house if it is under the eye or personal care of the owner of the house or of someone else who happens to be in the house. In such a case it is under the protection of the person, and stealing it is larceny from the person, and not larceny in or from the house.[266] The mere presence of the owner, however, does not prevent the property from being under the protection of the house.[267]

[264] Henry v. State, 39 Ala. 679.

[265] Martinez v. State, 41 Tex. 126. See, also, Lynch v. State, 89 Ala. 18, 7 So. 829. In People v. Wilson, 55 Mich. 506, 21 N. W. 905, Judge Cooley said that it might be a question whether taking a barrel of oil from in front of a store was not larceny from the store, but the point was not decided or discussed. Burge v. State, 62 Ga. 170, however, is opposed to the view stated in the text. It was there held that it was larceny from the house to steal a watch which was hanging on a post covered by the roof of a house. In an earlier case, however, the same court held that stealing property from a sidewalk or alley in front of a building was not within the statute. Middleton v. State, 53 Ga. 248.

[266] Rex v. Owen, 2 Leach, C. C. 572, 2 East, P. C. 645, Mikell's Cas. 829; Rex v. Campbell, 2 Leach, C. C. 564, 2 East, P. C. 644; Com. v. Smith, 111 Mass. 429, Beale's Cas. 703.

In Com. v. Lester, 129 Mass. 101, Beale's Cas. 705, a person in whose hands a shop keeper had placed goods for inspection ran off with them when the shop keeper momentarily turned his back. It was held that the goods were not at the time under the protection of the building, and that the theft was not larceny in a building.

[267] Rex v. Taylor, Russ. & R. 418, Mikell's Cas. 830; Rex v. Hamilton, 8 Car. & P. 49; Com. v. Smith, 111 Mass. 429, Beale's Cas. 703; Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885.

Thus, property that is in the room of a person who is asleep, and not actually on his person, is under the protection of the house, and not of the person, and stealing it is larceny in the house. Rex v. Taylor, supra; Rex v. Hamilton, supra; Com. v. Smith, supra.

In Simmons v. State, supra, a person went into a bank, and deposited on the counter a satchel containing money, and, while he was stand-

(*d*) *Who may Commit the Offense.*—It was early decided that a statute punishing larceny in a dwelling house does not apply to stealing by a person in his own house, nor to a stealing by a wife in her husband's house, which, for this purpose, is the same as her own,[268] as the statute is intended "to protect the owner's property in his own house from the depredation of others, or the property of others, lodged in his house; thereby giving protection against all but the owner himself."[269] The same construction has been placed upon statutes punishing larceny in other places than dwelling houses, as in stores and other buildings,[270] and in vessels.[271]

In Texas the statute punishing theft in a house expressly declares that it shall not apply to "a domestic servant or other inhabitant of such house."[272]

(*e*) *Ownership of the Property.*—Under these statutes the property need not be that of the owner or occupant of the house, unless the statute so requires.[273]

(*f*) *Entry of the Premises.*—There need be no entry into the house with intent to steal, unless this is required by the statute.[274] Nor, in the absence of such a requirement, need the

ing within about two feet of it, another person distracted his attention, and a third person abstracted money from the satchel. This was held to be larceny from the house. The decision is a very doubtful one.

[268] Rex v. Gould, 1 Leach, C. C. 217, 2 East, P. C. 644; Rex v. Thompson, 1 Leach, C. C. 338, 2 East, P. C. 644; Com. v. Hartnett, 3 Gray (Mass.) 450, Beale's Cas. 701.

[269] 2 East, P. C. 644; Metcalf, J., in Com. v. Hartnett, supra.

[270] Com. v. Hartnett, supra.

[271] Rex v. Madox, Russ. & R. 92, Beale's Cas. 641.

[272] This exception does not apply to a servant whose employment is out of doors, and not in the house, or to a lodger, boarder, or visitor in the house. Wakefield v. State, 41 Tex. 556; Williams v. State, 41 Tex. 649; Ullman v. State, 1 Tex. App. 220.

In Taylor v. State, 42 Tex. 387, a porter in a barroom, who cleaned up the room, etc., was held a domestic servant, within the meaning of the statute.

[273] Hill v. State, 41 Tex. 157; Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885; Rex v. Taylor, Russ. & R. 418, Mikell's Cas. 830.

[274] Berry v. State, 10 Ga. 511.

entry be without the consent of the owner or occupant; but the offense may be committed by one who is invited to enter.[275] Some statutes, however, punish anyone who shall enter a house and commit the crime of larceny, thus making an entry an element of the offense; and it has been held that under such a statute the entry must be without the consent of the owner or occupant, unless there is an intent to steal at the time of the entry.[276]

(*g*) *Asportation.*—To constitute larceny in or from a dwelling house, house, vessel, or other particular place, there must be an asportation, unless dispensed with by the statute, for this is a necessary element of the larceny.[277] It is not necessary, however, that the property shall be carried out of the house or off the vessel. It is enough if there be such an asportation within the house or on the vessel as is sufficient to make the larceny complete.[278]

(*h*) *Intent.*—To constitute larceny under these statutes the same felonious intent is necessary as in simple larceny.[279]

II. Embezzlement.

341. Definition.—Embezzlement is a statutory and not a common-law offense. The statutes vary so much in the different jurisdictions that it is impossible to frame a definition that will apply in all. It may be defined generally, however, as the fraudulent conversion or appropriation by a servant, clerk, agent, bailee, officer of a corporation, public officer, or other person specified in the statute, of money or property which has come into his possession by virtue of his employment

[275] Point v. State, 37 Ala. 148.

[276] State v. Chambers, 6 Ala. 855.

[277] Ante, § 321 et seq.

[278] Thus, it was held larceny from a vessel, under the Georgia statute, where a box of shoes on a vessel was broken open, and some of the shoes taken out and concealed on the vessel. Nutzel v. State, 60 Ga. 264.

[279] See Ward v. Com., 14 Bush (Ky.) 233; ante, § 326 et seq.

or office, or for or on account of his master, principal, or employer. The following elements are generally essential:

1. The thing appropriated must come within the terms of the statute.
2. The property must have been that of the master, principal, or employer, or some one else other than the accused.
3. Under most of the statutes, it must have been in the possession of the accused, and not in the actual or constructive possession of the master, principal, or employer, at the time of the conversion or appropriation.
4. It must have come into the possession of the accused, and been held by him, by virtue of his employment or office, or for or on account of his master, principal, or employer, according to the terms of the particular statute, so as to create a relation of trust or confidence.
5. It must have been converted or appropriated by the accused.
6. There must have been a fraudulent intent, as in larceny, to deprive the owner of his property.
7. The accused must have occupied such a relation or position as to come strictly within the terms of the statute.

342. Object of the Statutes.

The statutes punishing embezzlement were primarily intended to reach and punish the fraudulent conversion of property which could not be punished as larceny because of the absence of a trespass, and their object must be borne in mind in construing them.[280] As was shown in treating of larceny, a person

[280] Rex v. Headge, Russ. & R. 160, Beale's Cas. 706; Rex v. Sullens, 1 Mood. C. C. 129; Com. v. Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662, Beale's Cas. 711; Com. v. Berry, 99 Mass. 428, Beale's Cas. 714; Kibs v.

who has obtained *possession* of property lawfully, and without an intent to steal, does not commit larceny in afterwards converting the property to his own use so long as such lawful possession continues.[281] This is true of bailees generally. It is also true of a servant who receives property from his master as bailee, and not as servant, and fraudulently converts the same to his own use,[282] or who receives property from a third person for his master, and converts the same before it has reached the actual or constructive possession of the master.[283] It was to reach and punish cases like these that most of the embezzlement statutes were enacted.[284]

343. Particular Statutes.

(*a*) *In General.*—The original English statute was the statute of 39 Geo. III. c. 85, enacted in 1799. This statute in substance punished embezzlement by a servant or clerk of property received or taken into his possession by virtue of his employment, for or in the name or on account of his master or employer.[285] The statute of 7 & 8 Geo. IV. c. 49, § 47, was simi-

People, 81 Ill. 599, Mikell's Cas. 842; Reg. v. Gorbutt, Dears. & B. 166, Mikell's Cas. 844.

[281] Ante, § 316.

[282] Ante, § 317b (2).

[283] Ante, § 317b (3).

[284] Rex v. Headge, supra; Com. v. Hays, supra; Com. v. Berry, supra.

[285] The language of this statute was: "If any servant or clerk, or any person employed for the purpose, or in the capacity of a servant or clerk to any person or persons whomsoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name or on account of his master or masters, employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use, or in whose name or names, or on whose account, the same was or were delivered to or taken in the possession of such servant, clerk, or other person so employed, although such money * * * was or were not otherwise received into the possession of such mas-

lar. The present statute, 24 & 25 Vict. c. 96, § 68, is somewhat different. It omits the words "by virtue of his employment," and punishes embezzlement by a clerk or servant of property "delivered to or received or taken into possession by him for or in the name or on account of his master or employer."[286] In this country some of the statutes are like that of Geo. III.,[287] while others are more or less like that of Victoria.[288] Some differ very materially from both.[289] In most states there are also statutes punishing embezzlement by others than clerks and servants, as agents, bailees, officers of corporations, public officers, etc.[290]

(*b*) *Statutes Relating to Banks.*—In many states statutes have been enacted expressly punishing embezzlement by officers and employes of banks.[291] And an act of congress punishes embezzlement by officers and employes of national banks.[292] The latter matter is within the exclusive jurisdiction of the federal courts, and such embezzlement cannot be punished in a state court, even though a state statute may provide therefor.[293]

ter or masters, employer or employers, than by the actual possession of his or their servant, * * * so employed." See Mikell's Cas. 836.

[286] The language of this statute is: "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same, although such chattel * * * was not received into the possession of such master or employer otherwise than by the actual possession of his clerk," etc.

[287] See Bates' Ann. St. Ohio, § 6842; Pen. Code Cal. § 508; Crim. Code Ala. § 4659.

[288] See the various state statutes.

[289] See Pen. Code N. Y. § 528; Crim. Code Ill. §§ 165, 166; Pub. St. Mass. p. 1143, §§ 37-41.

[290] Bates' Ann. St. Ohio, § 6842; Pen. Code N. Y. § 528; Crim. Code 111, § 166; Crim. Code Ala. § 4659.

[291] See 10 Am. & Eng. Enc. Law (2d Ed.) 1013.

[292] Rev. St. U. S. § 5209.

[293] Com. v. Felton, 101 Mass. 204; Com. v. Ketner, 92 Pa. 372, 37 Am. Rep. 692; State v. Tuller, 34 Conn. 280.

(c) Statutes Relating to Public Officers and Employes.—Perhaps in all states there are statutes specifically punishing embezzlement of public moneys by public officers and employes, as state officers, and county, municipal, and township officers and employes.[294] And there are several acts of congress punishing embezzlement by United States officers.[295]

(d) Embezzlement from the Mails.—Statutes have also been enacted by congress punishing specifically embezzlement from the mails, and the stealing of letters and their contents, by postmasters, postal clerks, mail carriers, and private individuals.[296]

344. The Subject of Embezzlement.

(a) In General.—A thing, to be the subject of embezzlement, must come within the terms of the statute. Some statutes make anything that is the subject of larceny the subject of embezzlement, and this makes things that are made the subject of larceny by statute the subject of embezzlement also.[297] Other statutes use particular terms in specifying what shall be the subject of the offense, as "goods and chattels,"[298] "property,"[299] "money,"[300] "effects,"[301] etc.

[294] See 10 Am. & Eng. Enc. Law (2d Ed.) 1018 et seq.

[295] Rev. St. U. S. §§ 5488-5493; Act Feb. 3, 1879 (1 Supp. Rev. St. p. 213), amending Rev. St. § 5497.

[296] Rev. St. U. S. §§ 3892, 5467, 5469.

[297] State v. Stoller, 38 Iowa, 321.

[298] Choses in action, as promissory notes, bonds, etc., are not goods and chattels. 2 Bish. New Crim. Law, § 358.

[299] The term "property" is broader than "goods and chattels," and includes choses in action, as promissory notes, etc. Com. v. Stearns, 2 Metc. (Mass.) 343; State v. Orwig, 24 Iowa, 102; a mortgage, Com. v. Concannon, 5 Allen (Mass.) 502; a railroad ticket, Com. v. Parker, 165 Mass. 526, 43 N. E. 499; stock in a private corporation, People v. Williams, 60 Cal. 1; bonds of a municipal corporation, Bork v. People, 91 N. Y. 5, and State v. White, 66 Wis. 343, 24 N. W. 202.

[300] In Block v. State, 44 Tex. 620, it was held that the term "money" did not include United States treasury notes or national bank notes. And see 2 Bish. New Crim. Law, § 357.

(b) Value.—The property must be of some value,[302] but the extent of the value is not material unless made so by statute.[303] In some states the statute makes the offense a felony or a misdemeanor according to the value of the property.[304]

(c) Ownership.—A person cannot embezzle property of which he is himself the owner,[305] or which he owns jointly with another, or out of which he is entitled to a commission as to which there has been no accounting.[306] Some statutes require that the property shall be the property of the master or employer, etc. Others merely require that it shall be "the property of another." In the latter case it is sufficient if it was owned by any person other than the accused.[307]

(d) Property Unlawfully Acquired or Held.—As in larceny,[308] so in embezzlement, the fact that the property was un-

[301] The term "effects" covers choses in action, such as promissory notes, bills of exchange, etc. See State v. Newell, 1 Mo. 249; Rex v. Aslett, 2 Leach, C. C. 954; Rex v. Bakewell, 2 Leach, C. C. 943.

[302] Perry v. State, 22 Tex. App. 19, 2 S. W. 600; Wolverton v. Com., 75 Va. 909; U. S. v. Nott, 1 McLean, 499, Fed. Cas. No. 15,900.

"Valuable security or effects" does not include invalid instruments. Rex v. Aslett, 2 Leach, C. C. 954.

[303] See Washington v. State, 72 Ala. 272; People v. Salorse, 62 Cal. 139; People v. Bork, 78 N. Y. 346.

[304] See State v. Mook, 40 Ohio St. 588; Gerard v. State, 10 Tex. App. 690; Harris v. State, 21 Tex. App. 478, 2 S. W. 830.

[305] Reg. v. Barnes, 8 Cox, C. C. 129, Beale's Cas. 710; State v. Kent, 22 Minn. 41, 21 Am. Rep. 764; State v. Kusnick, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. Rep. 564.

Auctioneer is owner of funds received on sale of goods of another. Com. v. Stearns, 2 Metc. (43 Mass.) 343.

[306] Reg. v. Brew, Leigh & C. 346; State v. Kent, supra.

Where the relation of debtor and creditor exists between the master and servant as to the particular fund, there is no embezzlement. State v. Covert, 14 Wash. 652, 45 Pac. 304. See, also, People v. Wadsworth, 63 Mich. 500, 30 N. W. 99; Mulford v. People, 139 Ill. 586, 28 N. E. 1096.

[307] State v. Kusnick, supra; State v. Kent, supra; Com. v. Stearns, 2 Metc. (Mass.) 343; Fleener v. State, 58 Ark. 98, 23 S. W. 1; People v. Hennessey, 15 Wend. (N. Y.) 147.

[308] Ante, § 310.

lawfully acquired by the master or employer, or held unlawfully, does not render it any the less the subject of embezzlement.[309]

345. Possession at the Time of Conversion.

(*a*) *In General.*—As was stated in a previous section, the object of the statutes punishing embezzlement is to reach and punish persons who fraudulently appropriate or convert to their own use money or property which at the time is in their lawful possession, so that, as they do not commit a trespass, they are not guilty of larceny. This object, as we shall see, is taken into consideration by most of the courts in construing the statutes.

Statutes Expressly Requiring Possession by the Accused.—Some of the statutes, like the original and the present English statutes, expressly require that the money or other property shall have been in the "possession" of the accused at the time of the conversion.[310] Clearly, under such a statute as this, a person who has the bare custody of property, as distinguished from the possession, is not guilty of embezzlement in converting it to his own use,[311] but is guilty of larceny.[312] It has been considered that such a statute does not apply to any case which is larceny at common law.[313]

[309] Com. v. Smith, 129 Mass. 104; State v. Shadd, 80 Mo. 358; Woodward v. State, 103 Ind. 127, 2 N. E. 321; State v. O'Brien, 94 Tenn. 79, 28 S. W. 311; State v. Cloutman, 61 N. H. 142; State v. Littschke, 27 Or. 189, 40 Pac. 167. Thus, money intrusted to another for the purpose of accomplishing an immoral object may be embezzled. Com. v. Cooper, 130 Mass. 285; State v. Shadd, supra. And in the case of embezzlement from a corporation, it is no defense to show that the acquisition or possession of the property was unauthorized by its charter, Leonard v. State, 7 Tex. App. 417; or, in the case of a foreign corporation, that it was doing business in the state without a license, or acquired and held the property in violation of a statutory prohibition. People v. Hawkins, 106 Mich. 479, 64 N. W. 736; State v. O'Brien, supra.

[310] See ante, § 343, notes.

[311] Rex v. Murray, 1 Mood. C. C. 276, 5 Car. & P. 145.

[312] Ante, § 317.

[313] See Rex v. Headge, Russ. & R. 160, Beale's Cas. 706.

Statutes not Expressly Requiring Possession by the Accused.—Some of the statutes in this country are in much broader terms than the English statute, and do not expressly require that the property shall have come into the possession of the accused,[314] and in construing these statutes the courts have differed. Most courts, however, have held that the statutes, being intended to supplement the law of larceny, and supply supposed defects therein, are not to be construed as applying to a conversion of property that amounts to larceny; and that they apply, therefore, only where the accused had the lawful possession of the property at the time of the conversion, and do not apply where he had the mere custody, and is therefore guilty of larceny.[315]

(*b*) *Embezzlement by Servants—Delivery to Servant by Master.*—As was shown in treating of larceny, when a master delivers goods to his servant to be used by him in the course of his employment, or to be taken care of, he does not part with the possession. The servant has the bare custody, and, if he fraudulently converts the goods to his own use, he takes them from the constructive possession of the master, and is guilty of a trespass and larceny.[316] In such a case he is clearly not guilty of embezzlement under a statute expressly requiring that

[314] Thus, in Illinois, a statute punishes any person who shall embezzle or fraudulently convert to his own use "money, goods, or property delivered to him, which may be the subject of larceny," etc. Crim. Code Ill. § 165. There are similar statutes, or substantially similar ones, in Massachusetts and other states. Pub. St. Mass. p. 1143.

In South Carolina, a statute declares broadly that "any person committing a breach of trust with a fraudulent intent" shall be held guilty of larceny. See State v. Shirer, 20 S. C. 392.

[315] Com. v. O'Malley, 97 Mass. 584, Beale's Cas. 518; Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767, Beale's Cas. 714; Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, 31 Am. St. Rep. 560, Beale's Cas. 543; Kibs v. People, 81 Ill. 599, Mikell's Cas. 842; Johnson v. People, 113 Ill. 99; People v. Belden, 37 Cal. 51. Contra, State v. Wingo, 89 Ind. 204; State v. Shirer, 20 S. C. 392.

[316] Ante, § 317.

he shall have been in "possession."[317] Nor, by the weight of authority, is he guilty under a statute which does not expressly require possession.[318]

A master may deliver property to his servant under such circumstances as to give him the possession, and not merely the custody, as where he lends him a horse or other property to use in his own business; and in such a case the servant, if he fraudulently converts the property to his own use, is guilty, not of larceny, but of embezzlement,[319] like any other bailee.[320]

Delivery by Third Persons to Servant.—When money or property is delivered by a third person to a servant for or on account of his master, the servant has the possession, and is in the position of a mere bailee, until he has delivered the money or property to the master, or put it, intending to do so for the master,[321] where it is his duty to put it; and, if he fraudulently converts it before this, he is guilty of embezzlement, and not of larceny.[322] After he has disposed of the property, however, by putting it in the proper place for the master, as in the safe, or money drawer, or cart, etc., it is in the constructive possession of the master, and, if the servant

[317] Rex v. Murray, 1 Mood. C. C. 276, 5 Car. & P. 145; Rex v. Lavender, 2 East, P. C. 566, Beale's Cas. 532.

[318] Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767, Beale's Cas. 714; Johnson v. People, 113 Ill. 99; People v. Belden, 37 Cal. 51. Contra, State v. Wingo, 89 Ind. 204; State v. Shirer, 20 S. C. 392.

[319] See ante, § 317b.

[320] Post, § 345c.

[321] See Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, 31 Am. St. Rep. 560, Beale's Cas. 543.

[322] Rex v. Headge, Russ. & R. 160, Beale's Cas. 706; Reg. v. Masters, 1 Den. C. C. 332, Mikell's Cas. 689; Rex v. Sullens, 1 Mood. C. C. 129, Mikell's Cas. 688; Rex v. Walsh, Russ. & R. 215; Reg. v. Rud, Dears. C. C. 257, 6 Cox, C. C. 284, Beale's Cas. 536; Com. v. King, 9 Cush. (Mass.) 284; Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, 31 Am. St. Rep. 560, Beale's Cas. 543; Kibs v. People, 81 Ill. 599, Mikell's Cas. 842.

afterwards converts it, his offense is larceny, and not embezzlement.[323]

(c) *Embezzlement by Bailees—Possession Lawfully Acquired.*—As was shown in treating of larceny, one who is himself in lawful possession of property cannot commit a trespass, and therefore cannot be guilty of larceny, in fraudulently converting the property to his own use.[324] A hirer of property, a carrier, a warehouseman, or any other bailee, if he has obtained possession lawfully and without a felonious intent, cannot commit larceny by converting the property to his own use while the bailment continues.[325] In such a case he is guilty of embezzlement under the statutes punishing embezzlement by bailees, or by persons generally.[326]

Possession Obtained with Felonious Intent.—On the other hand, a person who obtains property by delivery from the owner or a third person under circumstances that would ordinarily make him a bailee, and give him the possession, commits a trespass, and is guilty of larceny, if he has a felonious intent to steal the property at the time he receives it.[327] And in such a case, by the weight of authority, he cannot be indicted and convicted under the statutes punishing embezzlement.[328]

Termination of Bailment.—If a bailment is terminated, either by the terms of the contract of bailment, or by operation of law because of the wrongful act of the bailee, the possession revests constructively in the bailor, and a subsequent fraudu-

[323] Com. v. Ryan, supra; Reg. v. Rud, supra; Reg. v. Norval, 1 Cox, C. C. 95, Beale's Cas. 535. And see ante, § 317b (3).

[324] Ante, § 316a.

[325] Ante, § 316b.

[326] Com. v. Simpson, 9 Metc. (Mass.) 138; Com. v. Doherty, 127 Mass. 20; People v. Husband, 36 Mich. 306; People v. Salorse, 62 Cal. 139; Hutchison v. Com., 82 Pa. 472.

[327] Ante, § 316c.

[328] People v. Salorse, 62 Cal. 139; People v. De Coursey, 61 Cal. 134; Johnson v. People, 113 Ill. 99; Quinn v. People, 123 Ill. 333, 15 N. E. 46; Moore v. U. S., 160 U. S. 268. Contra, State v. Tabener, 14 R. I. 272, 51 Am. Rep. 382.

lent conversion by the bailee is larceny.[329] Thus, the hirer or borrower of a horse to ride to a certain place, or to use for a certain time only, terminates the bailment if he rides it to a different place, or keeps it for a longer time, and, if he converts it to his own use after the bailment is thus terminated, he is guilty of larceny.[330] The same is true of a carrier or other bailee who breaks bulk and then converts the property to his own use.[331] According to the prevailing doctrine these cases do not fall within the statutes punishing embezzlement.[332]

(*d*) *Persons Other than Servants Having the Mere Custody.*—The distinction between possession and custody applies also to other persons than servants. The linen and tableware of an innkeeper in the hands of a guest is in the constructive possession of the innkeeper, and in the mere custody of the guest, and the latter commits larceny if he steals it.[333] The same is true of money or goods delivered to another to be examined or dealt with in some way in the owner's presence. He has the custody merely, and his fraudulent conversion of the money or goods is larceny.[334] Under such circumstances, therefore, the conversion would not be within the statutes of embezzlement.[335]

346. Character in Which the Property is Received or Held.

(*a*) *In General.*—The statutes punishing embezzlement generally require that the property shall have been received or held in possession by the accused in some particular character, or

[329] Ante, § 316e.

[330] Ante, § 316e (2); Tunnard's Case, 1 Leach, C. C. 214, note, Beale's Cas. 640.

[331] Ante, § 316e (3); Com. v. James, 1 Pick. (Mass.) 375, Beale's Cas. 645.

[332] See Com. v. Davis, 104 Mass. 548; Com. v. Barry, 116 Mass. 1; Johnson v. People, 113 Ill. 99.

[333] Ante, § 317c.

[334] Ante, § 317c.

[335] People v. Johnson, 91 Cal. 265, 27 Pac. 663; Com. v. O'Malley, 97 Mass. 584, Beale's Cas. 518.

for some particular purpose, and, when this is the case, the conversion of property will not be embezzlement, unless the property was so received or held.[336] This is true, for example, of a statute punishing conversion by a carrier or other person of money or other property delivered to him "to be carried for hire,"[337] and of a statute punishing the conversion of property delivered to a person "for safe custody."[338] A conversion, to be punishable as embezzlement, must come strictly within the statute. As was said in a Massachusetts case: "Embezzlement always presents a case of a breach of trust, but every breach of trust is by no means embezzlement."[339]

(b) Relation of Trust or Confidence.—There are statutes in some jurisdictions expressly requiring that the property shall be held under a trust, and in such a case, of course, a trust relation is essential.[340]

Even when the statute is in the most general terms, and does not expressly require a relation of trust or confidence, the courts have construed them as limited to cases in which there is such a relation, in view of the fact that the statutes of embezzlement are designed to reach and punish those cases in which a person converts property of which he has lawful possession by virtue of a delivery to him, either by or for the owner.[341] Thus, under a Massachusetts statute punishing any person to whom any money, goods, or other property, which may be the subject of larceny, "shall have been delivered," and who shall embezzle

[336] Reg. v. Newman, 8 Q. B. Div. 706; State v. Stoller, 38 Iowa, 321; Com. v. Williams, 3 Gray (Mass.) 461; Johnson v. Com., 5 Bush (Ky.) 431.

[337] State v. Stoller, 38 Iowa, 321.

[338] Reg. v. Newman, 8 Q. B. Div. 706.

[339] Per Bigelow, J., in Com. v. Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662, Beale's Cas. 711. See, also, Com. v. Stearns, 2 Metc. (Mass.) 345; Webb v. State, 8 Tex. App. 310.

[340] Keeller v. State, 4 Tex. App. 527.

[341] Com. v. Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662, Beale's Cas. 711.

the same, it has been held that there must be a delivery of property under such circumstances as to create a relation of trust or confidence, and that the statute does not apply, therefore, to one who fraudulently converts to his own use money overpaid him by mistake.[342]

(c) Receipt of Property by Virtue of Employment.—The original English statute of 39 Geo. III. c. 85, punished embezzlement by a clerk or servant of such property only as should be received or taken into his possession, "by virtue of his employment;" and many of the statutes in this country either use this language, or require that he shall have received the property "in the course of his employment."[343] Under such a statute the property must have been so received. It is not embezzlement for a servant to convert to his own use property received by him on his own account, and not in the course of his employment.[344] Some courts have held that it is not embezzlement under such a statute for a servant, agent, or other person to convert property, if, in receiving the same, he acted in excess of his authority, or contrary to his master's or employer's directions.[345] Other courts have taken a different and more

[342] Com. v. Hays, supra. And see Com. v. Stearns, 2 Metc. (Mass.) 345.

[343] Ante, § 343, note.

[344] Rex v. Mellish, Russ. & R. 80; Rex v. Snowley, 4 Car. & P. 390, Mikell's Cas. 837; Pullan v. State, 78 Ala. 21, 56 Am. Rep. 21; People v. Sherman, 10 Wend. (N. Y.) 298, 25 Am. Dec. 563; Johnson v. State, 9 Baxt. (Tenn.) 279; Griffin v. State, 4 Tex. App. 390; Brady v. State, 21 Tex. App. 659, 1 S. W. 462 (where an employe, without any authority at all, collected and converted to his own use money due to his employer).

See Rex v. Smith, 1 Lewin, C. C. 86, Mikell's Cas. 836, where it is held not to be embezzlement for a servant to convert money he received by express direction of his employer, which came from a source not within the duties of his regular employment.

[345] Thus, in Rex v. Snowley, 4 Car. & P. 390, Mikell's Cas. 837, Parke, J., held that a servant who was employed to lead a stallion, and who received a sum for the hire of the same, which was less than he was authorized by his master to take, and converted the

reasonable view of the statute, and have held that a man may receive property by virtue of his employment, or in the course of his employment, and be guilty of embezzlement in converting the same, though he may have acted in excess of his authority in receiving it.[346]

(*d*) *Receipt by Virtue of Office.*—The statutes punishing embezzlement by officers of banks and other private corporations or associations generally in terms require that the money or property shall have come into their possession by virtue of their office, and, in the absence of such an express requirement, it would undoubtedly be implied. Unless it was so received, therefore, an indictment cannot be sustained.[347] The same is true of statutes punishing embezzlement by public officers.[348]

same to his own use, was not within the statute, because the receipt of the money was not within his authority, and therefore not "by virtue of his employment." And see, to the same effect on different facts, Rex v. Hawtin, 7 Car. & P. 281; Reg. v. Harris, Dears. C. C. 344, 6 Cox, C. C. 363; Reg. v. Cullum, L. R. 2 Cr. Cas. 28, 12 Cox, C. C. 469, Mikell's Cas. 839.

[346] Thus, in Rex v. Beechey, Russ. & R. 318, it was held that a clerk who was authorized to receive money at home which outdoor collectors received abroad from customers, and who, in one instance, took a sum of money directly from a customer out of doors, was within the statute. And in Rex v. Williams, 6 Car. & P. 626, it was held that a servant was none the less guilty of embezzlement because he received the money from one of a class of persons from whom he was not authorized to receive money. See, also, Reg. v. Aston, 2 Car. & K. 413, Mikell's Cas. 838; Ex parte Hedley, 31 Cal. 109; Ker v. People, 110 Ill. 627, 51 Am. Rep. 706.

One receiving money on the assumption of agency for another may be estopped to deny the agency. People v. Treadwell, 69 Cal. 226, 10 Pac. 502; Ex parte Ricord, 11 Nev. 287; State v. Spaulding, 24 Kan. 1; State v. Pohlmeyer, 59 Ohio St. 491, 52 N. E. 1027.

[347] Thus, an officer of a corporation or association cannot be indicted for embezzlement with respect of funds received and converted by him before he became an officer. Lee v. Com. (Ky.) 1 S. W. 4. See, also, State v. Johnson, 21 Tex. 775; Bartow v. People, 78 N. Y. 377; People v. Gallagher, 100 Cal. 466, 35 Pac. 80.

[348] State v. Bolin, 110 Mo. 209, 19 S. W. 650. In this case, a statute punishing any officer who should embezzle public money received

(e) Receipt for or in the Name or on Account of Master or Employer.—Some of the statutes like the present English statute,[349] instead of requiring that the money or property shall have been received by the accused "by virtue of his employment," merely require that it shall have been received "for or in the name or on account of" his master or employer.[350] Under such a statute as this it is essential that the property shall have been received by the accused for or in the name or on account of his employer, and not for himself or on his own account, nor for or on account of some third person.[351] It is not necessary, however, as under the statutes requiring receipt by virtue of his employment, that he shall have had authority to receive the property, either express or implied.[352]

347. Persons Who are Within the Statutes.

(a) In General.—Generally the statutes punishing embezzlement only apply in terms to persons occupying particular relations or positions, as servants, agents, bailees, officers of corporations, or particular kinds of corporations, public officers, or par-

by him "by virtue of his office, or under color or pretense thereof," did not apply to one who had no right to public money by virtue of his office, but who obtained possession thereof by falsely representing that he had such a right, and afterwards converted the same to his own use. But see State v. Spaulding, 24 Kan. 1.

[349] Ante, § 343, note 286.

[350] Ante, § 343, note 285.

[351] Reg. v. Harris, Dears. C. C. 344, 6 Cox, C. C. 363, 25 Eng. Law & Eq. 579; Reg. v. Cullum, L. R. 2 C. C. 28, 12 Cox, C. C. 469, Beale's Cas. 707; Reg. v. Beaumont, Dears. C. C. 270.

Thus, where the captain of a vessel in the employ of the owner, whose duty it was to receive and carry such cargoes as the owner should direct, and account for the proceeds, took on a cargo contrary to orders, on his own account, and received and appropriated the freight, it was held that he was not guilty of embezzlement as he did not receive the money for or in the name or on account of his master or employer, as required by the statute, but on his own account. Reg. v. Cullum, supra.

[352] Reg. v. Cullum, supra.

ticular public officers, etc. And to sustain an indictment for embezzlement it must appear that the accused occupies such a relation or position as to bring him strictly within the statute.[353] His being within the intent and spirit of the statute is not enough.[354]

(*b*) *"Clerks" and "Servants."*[355]—Thus, a statute punishing embezzlement by a "clerk" or "servant" does not apply to embezzlement by a person who stands in the relation of agent or bailee.[356] To be a clerk or servant one must be under the immediate direction and control of his master or employer.[357] He

[353] Reg. v. Turner, 11 Cox, C. C. 551; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21; Lycan v. People, 107 Ill. 423; State v. Snell, 9 R. I. 112; Griffin v. State, 4 Tex. App. 390.

[354] State v. Butman, 61 N. H. 511, 60 Am. Rep. 332.

[355] For a full treatment of the question, who are clerks or servants, see 11 Am. & Eng. Enc. Law (2d Ed.) 999-1003.

[356] Reg. v. Bowers, 10 Cox, C. C. 250; Reg. v. Walker, 8 Cox, C. C. 1; Reed v. State, 16 Tex. App. 586; People v. Burr, 41 How. Prac. (N. Y.) 293; Com. v. Stearns, 2 Metc. (Mass.) 343; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185.

[357] Reg. v. Bowers, supra; Reg. v. Walker, supra; Gravatt v. State, 25 Ohio St. 162.

"'Servant' implies one employed in the service of another, who is under the immediate control of his master, and who is to carry out his master's behests under his implicit directions and usually with no option in the servant as to how or when the work shall be done. 'Agent' signifies one employed in the service of another, and who not only does for that other, but represents him, and acts for him in his name and stead. It implies a delegated authority." 11 Am. & Eng. Enc. Law (2d Ed.) 997, 998, and cases cited pages 999-1003. And see People v. Treadwell, 69 Cal. 226, 10 Pac. 502; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21.

In Reg. v. Turner, 11 Cox, C. C. 551, it was said by Lush, J.: "If a person says to another, '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,' then the person employed is a servant. And the reason for such distinction is this, that the person employing has no control of the person employed, as in the first case. But where, as in the second instance I have put, one employs another and

must not be engaged in an independent trade or business, and employed to perform services in the course of such trade or business.[358] One who is under the immediate direction and control of his employer is a clerk or servant within the meaning of the statute.[359] A mere volunteer, who is not employed to perform a service, but who does so by request in a single instance, is not a clerk or servant.[360] According to the better opinion, compensation is not absolutely necessary to render one a clerk or servant within the meaning of the statute.[361] An employe may be a clerk or servant though paid by commission, and not by salary.[362] By the weight of authority the employment, to constitute one a servant, need not be for any particular length of time, but may be for a single occasion only.[363] And it is not necessary that there shall be a formal appointment. One who acts as servant for another, with the other's acquiescence, is a servant *de facto,* and within the statute.[364]

(*c*) *"Agents."*[365]—A statute punishing embezzlement by agents applies only to persons who stand in the legal relation of

binds him to use his time and services about his (the employer's) business, then the person employed is subject to control."

[358] Reg. v. Hall, 13 Cox, C. C. 49; Com. v. Young, 9 Gray (Mass.) 5; People v. Burr, 41 How. Prac. (N. Y.) 293; Com. v. Stearns, 2 Metc. (Mass.) 343; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185.

[359] Reg. v. Turner, 11 Cox, C. C. 551; Reg. v. Bailey, 12 Cox, C. C. 56.

[360] Rex v. Nettleton, 1 Mood. C. C. 259; Reg. v. Hoare, 1 Fost. & F. 647; Reg. v. Mayle, 11 Cox, C. C. 150.

[361] Reg. v. Hoare, 1 Fost. & F. 647; State v. Barter, 58 N. H. 604; State v. Brooks, 85 Iowa, 366, 52 N. W. 240. Compare 1 Whart. Crim. Law (10th Ed.) § 1014.

[362] Reg. v. Turner, 11 Cox, C. C. 551; Reg. v. Tite, Leigh & C. 29; Rex v. Carr, Russ. & R. 198.

[363] Rex v. Smith, Russ. & R. 384; Reg. v. Thomas, 6 Cox, C. C. 403; Reg. v. Winnall, 5 Cox, C. C. 326; State v. Costin, 89 N. C. 511; State v. Barter, 58 N. H. 604; State v. Foster, 37 Iowa, 404. Contra, Rex v. Freeman, 5 Car. & P. 534; Johnson v. State, 9 Baxt. (Tenn.) 279.

[364] Rex v. Beacoll, 1 Car. & P. 457; Rex v. Rees, 6 Car. & P. 606.

[365] See 11 Am. & Eng. Enc. Law (2d Ed.) 1003-1006.

agent of another. An agent is one to whom is delegated authority to act for and in the name of his employer, and who is not under his employer's immediate direction and control.[366] The term does not include mere clerks or servants. Nor does it include a mere naked bailee,[367] or a hirer of property or other bailee who receives the property for his own use and benefit.[368] It includes bank officers.[368a] A person may be an agent, and within the statute, though he may be paid by commissions out of the moneys received by him for his employer;[369] though he may receive no compensation at all;[370] and though he may be employed, not for any particular length of time, but for a particular occasion only.[371] One who assumes to act for another, when he has no authority in fact, and thereby receives money or property for or on account of the person for whom he assumes to act, is an agent *de facto*. He is estopped to deny authority to act, and is within the statute.[372]

[366] Reg. v. Cosser, 13 Cox, C. C. 187; People v. Treadwell, 69 Cal. 226, 10 Pac. 502; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21; Com. v. Newcomer, 49 Pa. St. 478; Com. v. Young, 9 Gray (Mass.) 9.

[367] Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21.

[368] Watson v. State, 70 Ala. 13, 45 Am. Rep. 70.

[368a] State v. Kortgaard, 62 Minn. 7, 64 N. W. 51.

[369] Com. v. Foster, 107 Mass. 221, Beale's Cas. 715; Com. v. Smith, 129 Mass. 104; Campbell v. State, 35 Ohio St. 70; Morehouse v. State, 35 Neb. 643, 53 N. W. 571.

He must not have the right to mingle the money received for his principal with his own funds. Com. v. Stearns, 2 Metc. (Mass.) 343; Com. v. Foster, supra.

[370] State v. Barter, 58 N. H. 604; State v. Brooks, 85 Iowa, 366.

[371] Rex v. Smith, Russ. & R. 384; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21; State v. Barter, 58 N. H. 604; Com. v. Newcomer, 49 Pa. 478. Contra, Johnson v. State, 9 Baxt. (Tenn.) 279.

[372] People v. Treadwell, 69 Cal. 226, 10 Pac. 502; State v. Spaulding, 24 Kan. 1; State v. Pohlmeyer, 59 Ohio St. 491, 52 N. E. 1027. Contra, Moore v. State, 53 Neb. 831, 74 N. W. 319.

"The rule that one who receives money or any other thing of value in the assumed exercise of authority as agent for another is estopped thereafter to deny such authority applies in criminal prosecutions as well as in civil actions." State v. Pohlmeyer, supra.

(*d*) *"Employes."*—Statutes sometimes punish embezzlement by "employes." Such a statute applies to any person who is employed by another, whatever may be the nature of the employment, and whether the relation arising therefrom be that of agent or servant.[373]

(*e*) *"Bailees."*[374]—In many jurisdictions statutes punish embezzlement by "bailees," or particular kinds of bailees, as common carriers, warehousemen, etc. Statutes punishing embezzlement by bailees have been held to apply to an innkeeper in possession of a guest's baggage;[375] to a person to whom money was delivered by another to buy goods;[376] to a person to whom accepted orders for oil were delivered;[377] to an attorney employed to collect money, and to receive as compensation a certain percentage of the amount collected,[378] etc. But a person who receives money or property for another does not necessarily become a bailee within the meaning of the statutes.[379] It has been held, for example, that the statute does not apply to a principal who has received a deposit of money from his agent, to insure the faithful discharge by the latter of his duties,[380] or to a person to whom an excessive payment of money has been made by mistake.[381] A person to whom goods are delivered upon a sale on condition that the title shall pass upon payment of the price is not a bailee.[382] Under some statutes, embezzlement can be committed by such bailees only as stand in a fiduciary relation to the bailor, and who receive the property exclusively for the

[373] State v. Foster, 37 Iowa, 404; Ritter v. State, 111 Ind. 324, 12 N. E. 501.

[374] See generally 10 Am. & Eng. Enc. Law (2d Ed.) 1007 et seq.

[375] People v. Husband, 36 Mich. 306.

[376] Reg. v. Aden, 12 Cox, C. C. 512.

[377] Hutchinson v. Com., 82 Pa. 472.

[378] Wallis v. State, 54 Ark. 611, 16 S. W. 821.

[379] See Reg. v. Hoare, 1 Fost. & F. 647.

[380] Mulford v. People, 139 Ill. 586, 28 N. E. 1096.

[381] Fulcher v. State, 32 Tex. Cr. R. 621, 25 S. W. 625.

[382] Krause v. Com., 93 Pa. 418, 39 Am. Rep. 762.

benefit of the bailor. Such statutes do not apply where the property is held for the benefit of the bailee, as for hire.[383] The English statute has been held to apply only in the case of bailments in which the specific property is to be returned to the bailor.[384]

348. The Conversion or Embezzlement.

The statutes vary somewhat in the terms used to designate the act by which embezzlement may be effected. They almost invariably require a conversion, and generally use the term "embezzle," which implies a conversion. To constitute a conversion, so as to make out a case of embezzlement, the owner must be deprived of his money or property by an adverse using or holding.[385] Mere secreting of property with intent to convert it is not enough.[386] Nor is it embezzlement merely to fail or refuse to pay a debt, whatever may be the motive by which the debtor is influenced.[387] To make a conversion embezzlement, no demand is necessary,[388] unless required by the statute.[389]

[383] Watson v. State, 70 Ala. 13, 45 Am. Rep. 70; Reed v. State, 16 Tex. App. 586.

[384] Reg. v. Garrett, 8 Cox, C. C. 368; Reg. v. Hassall, 8 Cox, C. C. 491, Leigh & C. 58.

[385] State v. Hill, 47 Neb. 456, 66 N. W. 541; Chaplin v. Lee, 18 Neb. 440, 25 N. W. 609. See, also, Reg. v. Chapman, 1 Car. & K. 119; Penny v. State, 88 Ala. 105, 7 So. 50.

[386] McAleer v. State, 46 Neb. 116, 64 N. W. 358.

[387] People v. Hurst, 62 Mich. 276, 28 N. W. 838, Beale's Cas. 716; People v. Wadsworth, 63 Mich. 500, 30 N. W. 99; Collins v. State, 33 Fla. 429; Com. v. Foster, 107 Mass. 221; Kribs v. People, 82 Ill. 425; Mulford v. People, 139 Ill. 586, 28 N. E. 1096; Com. v. Rockafellow, 163 Pa. 139, 29 Atl. 757.

[388] Com. v. Tuckerman, 10 Gray (Mass.) 173; Com. v. Hussey, 111 Mass. 432; State v. Mason, 108 Ind. 48, 8 N. E. 716; Alderman v. State, 57 Ga. 367; State v. Comings, 54 Minn. 359, 56 N. W. 50.

[389] A demand was held necessary under a statute making it embezzlement for any agent to neglect or refuse to deliver to his employer, "on demand," any money, etc. Wright v. People, 61 Ill. 382. And see State v. Murch, 22 Minn. 67; State v. Bancroft, 22 Kan. 170.

The means by which an embezzlement is accomplished are not material, so long as there is a conversion.[390] An agent may commit the crime by drawing a draft on his principal, payable to a third person, the same as though he received the money in person, if the principal pays the draft.[391] And the pledge of his principal's property by an agent is embezzlement if it was intrusted to him merely for safe-keeping, or for sale on commission.[392] Embezzlement may consist of a continuous series of acts of conversion.[393]

Authorized Acts.—A servant, agent, or bailee, who does with the property or money in his possession only what he is authorized to do by the terms of his employment, having no felonious intent, cannot be guilty of embezzlement.[394] But authority to sell property, or to otherwise deal with it, is no defense, and does not bar an indictment for embezzlement, if the agent, servant, or bailee converts the same or its proceeds to his own use with a fraudulent intent.[395] Where a bailee or agent has authority to sell property, and sells it, not for the purpose authorized, but with a fraudulent intent to appropriate it or its proceeds to his own use, he is guilty of embezzling the property itself as much as if he had no authority to sell, for the sale of the property with the fraudulent intent is a conversion.[396]

[390] Leonard v. State, 7 Tex. App. 417; State v. Ezzard, 40 S. C. 312, 18 S. E. 1025.

Giving orders for grain in a warehouse. Calkins v. State, 18 Ohio St. 366, 98 Am. Dec. 121.

[391] Ex parte Hedley, 31 Cal. 109.

[392] Morehouse v. State, 35 Neb. 643, 53 N. W. 571.

[393] Brown v. State, 18 Ohio St. 497; Ker v. People, 110 Ill. 627, 51 Am. Rep. 706.

[394] Com. v. Smith, 129 Mass. 104; Miller v. State, 16 Neb. 179, 20 N. W. 253.

[395] Leonard v. State, 7 Tex. App. 417.

[396] Leonard v. State, 7 Tex. App. 417; State v. Adams, 108 Mo. 208, 18 S. W. 1000.

If a bailee or agent, who has authority to sell goods, sells them without any intent to defraud his principal, and after the sale fraudulently converts the proceeds, he is guilty of embezzling the proceeds,

349. The Intent.

To constitute embezzlement, there must be, as in larceny,[397] a fraudulent intent to deprive the owner of his property.[398] If property is converted under a *bona fide* claim of right, an action for conversion may lie, but the conversion is not embezzlement, however unfounded the claim may be.[399] The same is true in any other case of conversion by mistake, and without intent to defraud.[400]

III. Cheats and False Pretenses.

(A) Common-Law Cheats.

350. Definition.—Cheating, as a common-law offense, is the fraudulent obtaining of the property of another by any deceitful and illegal practice or token, not amounting to a felony, which is of such a nature that it directly affects, or may di-

but not of embezzling the goods. Baker v. State, 6 Tex. App. 346; Leonard v. State, 7 Tex. App. 417.

[397] Ante, § 326 et seq.

[398] Reg. v. Creed, 1 Car. & K. 63; Reg. v. Balls, L. R. 1 C. C. 328; Reg. v. Norman, Car. & M. 501; People v. Galland, 55 Mich. 628; People v. Hurst, 62 Mich. 276, 28 N. W. 838, Beale's Cas. 716; People v. Wadsworth, 163 Mich. 500, 30 N. W. 99; State v. Eastman, 60 Kan. 557, 57 Pac. 109; Spalding v. People, 172 Ill. 40; Com. v. Tuckerman, 10 Gray (Mass.) 173; State v. Leonard, 6 Cold. (Tenn.) 307.

In State v. Baldwin, 70 Iowa, 180, 30 N. W. 476, it was said: "The crime of embezzlement embraces all of the elements of larceny except the actual taking of the property or money embezzled. It is the larceny of money or property rightfully in the possession of the party charged with the crime."

[399] Reg. v. Creed, 1 Car. & K. 63; Reg. v. Norman, Car. & M. 501; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Beaty v. State, 82 Ind. 228.

Though the bailee cannot dispute his bailor's title, a good faith claim that the property was stolen by the bailor of a third person and belongs to him will exculpate the bailee. State v. Littschke, 27 Or. 189, 40 Pac. 167.

[400] State v. Smith, 47 La. Ann. 432, 16 So. 938; Van Etten v. State, 24 Neb. 734, 40 N. W. 289.

rectly affect, the public at large.[401] Such a cheat is a misdemeanor at common law.

351. Indictable Cheats and Private Frauds Distinguished.

To render a cheat indictable at common law, the means by which it is accomplished must be such as affect or may affect the public at large, and not merely a single individual. The cheat must be of a public nature, and such that common prudence cannot guard against it. It is a misdemeanor at common law for a dealer to cheat a customer by using false weights or measures,[402] or for a person to obtain another's money or property by means of a false token, if it be of such a nature as to be likely to deceive the public generally.[403] And a conspiracy to defraud is indictable at common law.[404] These are fraudulent practices which affect, or may affect, the public at large, and against which common prudence cannot guard.[405] But for a person to obtain another's money or property by a mere lie, or by a promise which he does not intend to perform, or by other practices not affecting the public, is a mere private fraud, and is not indictable unless made so by statute.[406]

[401] Steph. Dig. Crim. Law, art. 338; 2 East, P. C. 818; Rex v. Wheatly, 2 Burrow, 1125, 1 W. Bl. 273, Beale's Cas. 97. And see Middleton v. State, Dudley (S. C.) 275, Mikell's Cas. 57; State v. Renick, 33 Or. 584, 56 Pac. 275.

[402] Rex v. Wheatly, 2 Burrow, 1125, 1 W. Bl. 273, Beale's Cas. 97; Young v. Rex, 3 Term R. 104; Rex v. Dunnage, 2 Burrow, 1130; People v. Gates, 13 Wend. (N. Y.) 319.

[403] Reg. v. Mackarty, 2 Ld. Raym. 1179, 6 Mod. 301, 2 East, P. C. 823; Com. v. Speer, 2 Va. Cas. 65; State v. Stroll, 1 Rich. (S. C.) 244.

Selling goods with false marks on them, making them appear to be what they are not, is a common-law cheat. Reg. v. Closs, Dears. & B. 460, 7 Cox, C. C. 494; Rex v. Edwards, 2 East, P. C. 820; Rex v. Worrel, 2 East, P. C. 820; Respublica v. Powell, 1 Dall. (Pa.) 47, Mikell's Cas. 56.

[404] Reg. v. Mackarty, 2 Ld. Raym. 1179, 6 Mod. 301; 2 East, P. C. 823; Com. v. Warren, 6 Mass. 74; ante, § 144.

[405] Rex v. Wheatly, 2 Burrow, 1125, 1 W. Bl. 273, Beale's Cas. 97.

[406] Rex v. Wheatly, 2 Burrow, 1125, 1 W. Bl. 273, Beale's Cas. 97;

This distinction was clearly brought out in a leading English case,[407] in which a brewer was indicted for a cheat in delivering sixteen gallons of beer for and as eighteen gallons, which he had contracted to deliver, and obtaining pay for the latter amount. It was held that this was not an indictable offense. Lord Mansfield said: "That the fact here charged should not be considered as an indictable offense, but left to a civil remedy by an action, is reasonable and right in the nature of the thing, because it is only an inconvenience and injury to a private person arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not. The offense that is indictable must be such a one as affects the public, as if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing; so, if a man defrauds another, under false tokens; for these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat; for ordinary care and caution is no guard against this. Those cases are much more than mere private injuries; they are public offenses. But here it is a mere private imposition or deception. No false weights or measures are used, no false tokens given, no conspiracy; only an imposition upon the person he was dealing with in delivering him a less quantity instead of a greater which the other carelessly accepted. 'Tis

Rex v. Lara, 2 Leach, C. C. 652, 2 East, P. C. 827, 6 Term R. 565; Reg. v. Eagleton, Dears. C. C. 376; Rex v. Bryan, 2 Strange, 866; Com. v. Warren, 6 Mass. 72; State v. Justice, 2 Dev. (N. C.) 199; People v. Miller, 14 Johns. (N. Y.) 371; People v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256; Ranney v. People, 22 N. Y. 413; Hartmann v. Com., 5 Pa. 60; Com. v. Hickey, 2 Pars. Sel. Cas. (Pa.) 317; Wright v. People, 1 Ill. 102; Middleton v. State, Dudley (S. C.) 275, Mikell's Cas. 57; People v. Garnett, 35 Cal. 470, 95 Am. Dec. 125; State v. Renick, 33 Or. 584, 56 Pac. 275. Compare, as contra, Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441.

See, also, Steph. Dig. Crim. Law, art. 338.

[407] Rex v. Wheatly, supra.

only a nonperformance of his contract, for which nonperformance he may bring his action."[408]

(B) False Private Tokens.

352. In general.—To fraudulently obtain property by means of a false token not of such a nature as to affect the public generally was not an offense at common law, but it has been made so in some jurisdictions by statute.

353. Common law.

At common law, as we have seen, it was an indictable offense to cheat by means of false tokens of such a nature as to deceive or affect the public at large.[409] It was not an offense, however, to use mere private tokens.[410]

354. Statutes.

This was changed in England by the statute of 33 Hen. VIII. c. 1, making all cheats by false tokens indictable, whether of a public or a private nature.[411] This statute is old enough to be

[408] In Reg. v. Jones, 2 Ld. Raym. 1013, 1 Salk. 379, Mikell's Cas. 845, the defendant had obtained money from the prosecutor by pretending to be sent for it by a person who had not sent him. The court said: "It is not indictable, unless he came with false tokens. We are not to indict one man for making a fool of another; let him bring his action." And see Rex v. Bryan, 2 Strange, 866.

The giving of a check on a bank by one who has no account there, and falsely representing that it is good, is not a common-law cheat. Rex v. Lara, 2 Leach, C. C. 647, 2 East, P. C. 819.

It is not an indictable cheat at common law to obtain money or goods by means of a fraudulent promise to send a pledge, or to pay. See Nehuff's Case, 1 Salk. 151; Hartmann v. Com., 5 Pa. 60.

Nor is it cheating at common law to induce another to purchase a promissory note that has been paid, by falsely and fraudulently representing that it is unpaid. Middleton v. State, Dudley (S. C.) 275, Mikell's Cas. 57.

[409] Ante, §§ 350, 351.

[410] Rex v. Lara, 2 Leach, C. C. 652, 2 East, P. C. 819, 6 Term R. 565; State v. Renick, 33 Or. 584, 56 Pac. 275.

[411] See 3 Chit. Crim. Law, 996, Mikell's Cas. 845.

a part of our common law, and has been recognized as in force in some of the states,[412] though not in all.[413] In some states similar statutes have been enacted.[414]

To constitute a false token within the meaning of such a statute, there must be something more than a mere verbal lie. There must be something real and visible, as a ring, a key, a seal or other mark, or some writing.[415] And it has been held that even a writing will not suffice unless it be in the name of another than the accused, or be so framed as to afford more credit than the mere assertion of the party defrauding.[416]

It has been said that a statute punishing the obtaining of property by "color of any false token or writing" applies whenever the fraud is effected by making a token or writing appear to be different from what it really is, or by representing a false token or a false writing to be genuine.[417]

[412] Com. v. Warren, 6 Mass. 72.

[413] Com. v. Hutchinson, 1 Clark (Pa.) 250.

[414] In some states, the statute is somewhat broader, punishing the obtaining of property "by color of any false token or writing." See Jones v. State, 50 Ind. 473; People v. Gates, 13 Wend. (N. Y.) 320.

[415] 3 Chit. Crim. Law, 997. And see Tatum v. State, 58 Ga. 409; State v. Renick, 33 Or. 584, 56 Pac. 275; State v. Delyon, 1 Bay (S. C.) 353.

The statute against obtaining property by false tokens does not apply where a person induces another to buy a blind horse by falsely representing that it is sound. State v. Delyon, supra. And see Tatum v. State, supra.

Nor does it apply where a man assumes a fictitious name, and represents that he is unmarried, and by this means, together with a promise to marry, obtains money from a woman. State v. Renick, supra.

[416] 3 Chit. Crim. Law, 997, citing 2 East, P. C. 689.

[417] Wagoner v. State, 90 Ind. 504. And see Jones v. State, 50 Ind. 473.

The writing must purport to be the act of some person, at least. Therefore, a writing in the form of a note or bond, but which has no signature, and does not purport to have a signature, is not within the statute. People v. Gates, 13 Wend. (N. Y.) 320.

The statute does not apply where a genuine writing is used to perpetrate a fraud. Shaffer v. State, 82 Ind. 221.

(C) False Pretenses.

355. In General.—To obtain property by mere false and fraudulent representations, without the use of false weights, measures, or tokens, was not an offense at common law, but in most jurisdictions it is now punished by statute. The statutes vary somewhat in their terms, but they all, in substance, punish the fraudulent obtaining of the property of another by any false pretense. To constitute this offense:

1. The pretense may be made either by written or spoken words, or by conduct alone.
2. There must be something more than mere failure to disclose facts.
3. The pretense must be a representation of a fact as existing or as having existed. It must not be—
   (a) A statement as to future events, as a prediction, or a statement of intention or expectation.
   (b) A mere promise.
   (c) A mere expression of opinion or belief.
   (d) Mere dealers' talk or puffing.
4. The pretense must be false, and it must be so at the time the property is obtained.
5. It must be reasonably calculated to deceive, but it must be considered with reference to the capacity and condition of the particular person to whom it is made.
6. It must be made—
   (a) With knowledge that it is false.
   (b) With intent to defraud.
   (c) With intent to deprive the owner wholly of his property.
7. It must deceive the person to whom it is made. Therefore, it must be relied upon by him, and be a direct and proximate cause of his parting with the property. But it need not be the sole inducement.
8. By the weight of authority, negligence of the person defrauded is no defense.

9. The pretense must result in the obtaining of the property. Therefore,

(a) The property must be actually obtained.

(b) The property, as distinguished from the mere possession, must be parted with.

10. The person to whom the pretense is made must be defrauded. Injury must be sustained.

11. The thing obtained must be within the terms of the statute.

Reason for the Statutes.—The statutes punishing as a crime the obtaining of another's property by false pretenses were intended to remedy two supposed defects in the common law. As has just been shown, it is not an indictable cheat at common law to fraudulently obtain money or goods from another by mere false pretenses, without the use of any false token, weight, or measure.[418] Nor does it amount to larceny where the owner intends to part with his *property* in the money or goods.[419] It is to reach these cases that the statutes were originally enacted.

The English Statutes.—The original English statute was that of 30 Geo. II. c. 24, which made it a criminal offense for any person to "knowingly and designedly, by false pretense or pretenses, * * * obtain from any person or persons money, goods, wares, or merchandise, with intent to cheat or defraud any person or persons of the same."[419a] After this came the statute of 7 & 8 Geo. IV. c. 30, § 53, punishing any person who should "by any false pretense obtain from any other person any chattels, money, or valuable security, with intent to cheat or defraud any person of the same." This language was also adopted by the present statute of 24 & 25 Vict. c. 96, § 88.

The Statutes in the United States.—In this country the stat-

[418] Ante, § 351.

[419] Ante, § 318.

[419a] Mikell's Cas. 846.

utes vary in the different states. Many of them follow the English statute of Geo. II., but some are broader.[420]

356. The False Pretense—In General.

To constitute the offense of obtaining property by a false pretense, it is clear that some pretense must be made.[421] The statutes, however, do not require that any false token shall be used. A mere lie or false representation is sufficient.[422] A pretense, within the meaning of the statutes, is a representation of a fact as existing or as having existed in the past.[423]

357. How the Pretense may be Made.

The false representation or pretense may be, and generally is, verbal or in writing,[424] but it need not be so. It may be by conduct alone, without any words at all, either written or spoken.[425]

[420] See, generally, Ranney v. People, 22 N. Y. 413; State v. Vanderbilt, 27 N. J. Law, 328.

[421] See Reg. v. Jones [1898] 1 Q. B. 120; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744.

[422] Reg. v. Woolley, 3 Car. & K. 98, 1 Den. C. C. 559, 4 Cox, C. C. 193; Young v. Rex, 3 Term R. 98; Com. v. Burdick, 2 Pa. 164, 44 Am. Dec. 186; People v. Johnson, 12 Johns. (N. Y.) 292; State v. Vanderbilt, 27 N. J. Law, 328.

[423] Reg. v. Hazelton, L. R. 2 C. C. 134; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Jackson v. People, 126 Ill. 139, 18 N. E. 286; People v. Johnson, 12 Johns. (N. Y.) 292; Taylor v. Com., 94 Ky. 281, 22 S. W. 217; People v. Reynolds, 71 Mich. 348, 38 N. W. 923; People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73; Com. v. Moore, 99 Pa. 574; State v. Moore, 111 N. C. 667, 16 S. E. 384.

[424] It may be by means of an advertisement in a newspaper, or elsewhere. See Jackson v. People, 126 Ill. 139, 18 N. E. 286; Reg. v. Cooper, 1 Q. B. Div. 19, 13 Cox, C. C. 123.

[425] Rex v. Barnard, 7 Car. & P. 784, Beale's Cas. 727; Reg. v. Goss, Bell, C. C. 208, 8 Cox, C. C. 262, Beale's Cas. 737; Reg. v. Bull, 13 Cox, C. C. 608; Rex v. Story, Russ. & R. 80; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271; Blum v. State, 20 Tex. App. 592, 54 Am. Rep. 530; Brown v. State, 37 Tex. Cr. R. 104, 38 S. W. 1008, 66 Am. St. Rep. 794; State v. Wilkerson, 98 N. C. 696, 3 S. E. 683; Com. v. Wallace, 114 Pa. 412, 6 Atl. 685, 60 Am. Rep. 353.

Thus, in a leading English case it was held that an indictment would lie under the statute against a person who had fraudulently obtained goods from a tradesman at Oxford by wearing a cap and gown, and thus by his conduct giving the impression that he was a member of the University.[426] The principle also applies where a man obtains money or goods by giving a worthless check, knowing that he has no funds in the bank, and having no reason to suppose that the check will be paid.[427]

A false personation is a false pretense.[427a] To prosecute a

[426] Rex v. Barnard, 7 Car. & P. 784, Beale's Cas. 727.

It is a false pretense for a person to present a money order for payment at the post office, and falsely assume to be the person mentioned in the order, though he may not make any verbal false representation. Rex v. Story, Russ. & R. 80.

The presentation of a bank note as good, knowing that the bank by which it was issued has stopped, is a false pretense by conduct. Per Crompton, J., in Evan's Case, Bell, C. C. 192, 8 Cox, C. C. 259, Mikell's Cas. 851, n. See, also, Com. v. Stone, 4 Metc. (45 Mass.) 43; People v. Bryant, 119 Cal. 595, 51 Pac. 960; State v. Bourne, 86 Minn. 432, 90 N. W. 1108.

Where it appears that the note may ultimately be paid there can be no conviction. Rex v. Spencer, 3 Car. & P. 420, Mikell's Cas. 850. See post, § 362.

Merely to enter an eating house and order a meal and eat it without at the time having money to pay for it is not a false pretense. Reg. v. Jones [1898] 1 Q. B. 119, Mikell's Cas. 853.

[427] Reg. v. Hazelton, L. R. 2 C. C. 134; Rex v. Jackson, 3 Camp. 370; Lesser v. People, 73 N. Y. 78; Barton v. People, 135 Ill. 409, 25 N. E. 776, 25 Am. St. Rep. 375; Com. v. Wallace, 114 Pa. 412, 6 Atl. 685, 60 Am. Rep. 353; Com. v. Devlin, 141 Mass. 430, 6 N. E. 64. Contra, Brown v. State, 37 Tex. Cr. R. 104, 38 S. W. 1008, 66 Am. St. Rep. 794.

Giving a postdated check or bill of exchange may be a false pretense. Rex v. Parker, 7 Car. & P. 825, 2 Mood. C. C. 1; Reg. v. Hughes, 1 Fost. & F. 355.

The paper used as a false token need not be such that if genuine it would be of legal validity. State v. Southall, 77 Minn. 296, 79 N. W. 1007.

The mere fact that defendant's bank account was overdrawn does not constitute the offense. State v. Johnson, 77 Minn. 267, 79 N. W. 968.

[427a] State v. Marshall (Vt.) 59 Atl. 916.

claim to judgment and collect it, or to fabricate circumstances that will induce another to do so in good faith, is not a false pretense, though the claim is in fact fraudulent.[427b]

358. Nondisclosure of Facts.

Mere silence or failure to disclose facts can rarely, if ever, amount to a false pretense, provided there is no such conduct as to amount to a representation.[427c] Thus, it has been held that an indictment will not lie against an insolvent person for purchasing goods on credit without disclosing the fact of his insolvency, if there is no misrepresentation as to his condition.[428] Mere nondisclosure must be distinguished from false representation by conduct.[429]

359. Statements as to Future Events and Promises.

(*a*) *In General.*—It has been repeatedly held that predictions, or other statements as to future events, not being representations as to existng or past facts, are not false pretenses within the meaning of the statutes, even though the person making them may believe or know that they will not be fulfilled.[430] Thus, it has been held that an indictment will not lie against a person who obtains money or property from another by falsely stating that the other's property is about to be attached.[431]

(*b*) *Statements of intention or expectation,* since they relate to the future, are not false pretenses, within the meaning of the statutes, even though the person making them may not intend or

[427b] Com. v. Harkins, 128 Mass. 79; Hunter v. State (Tex. Cr. App.) 81 S. W. 730.

[427c] See Crawford v. State, 117 Ga. 247, 43 S. E. 762.

[428] Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

[429] See ante, § 357, and the cases there referred to.

[430] Rex v. Bradford, 1 Ld. Raym. 366; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; State v. Kingsley, 108 Mo. 135, 18 S. W. 994; Ranney v. People, 22 N. Y. 413; People v. Blanchard, 90 N. Y. 314; Com. v. Burdick, 2 Pa. 164, 44 Am. Dec. 186; Burrow v. State, 12 Ark. 65. Compare In re Greenough, 31 Vt. 290.

[431] Burrow v. State, 12 Ark. 65.

expect what he says, and though he may make the statements fraudulently.[432] Thus, it has been held that an indictment will not lie under these statutes against a man who obtains money from a woman by falsely stating that he intends to marry her,[433] or against a person who obtains board at a hotel by falsely telling the proprietor that he expects a check at a certain time;[434] or against a person who obtains money or property by false statements as to the purpose for which he intends to use it.[435]

(*c*) *Promises,* like predictions and statements of intention, relate to the future, and they do not fall within the statutes against false pretenses, even when they are made with fraudulent intent, and with the intention of not performing them.[436] Thus, it has been held that the statutes do not apply to the obtaining

[432] Reg. v. Woodman, 14 Cox, C. C. 179; Reg. v. Lee, Leigh & C. 309, 9 Cox, C. C. 304, Mikell's Cas. 851; Reg. v. Johnston, 2 Mood. C. C. 254; Com. v. Moore, 99 Pa. 574; State v. Kingsley, 108 Mo. 135, 18 S. W. 994; Com. v. Warren, 94 Ky. 615, 23 S. W. 193.

[433] Reg. v. Johnston, 2 Mood. C. C. 254.

[434] State v. Kingsley, 108 Mo. 135, 18 S. W. 994.

[435] Reg. v. Lee, Leigh & C. 309, 9 Cox, C. C. 304, Mikell's Cas. 851; Reg. v. Woodman, 14 Cox, C. C. 179; State v. DeLay, 93 Mo. 98, 5 S. W. 607; Com. v. Warren, 94 Ky. 615, 23 S. W. 193.

In Reg. v. Lee, 9 Cox, C. C. 304, Leigh & C. 309, Mikell's Cas. 851, the prosecutor lent £10 to the prisoner, on the false pretense that he was going to pay his rent, and testified that if the prisoner had not told him that he was going to pay his rent he would not have lent the money. It was held that this was not a false pretense of any existing fact, and that a conviction could not be sustained.

[436] Rex v. Goodhall, Russ. & R. 461, Beale's Cas. 725; Rex v. Bradford, 1 Ld. Raym. 366; Ranney v. People, 22 N. Y. 413; People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; Com. v. Moore, 89 Ky. 542, 12 S. W. 1066; State v. Kingsley, 108 Mo. 135, 18 S. W. 994; Com. v. Burdick, 2 Pa. 164, 44 Am. Dec. 186; Strong v. State, 86 Ind. 210, 44 Am. Rep. 292; State v. Magee, 11 Ind. 154; Dillingham v. State, 5 Ohio St. 280; State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271.

"Any representation or assurance in relation to a future transaction may be a promise or covenant or warranty, but cannot amount to a statutory false pretense." Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744.

of money or property by a promise to pay in the future,[437] or to apply the proceeds of an expected remittance,[437a] or to send or furnish goods,[438] or to marry,[439] or to procure employment.[440]

(*d*) *Statements as to Future Events Accompanied by Statements of Fact.*—If a statement as to future events, as a prediction, promise, or statement of intention, is accompanied by a false representation as to an existing or past fact, and this representation is relied upon, and is one of the inducements for parting with the property, an indictment will lie,[441] for a pretense, to come within the statute, need not be the sole inducement.[442] In such a case, however, the indictment is based upon

[437] Rex v. Goodhall, Russ. & R. 461, Beale's Cas. 725; People v. Tompkins, 1 Park. Cr. R. (N. Y.) 238.

[437a] State v. Whidbee, 124 N. C. 796, 32 S. E. 318.

[438] State v. Haines, 23 S. C. 170.

[439] Reg. v. Johnston, 2 Mood. C. C. 254.

[440] Ranney v. People, 22 N. Y. 413. But see post, § 359d, note 441.

[441] Reg. v. Bates, 3 Cox, C. C. 201; Rex v. Asterley, 7 Car. & P. 191; Reg. v. West, Dears. & B. C. C. 575, 8 Cox, C. C. 12; Reg. v. Jennison, Leigh & C. 157, 9 Cox, C. C. 158, Beale's Cas. 742; Reg. v. Speed, 15 Cox, C. C. 24; Com. v. Wallace, 114 Pa. 413, 6 Atl. 685, 60 Am. Rep. 353; Boscow v. State, 33 Tex. Cr. R. 390, 26 S. W. 625; State v. Thaden, 43 Minn. 326, 45 N. W. 614; Donohoe v. State, 59 Ark. 377, 27 S. W. 226; Com. v. Moore, 89 Ky. 542, 12 S. W. 1066.

Thus, the statute applies where a person obtains money from another, not only by pretending that he will cure a disease, but also by falsely representing that he is a regular physician, and a member of a medical institute. Boscow v. State, supra; Jules v. State, 85 Md. 305, 36 Atl. 1027.

The same is true where a promise to procure a position for another is accompanied by a false representation of ability to do so, or a false representation that there is a certain position open. People v. Winslow, 39 Mich. 507; Com. v. Parker, Thach. C. C. (Mass.) 24. Ranney v. People, 22 N. Y. 413, which is to the contrary, cannot be sustained.

The same is true where a man's promise to furnish a house and marry a woman is accompanied by a false representation that he is a single man. Reg. v. Jennison, Leigh & C. 157, 9 Cox, C. C. 158, Beale's Cas. 742.

[442] Post, § 365c.

the false representation of fact, and not upon the prediction, promise, or statement of intention. If the former is not relied upon, and the latter is the sole inducement, an indictment will not lie.[443]

360. Expression of Opinion or Belief.

A mere expression of opinion or belief is not a false pretense within the statutes. And it can make no difference that the opinion expressed is not in fact entertained.[444] For example, it has been held that an indictment cannot be maintained for a fraudulent expression of opinion as to the value of property,[445] or as to the wealth of a person,[446] or for a statement that land is "nicely located."[447] This rule does not apply, however, where a statement, though in the form of an opinion, really involves a statement as to existing or past facts.[448]

361. "Dealers' Talk" or "Puffing."

The statutes are not intended to cover statements known as "dealers' talk" or "puffing," or mere exaggerated statements by the seller of land or goods as to the quality or value thereof, made for the purpose of inducing another to buy them, for such

[443] People v. Tompkins, 1 Park. Cr. R. (N. Y.) 238.

Where the prisoner obtained goods by sending the half of a bank note, the conviction was sustained on the theory that the sending was a representation that prisoner had the other half of the note, it appearing that it was in fact in the hands of another. Reg. v. Murphy, Ir. Rep. 10 C. L. 508, Mikell's Cas. 852.

[444] People v. Jacobs, 35 Mich. 36; Com. v. Stevenson, 127 Mass. 448; People v. Gibbs, 98 Cal. 661, 33 Pac. 630; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; Rothschild v. State, 13 Lea (Tenn.) 300; State v. Daniel, 114 N. C. 823, 19 S. E. 100.

[445] Com. v. Wood, 142 Mass. 461, 8 N. E. 432; People v. Gibbs, 98 Cal. 661, 33 Pac. 630; People v. Jacobs, 35 Mich. 38. Compare People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73.

[446] Com. v. Stevenson, 127 Mass. 448. And see Rothschild v. State, 13 Lea (Tenn.) 300.

[447] People v. Jacobs, 35 Mich. 36.

[448] People v. Peckens, 153 N. Y. 576, 47 N. E. 883.

statements are to be expected, and persons are not supposed to rely upon them.[449] There is a point, however, beyond which a seller of land or goods cannot go. If he fraudulently makes a positive false representation of fact as to the quality or condition of an article, or of the quality or location, etc., of land, to induce another to purchase it, he may render himself liable to indictment.[450]

362. Falsity of Pretense.

To constitute the offense of obtaining property by a false pretense, the pretense must be false. The offense is not committed by one who obtains another's property by means of a pretense which is true, though he may believe it is false,[451] for the law does not undertake to punish a mere criminal intent.[452] It is also necessary that the pretense shall be false, not only when made, but also when the property is obtained.[453] When several pretenses are made, the fact that some of them are true will not prevent an indictment, if the person to whom they are made is partly influenced by those which are false.[454]

[449] Reg. v. Bryan, Dears. & B. C. C. 265, 7 Cox, C. C. 313, Beale's Cas. 729, Mikell's Cas. 855 (as to which see Steph. Dig. Crim. Law, p. 273, note 3); People v. Morphy, 100 Cal. 84, 34 Pac. 623; State v. Heffner, 84 N. C. 752.

[450] See Reg. v. Goss, Bell, C. C. 208, 8 Cox, C. C. 262, Beale's Cas. 737; Reg. v. Ragg, Bell, C. C. 214, 8 Cox, C. C. 265; Reg. v. Ardley, L. R. 1 C. C. 301, 12 Cox, C. C. 23, Mikell's Cas. 864; Reg. v. Roebuck, Dears. & B. C. C. 24, 7 Cox, C. C. 126; State v. Stanley, 64 Me. 157; Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397; State v. Burke, 108 N. C. 750, 12 S. E. 1000; People v. Bryant, 119 Cal. 595, 51 Pac. 960.

[451] State v. Asher, 50 Ark. 427, 8 S. W. 177, Beale's Cas. 229; State v. Garris, 98 N. C. 733, 4 S. E. 633; People v. Reynolds, 71 Mich. 348, 38 N. W. 923.

Thus, it was held in State v. Garris, supra, that an indictment could not be maintained against a person who, with intent to defraud, and believing his statement to be false, represented that a crop was not mortgaged, where a mortgage which was intended to cover the crop failed to do so because of a defect in the description.

[452] Ante, §§ 116-118.

[453] See In re Snyder, 17 Kan. 555, 2 Am. Cr. R. 238.

[454] Reg. v. Lince, 28 Law Times (N. S.) 570.

363. Pretenses not Calculated to Deceive.

It has been held that the pretense, to come within the statute, must be made under such circumstances, and be of such a character, as to reasonably deceive,[455] and that it must not be clearly absurd or unreasonable.[456] In determining, however, in any particular case, whether the pretense was calculated to deceive, the intelligence and other circumstances of the person to whom it was made must be taken into consideration, the question being whether it was calculated to deceive him.[457] As was said in an Ohio case: "Even persons deprived of ordinary discretion, children, or idiots are entitled to the protection of the laws, and a man who is ineffably dull may not for that reason alone be robbed with impunity."[458]

[455] Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Watson v. People, 87 N. Y. 566, 4 Am. Rep. 397; State v. Estes, 46 Me. 150; Cowen v. People, 14 Ill. 348; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; Canter v. State, 7 Lea (Tenn.) 349.

[456] Watson v. People, supra; Woodbury v. State, supra; Com. v. Drew, supra; State v. Vanderbilt, 27 N. J. Law, 328.

[457] Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71, and other cases cited in the note following.

[458] Bartlett v. State, 28 Ohio St. 669.

There are some cases in which it has been said that the pretense must be such as is calculated to impose upon a person of ordinary prudence and caution. See Com. v. Grady, 13 Bush (Ky.) 285, 26 Am. Rep. 192; People v. Williams, 4 Hill (N. Y.) 9, 40 Am. Dec. 258; Com. v. Hickey, 2 Pars. Sel. Cas. (Pa.) 217; State v. Magee, 11 Ind. 154 (expressly overruled in Lefler v. State, 153 Ind. 82, 54 N. E. 439, 74 Am. St. Rep. 300, 45 L. R. A. 424). But this view is not sound. By the overwhelming weight of authority, the test is whether the pretense was calculated to deceive the particular person to whom it was made, and not whether it was calculated to deceive persons of ordinary intelligence, prudence, and caution. Watson v. People, 87 N. Y. 564, 41 Am. Rep. 397; Reg. v. Woolley, 3 Car. & K. 98, 1 Den. C. C. 559, 4 Cox, C. C. 193; People v. Sully, 5 Park. Cr. R. (N. Y.) 166; People v. Gilman, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218; People v. Summers, 115 Mich. 537, 73 N. W. 818; People v. Bird, 126 Mich. 631, 86 N. W. 127, Mikell's Cas. 869; State v. Southall, 77 Minn. 296, 79 N. W. 1007; Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71; Com. v. Henry, 22 Pa. 256; State v. Vanderbilt, 27 N. J. Law, 332; Ox v. State, 59 N. J.

That the existence of the alleged fact was impossible is immaterial, if the person to whom the representation was made believed it and relied upon it in parting with his property. Thus, representations by a person that he is possessed of supernatural powers, and the like, may be false pretenses.[459]

Law, 99, 35 Atl. 646; Johnson v. State, 36 Ark. 242; Cowen v. People, 14 Ill. 352; State v. Knowlton, 11 Wash. 512, 39 Pac. 966; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515. And see Reg. v. Wickham, 10 Adol. & E. 34.

"The object and purpose of the law is to protect all persons alike, without regard to the single capacity to exercise ordinary caution, a condition of mind very difficult of definition, and certainly of very different meaning under the various circumstances that may surround the person proposed to exercise it. * * * If 'ordinary caution' is to have its influence in the application of the law, it must be such ordinary caution as we may naturally and reasonably expect to exist under the circumstances and conditions of life of the person practiced upon. The question is, what caution is he capable of exercising? The main object of the law is to protect the weak against the strong, the inexperienced and unsuspecting against the experienced and vicious. There can be no rule of law caring more for the protection of the wise and cultivated than for the foolish and unlettered. It is not required that one should exercise more caution and prudence than nature has given him." Bowen v. State, 9 Baxt. (Tenn.) 45, 50. In this case, an indictment and conviction was sustained for very absurd representations, by which an ignorant and superstitious negro was imposed upon.

[459] Reg. v. Giles, Leigh & C. 502, 10 Cox, C. C. 44; Reg. v. Lawrence, 36 Law Times (N. S.) 404; Bowen v. State, 9 Baxt. (Tenn.) 45.

In Reg. v. Lawrence, supra, the defendant was convicted of attempting to obtain money upon the false pretense that he had power to communicate with the spirits of deceased and other persons, although such persons were not present in the place where he then was; and also that he had power to produce and cause to be present such spirits as aforesaid in a materialized or other form; and also that divers musical instruments produced sounds by the sole means of such spirits. It was held that he was thereby charged with falsely pretending an existing fact, and that the indictment so alleging was good.

364. The Intent.

(*a*) *Knowledge That the Representation is False.*—In some states the statute expressly requires that the person making the representation shall know that it is false. Even when the statute does not expressly so require, it is assumed that the legislature did not intend to dispense with the necessity for a criminal intent, and knowledge that the representation is false is held to be an essential element of the offense.[460]

(*b*) *Intent to Defraud.*—It is also necessary that the false representation shall be made with intent to defraud.[461] For this reason, among others, it has been held that a person is not guilty of this offense in inducing another to pay a debt that is honestly due, although he may do so by means of a pretense which he knows to be false.[462]

A false pretense made to avoid a forfeiture is not indictable.[462a] And where accused, to avoid going to work to help support his family, falsely stated to the overseer of the poor that he had no shoes and was given a pair, it was held that his act was not within the statute.[462b] If a person, however, obtains money or goods by false pretenses, he is none the less guilty because he intends to repay the money or pay for the goods,[463] for "an

[460] Watson v. People, 87 N. Y. 564, 41 Am. Rep. 397; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Com. v. Jeffries, 7 Allen (Mass.) 548; State v. Hurst, 11 W. Va. 59; People v. Getchell, 6 Mich. 496; People v. Behee, 90 Mich. 356, 51 N. W. 515; State v. Alphin, 84 N. C. 745. As to the presumption of knowledge, see Jackson v. People, 126 Ill. 139, 18 N. E. 286.

[461] Rex v. Williams, 7 Car. & P. 354; People v. Getchell, 6 Mich. 496; Com. v. Drew, 19 Pick. (Mass.) 179; Com. v. Van Tuyl, 1 Metc. (Ky.) 1, 71 Am. Dec. 455; Therasson v. People, 82 N. Y. 239; Watson v. People, 87 N. Y. 564, 41 Am. Rep. 397; People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73; Blum v. State, 20 Tex. App. 592, 54 Am. Rep. 530; People v. Wakely, 62 Mich. 303, 28 N. W. 871.

[462] Rex v. Williams, 7 Car. & P. 354, Mikell's Cas. 879; People v. Thomas, 3 Hill (N. Y.) 169, Beale's Cas. 722; post, § 368a.

[462a] Reg. v. Stone, 1 Fost. & F. 311, Mikell's Cas. 880.

[462b] Rex v. Wakeling, Russ. & R. 504.

[463] Reg. v. Naylor, L. R. 1 C. C. 4, 10 Cox, C. C. 149, Mikell's Cas. 880;

intent to defraud is consistent with an intent to undo the effect of the fraud if the offender should be able to do so."[464] That there is ability as well as intent to repay is no defense.[465] Even an offer to repay or actual repayment is no defense.[466]

(*c*) *Intent to Deprive the Owner of His Property.*—To constitute the obtaining of property by false pretenses, it is essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property in the thing obtained. The offense is not committed where the intent is merely to deprive him of the temporary possession and use.[467]

365. The Pretense as the Inducement.

(*a*) *In General.*—A man cannot be said to obtain another's property by a false pretense, unless the pretense is at least one of the inducements for the other's parting with the property. There must not only be a false and fraudulent pretense, but it is also necessary that the property shall be obtained *by means* of the pretense. The offense, therefore, is not committed if the other party does not rely upon the pretense, but makes independent inquiries or examination, and acts upon his own judgment, or upon other considerations.[468] Nor is it committed if

Com. v. Schwartz, 92 Ky. 510, 18 S. W. 775, 36 Am. St. Rep. 609; People v. Oscar, 105 Mich. 704, 63 N. W. 971; Com. v. Coe, 115 Mass. 501.

[464] Steph. Dig. Crim. Law, art. 332.

[465] State v. Thatcher, 35 N. J. Law, 445.

[466] Donohoe v. State, 59 Ark. 378, 27 S. W. 226; and cases cited in the second preceding note. And see ante, § 156.

[467] Reg. v. Kilham, L. R. 1 C. C. 261, 11 Cox, C. C. 561, Beale's Cas. 718. In this case, the prisoner, by falsely pretending to a liveryman that he was sent by another person to hire a horse for him for a drive to a certain place, obtained the horse. He returned the horse the same evening, but did not pay for the hire. It was held that this was not obtaining property by false pretenses. The case of Reg. v. Boulton, 1 Den. C. C. 508, was distinguished.

[468] Rex v. Dale, 7 Car. & P. 352; Reg. v. Mills, Dears. & B. C. C. 205, 7 Cox, C. C. 263, Beale's Cas. 727; Com. v. Drew, 19 Pick. (Mass.) 179; Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397; People v. Whiteman, 72 App. Div. 90, 76 N. Y. Supp. 211, Mikell's Cas. 876; Blum v. State, 20 Tex. App. 578, 54 Am. Rep. 530; Jamison v. State, 37 Ark. 445, 40

he knows or believes that the pretense is false,[469] or if the pretense is not made until after the property has been obtained.[470]

(*b*) *Remoteness of Pretense.*—It is also necessary that the pretense shall be a direct or proximate inducement or cause of parting with the property, and not a remote cause.[471] For this reason there are cases in which it has been held that obtaining goods from a person under a contract into which he was induced to enter by false pretenses was not indictable.[472] The mere

Am. Rep. 103; Morgan v. State, 42 Ark. 131, 48 Am. Rep. 55; Bowler v. State, 41 Miss. 578; People v. McAllister, 49 Mich. 12, 12 N. W. 891; State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271; State v. Green, 7 Wis. 676; People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73; People v. Gibbs, 98 Cal. 661, 33 Pac. 661; Fay v. Com., 28 Grat. (Va.) 918; State v. Hurst, 11 W. Va. 59.

Where defendant represented himself to be a revenue officer and obtained money from witness on threats to prosecute him for illegal liquor selling, the offense is not obtaining money by false pretenses but blackmail. Jackson v. State, 118 Ga. 125, 44 S. E. 833.

[469] Hunter v. State (Tex. Cr. App.) 81 S. W. 730; Reg. v. Mills, Dears. & B. C. C. 205, 7 Cox, C. C. 263, Beale's Cas. 727; Reg. v. Hensler, 11 Cox, C. C. 570; Thorpe v. State, 40 Tex. Cr. R. 346, 50 S. W. 383.

In Hunter v. State, supra, defendant procured insurance on his life and then disappeared under circumstances pointing to his death. The beneficiary collected the insurance by proceedings at law, and on the reappearance of defendant he was prosecuted for swindling. It was held that the insurance company was never deceived and that the courts could not be regarded as an agency of fraud.

[470] Reg. v. Brooks, 1 Fost. & F. 502; Reg. v. Jones, 15 Cox, C. C. 475; State v. Moore, 111 N. C. 672, 16 S. E. 384; State v. Willard, 109 Mo. 242, 19 S. W. 189; Chauncey v. State, 130 Ala. 71, 30 So. 403, 89 Am. St. Rep. 17.

In Reg. v. Brooks, supra, a carrier, having ordered a cask of ale, said, after he had possession of it, "This is for W." It was held that an indictment for obtaining it by falsely pretending that he was sent for it by W. could not be sustained.

[471] Reg. v. Larner, 14 Cox, C. C. 497; Reg. v. Gardner, Dears. & B. C. C. 40, 7 Cox, C. C. 136, Mikell's Cas. 870; Watson v. People, 27 Ill. App. 496. And see Wagoner v. State, 90 Ind. 507.

[472] Thus, where a person, by falsely representing himself to be a naval officer, induced another to enter into a contract with him for lodging, and several days afterwards became a boarder also, it was held that an indictment would not lie against him for obtaining the board

fact, however, that goods are obtained under contract by means of false pretenses does not necessarily render the pretense too remote. The statute applies, for instance, when a man fraudulently induces another by false pretenses to sell and deliver goods on credit. The fact that there is a contract does not render pretenses too remote.[473]

(*c*) *Other Inducements Contributing.*—By the overwhelming weight of authority it is not at all necessary that the false pretense shall be the sole inducement for parting with the property, or even that it shall be the main inducement. If it is relied upon, and is one of the inducements, an indictment will

by a false pretense. The obtaining of the board, it was held, was too remotely connected with the pretense. Reg. v. Gardner, Dears. & B. C. C. 40, 7 Cox, C. C. 136, Mikell's Cas. 870. See, also, Reg. v. Bryan, 2 Fost. & F. 567.

In an English case, the prisoner was charged with obtaining a prize in a certain swimming race by false pretenses. He obtained his competitor's ticket for the race by representing himself to be a member of a certain club, and by a letter purporting to be written by the secretary of that club. On the faith of these representations, which turned out to be false, he was allowed twenty seconds' start in the race, and won the prize. It was held that the false pretenses were too remote, and that the count charging them could not be sustained. Reg. v. Larner, 14 Cox, C. C. 497. But see Reg. v. Button [1900] 2 Q. B. 597, Mikell's Cas. 873, where the opposite result was reached on similar facts.

[473] Reg. v. Abbott, 1 Den. C. C. 273, 2 Car. & K. 630, 2 Cox, C. C. 430; Reg. v. Dark, 1 Den. C. C. 276; Reg. v. Willot, 12 Cox, C. C. 68; Com. v. Lee, 149 Mass. 179, 21 N. E. 299; People v. Martin, 102 Cal. 558, 36 Pac. 952; Wilkerson v. State, 140 Ala. 155, 36 So. 1004. And see Smith v. State, 55 Miss. 521.

On this point, see Steph. Dig. Crim. Law, art. 331, and the illustrations there given.

If there is any distinction between obtaining goods by a false pretense directly made, and obtaining goods at several times under a contract into which the seller has been entrapped by a false pretense, it has no force in a case where, the goods being obtained at different times, the accused at each time repeated the false pretense. In such a case, the sale of the goods will be referred to the false pretense thus repeated, rather than to the contract. Smith v. State, 55 Miss. 513.

lie, however many other inducements may contribute.[474] And it can make no difference that the property would not have been parted with except for the other inducements.[475]

One who according to an established custom obtains public money on the false pretense of rendering certain public services can take no benefit from the fact that there is no law authorizing payment for such services.[475a]

(*d*) *Lapse of Time—Continuing Pretense.*—An indictment will lie for obtaining property by a false pretense, notwithstanding the lapse of time between the making of the pretense and the obtaining of the money, if the pretense is relied upon and intended to be relied upon, for it may be considered as continuing.[476] The lapse of time, however, may be considered in determining whether the pretense was in fact relied upon.[477]

[474] Reg. v. Jennison, Leigh & C. 157, 9 Cox, C. C. 158, Beale's Cas. 742; Reg. v. English, 12 Cox, C. C. 171, Mikell's Cas. 868; Fay v. Com., 28 Grat. (Va.) 912; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Com. v. Lee, 149 Mass. 179; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; In re Snyder, 17 Kan. 554; Jules v. State, 85 Md. 305, 36 Atl. 305; State v. Thatcher, 35 N. J. Law, 445; People v. Miller, 2 Park. Cr. R. (N. Y.) 199; People v. Oyer & Terminer Court, 83 N. Y. 453; State v. Conner, 110 Ind. 471, 11 N. E. 454; State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Carter, 112 Iowa, 15, 83 N. W. 715; Braxton v. State, 117 Ga. 703, 45 S. E. 64; Holton v. State, 109 Ga. 127, 34 S. E. 358. See ante, § 359d.

"It is sufficient if the jury are satisfied that the unlawful purpose would not have been effected without the influence of the false pretense, added to any other circumstances which might have contributed to control the will of the injured party." State v. Thatcher, supra.

[475] Com. v. Lee, 149 Mass. 179; People v. Weir, 120 Cal. 279, 52 Pac. 656.

[475a] Berreyesa v. Ter. (Ariz.) 76 Pac. 472.

[476] Reg. v. Greathead, 38 Law Times (N. S.) 691, 14 Cox, C. C. 108; Reg. v. Welman, Dears. C. C. 188. And see State v. House, 55 Iowa, 473, 8 N. W. 307; Com. v. Lee, 149 Mass. 179, 21 N. E. 299.

In an English case, the prisoner, by means of a false wages sheet, obtained from his master a check for the amount stated in the sheet to pay the men's wages. The check was informally drawn, and refused payment by the bank. The prisoner returned it to his master, telling him of the cause of its nonpayment, and the master tore it up, and gave another. This the prisoner cashed, and he appropriated the

366. Negligence of the Person Defrauded.

It has been held in some cases that negligence of the person defrauded in relying upon the false pretense may prevent the obtaining of the property from him from being indictable, as where he has equal means of knowing or ascertaining the truth.[478] But the soundness of this view is very doubtful. One who perpetrates a fraud upon another by a representation which he knows to be false should not be allowed to say, either in a civil or a criminal case, that the other was guilty of negligence in believing him; and there are a number of cases in which this view has been taken.[479]

difference between what was really due for wages and what was falsely stated to be due. On an indictment charging him with obtaining money by false pretenses, it was objected that this evidence did not prove the charge, as he had only obtained a valueless piece of paper. It was held, however, that the false pretense was a continuing one, and that the second valuable check was obtained thereby equally with the first, and that the charge was proved. Reg. v. Greathead, supra.

[477] See Reg. v. Gardner, Dears. & B. C. C. 40, 7 Cox, C. C. 136.

[478] Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Com. v. Norton, 11 Allen (Mass.) 266, Beale's Cas. 750; Com. v. Grady, 13 Bush (Ky.) 285, 26 Am. Rep. 192; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; Buckalew v. State, 11 Tex. App. 352.

[479] See Reg. v. Woolley, 3 Car. & K. 98, 1 Den. C. C. 559, 4 Cox, C. C. 193; Reg. v. Jessop, Dears. & B. C. C. 442, 7 Cox, C. C. 399; State v. Knowlton, 11 Wash. 512, 39 Pac. 966; Crawford v. State, 117 Ga. 247, 43 S. E. 762; Com. v. Mulrey, 170 Mass. 103; Thomas v. People, 113 Ill. 537.

In Reg. v. Woolley, supra, the secretary of an Odd Fellows' lodge told a member that he owed a certain sum, and thereby obtained that sum from him, whereas he owed a less sum. It was held that this was a false pretense, within the statute, though the truth might easily have been ascertained by inquiry.

And in Reg. v. Jessop, supra, a person who fraudulently offered a £1 bank note as a note for £5, and obtained change as for a £5 note, was held guilty of obtaining money by false pretenses, though the other person could read, and the note itself, upon the face of it, clearly afforded the means of detecting the fraud.

367. The Obtaining of the Property.

(*a*) *In General.*—To constitute the offense of obtaining property by a false pretense, the property must be actually obtained.[480] Otherwise, it is at the most an attempt only. But where the owner actually parts with his property, it is immaterial that the title passes not to defendant, but to a corporation of which he is an officer.[480a]

(*b*) *The Property, and not Merely the Possession, must be Obtained.*—It was shown in a preceding section that, to constitute an obtaining of property by false pretenses, it is essential that there shall be an intention to deprive the owner *wholly* of his *property* in the chattel, and the offense is not committed where the intent is merely to obtain the temporary possession and use.[481]

It is also necessary that the *owner shall intend* to part with the *property* in the chattel. The statute does not apply where a person, by means of false and fraudulent representations, obtains the mere possession of another's property for a temporary purpose, though *he* may intend at the time to appropriate the property to his own use.[482] In such a case he is guilty of larceny.[483] The statutes do not apply, for instance, where a person merely hires or borrows property, using false pretenses to obtain possession, though he may intend to appropriate the same to his own use and deprive the owner permanently of his prop-

[480] Rex v. Buttery, cited 5 Dowl. & R. 619, 3 Barn. & C. 700; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103; Ex parte Parker, 11 Neb. 313, 9 N. W. 33.

[480a] Com. v. Langley, 169 Mass. 89, 47 N. E. 511.

[481] Ante, § 364c.

[482] Reg. v. Kilham, L. R. 1 C. C. 261, 11 Cox, C. C. 561, Beale's Cas. 718; Reg. v. Prince, L. R. 1 C. C. 150; Canter v. State, 7 Lea (Tenn.) 349, Mikell's Cas. 849; Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178; Welsh v. People, 17 Ill. 339; Miller v. Com., 78 Ky. 15, 39 Am. Rep. 194; State v. Kube, 20 Wis. 217, 91 Am. Dec. 390; State v. Buck (Mo.) 84 S. W. 951. See, also, Rex v. Hammon, 2 Leach, C. C. 1083, Russ. & R. 221, 4 Taunt. 304.

[483] Ante, § 316c.

erty therein.[484] The intention of the owner, therefore, as well as the intention of the accused, is to be considered. If the owner intends to part with the property, and not merely with the possession, the offense is the obtaining of property by false pretenses, and not larceny.[485]

In some states, by express statutory provision, a defendant indicted for false pretenses may be convicted notwithstanding the evidence may show that the offense was larceny.

368. Necessity for Injury.

(*a*) *In General.*—It is necessary, in order that a case may come within the statutes against obtaining property by false pretenses, that the person from whom it is obtained shall be defrauded. If he sustains no injury, the offense is not committed.[486] It is not obtaining property by false pretenses, within the meaning of the statutes, to induce another to pay a debt which is justly due from him, or to do any other act which he is legally bound to do, though he is induced to do so by false pretenses.[487] "A false representation by which a man may be cheated into his duty is not within the statute."[488]

[484] See the cases above cited.

[485] Rex v. Adams, Russ. & R. 225, Beale's Cas. 720; Reg. v. Thompson, Leigh & C. 233, 9 Cox, C. C. 222; People v. Johnson, 12 Johns. (N. Y.) 292; Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589; State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

[486] People v. Thomas, 3 Hill (N. Y.) 169, Beale's Cas. 722; State v. Asher, 50 Ark. 427, 8 S. W. 177; People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73; State v. Palmer, 50 Kan. 318, 32 Pac. 29; State v. Clark, 46 Kan. 65, 26 Pac. 481.

In State v. Palmer, supra, it was said: "The mere obtaining of money under false pretenses does not alone constitute a crime. The money must be obtained to the injury of some one. Though money is obtained by misrepresentation, if no injury follows, no crime is accomplished. * * * A person must be charged with and convicted of some specific offense, if convicted at all. It will not do to convict on general principles, because the evidence shows the defendant devoid of common honesty."

[487] Rex v. Williams, 7 Car. & P. 354, Mikell's Cas. 879; People v. Thomas, 3 Hill (N. Y.) 169, Beale's Cas. 169; Com. v. McDuffy, 126

A person is injured and defrauded, within the meaning of the law, if by false and fraudulent pretenses he is induced to take something different from what he bargained for. That it is of equal value is immaterial.[489] Likewise it is criminal to obtain settlement of a claim by misrepresenting one's injuries, though no more than fair compensation for injuries actually received was obtained.[489a]

(*b*) *Obtaining Charity.*—By the weight of authority the statute applies where a person obtains charity by false pretenses, as by a false begging letter. There is no want of injury because the property is given away.[490]

(*c*) *Wrong on the Part of the Person Defrauded.*—As was shown in a preceding chapter, on an indictment for obtaining property by false pretenses, it is no defense to show that the person defrauded was also in the wrong, as that he also made false pretenses with intent to defraud the accused.[491]

369. The Thing Obtained.

The statutes vary somewhat in the different jurisdictions as to the subjects of this offense. The statute of 30 Geo. II. punished

Mass. 467; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103; State v. Hurst, 11 W. Va. 54.

[488] People v. Thomas, supra.

[489] In State v. Mills, 17 Me. 211, it was held that an indictment would lie against a person for obtaining money and property for a horse by falsely representing the horse to be a horse called "The Charley," though it appeared that the horse was equal in value to the horse called "The Charley." "The horse called 'The Charley,'" it was said, "might have had the reputation of possessing qualities which rendered it desirable for the party injured to become the owner of him."

[489a] Com. v. Burton, 183 Mass. 461, 67 N. E. 419.

[490] Reg. v. Jones, 1 Den. C. C. 551, 3 Car. & K. 346, 4 Cox, C. C. 198; Reg. v. Hensler, 11 Cox, C. C. 570, 22 Law Times (N. S.) 691; Com. v. Whitcomb, 107 Mass. 486, Beale's Cas. 751; State v. Carter, 112 Iowa, 15, 83 N. W. 715; Baker v. State, 120 Wis. 135, 97 N. W. 566. And see State v. Matthews, 91 N. C. 635. Contra, People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

[491] Ante, § 157.

the obtaining of "money, goods, wares, or merchandise." The later English statutes use the words "chattels, money, or valuable security." In this country many of the statutes are much broader, using such terms as "property," "personal property," "evidence of debt," "other things of value," etc.

The term "chattels" includes only such things as are the subject of larceny at common law.[492] The term "money" has been held, though not by all courts, not to include bank notes.[493] "Property" and "personal property" are much broader terms, and include, not only everything that is the subject of larceny at common law, but also promissory notes and bills or drafts.[494] Obtaining the discharge of a debt or a credit on an account or on a note is not obtaining money or property;[495] nor is the obtaining of a judgment by consent, though the judgment is afterwards satisfied by the payment of money.[496]

Some of the states use the terms "valuable thing" or "thing of value." These terms, it has been said, include everything of a personal nature that is of value.[497] They include notes,

[492] A dog, not being the subject of larceny at common law, was held not to be within the English statute. Reg. v. Robinson, Bell, C. C. 34, Beale's Cas. 721. See, also, State v. Burrows, 11 Ired. (N. C.) 477.

In Reg. v. Boulton, 1 Den. C. C. 508, 2 Car. & K. 917, 3 Cox, C. C. 576, a railway ticket was held to be a chattel, within the meaning of the English statute. But the soundness of this decision is doubtful. See ante, § 311.

[493] Rex v. Hill, Russ. & R. 190; Com. v. Swinney, 1 Va. Cas. 146, 5 Am. Dec. 512. Contra, State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

[494] State v. Switzer, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789; People v. Reed, 70 Cal. 529, 11 Pac. 676; State v. Patty, 97 Iowa, 373, 66 N. W. 727.

[495] Rex v. Wavell, 1 Mood. C. C. 224; Moore v. Com., 8 Pa. 260, Mikell's Cas. 846; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103; State v. Moore, 15 Iowa, 412. See Reg. v. Eagleton, Dears. C. C. 515, 6 Cox, C. C. 559.

[496] Com. v. Harkins, 128 Mass. 79, Beale's Cas. 752.

[497] See State v. Thatcher, 35 N. J. Law, 445, where it was held that the words "valuable thing" included the prosecutor's own note or contract of suretyship. It was said: "The legislature intended to denounce as a crime the obtaining by deceit of every valuable thing of a personal nature. 'Other valuable thing' includes everything of value."

checks, and other evidences of debt or choses in action,[498] provided they are valid in the hands of *bona fide* holders, but not otherwise, for unless they may be enforced or used they are of no value.[499] They do not include land.[500]

Obtaining board or lodging has been held not to be obtaining property within the meaning of the Wisconsin statute,[501] but it is in terms punished in some jurisdictions.[502]

There are also statutes in most jurisdictions punishing any person who, by false pretenses, and with intent to defraud, procures another's signature to a written instrument, or to particular kinds of instruments.[503]

Property not in Existence.—The property need not be in existence at the time the pretense is made. Thus, if a person orders a thing to be manufactured for him,—as a wagon, for example,—and gets it made and delivered by falsely and fraudulently pretending to be the agent of a corporation, an indictment will lie.[504]

[498] State v. Tomlin, 29 N. J. Law, 13; State v. Porter, 75 Mo. 171; Tarbox v. State, 38 Ohio St. 581.

[499] See Robinson v. State, 53 N. J. Law, 41, 20 Atl. 753; State v. Clay, 100 Mo. 571, 13 S. W. 827. Compare, however, State v. Porter, supra.

[500] The words "money, goods, property, or other things of value" do not include land. State v. Burrows, 11 Ired. (N. C.) 477; People v. Cummings, 114 Cal. 437, 46 Pac. 284, Mikell's Cas. 847.

[501] See State v. Black, 75 Wis. 490, 44 N. W. 635, Beale's Cas. 723. And see Reg. v. Gardner, 7 Cox, C. C. 136. But see State v. Snyder, 66 Ind. 203.

[502] See State v. Kingsley, 108 Mo. 135, 18 S. W. 994.

[503] See Fenton v. People, 4 Hill (N. Y.) 126; People v. Stone, 9 Wend. (N. Y.) 182; State v. Alexander, 119 Mo. 447, 24 S. W. 1060; State v. Layman, 8 Blackf. (Ind.) 330; Moline v. State (Neb.) 100 N. W. 810.

Unless the instrument is one which takes effect without delivery, delivery, as well as signing, is necessary to complete the offense. See Com. v. Hutchison, 114 Mass. 325; Fenton v. People, 4 Hill (N. Y.) 126; State v. Clark, 72 Iowa, 30, 33 N. W. 340.

[504] Reg. v. Martin, L. R. 1 C. C. 56, 10 Cox, C. C. 383.

IV. Robbery.

370. Definition.—Robbery, which is one of the common-law felonies, is the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or by putting him in fear.[505]

Robbery includes larceny, and all the elements that are necessary to constitute larceny are also necessary to constitute robbery. Therefore,

1. **The thing taken must be the subject of larceny.**
2. **There must be both a taking and a carrying away of the property,—a trespass and an asportation.**
3. **The taking and carrying away must be with felonious intent,—that is, with a fraudulent intent to deprive the owner permanently of his property.**

The aggravating circumstances necessary to constitute robbery, as distinguished from simple larceny, are these:

1. **The property must be taken from the person of another. But if it is taken in his presence, it is taken constructively from his person.**
2. **The taking must not only be without his consent, but it must also be accomplished either by violence or by putting him in fear.**

[505] Rex v. Donnally, 1 Leach, C. C. 193; Williams v. Com., 20 Ky. L. R. 1850, 50 S. W. 240; Com. v. Snelling, 4 Binn. (Pa.) 379; Houston v. Com., 87 Va. 257; Hammond v. State, 3 Cold. (Tenn.) 129; Clary v. State, 33 Ark. 561. And see State v. Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575.

"Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale, P. C. 532. See, also, 1 Hawk. P. C. c. 16, § 19, Beale's Cas. 419; Bracton, fol. 150b, Mikell's Cas. 831.

Robbery is a "felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East, P. C. 707.

The common-law offense of robbery is "the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting in fear." Houston v. Com., 87 Va. 257, 12 S. E. 385.

371. The Subject of Robbery.

To constitute robbery at common law, the thing taken must be the subject of larceny.[506] It must therefore be something which the law recognizes as property, and it must be personal as distinguished from real property, and, at common law, something more than a mere chose in action.[507] It must also be of some value, though the slightest value to the person robbed is sufficient.[508] And it must be the property of another. A man is not guilty of robbery in taking his own property, though he may do so by violence or by putting in fear,[509] unless the person robbed has a special property therein and right to possession.[510] The property taken need not be owned by the person robbed. Actual possession or custody is sufficient as against the wrongdoer.[511]

Anything that is the subject of larceny is also the subject of robbery. If something that is not the subject of larceny at com-

[506] Rex v. Phipoe, 2 Leach, C. C. 673, 2 East, P. C. 599; State v. Trexler, 4 N. C. 188, 2 Car. Law Repos. 90, 6 Am. Dec. 558. As to what is the subject of larceny, see ante, § 304 et seq.

[507] State v. Trexler, supra, §§ 305-311.

[508] Jackson v. State, 69 Ala. 249. See Rex v. Bingley, 5 Car. & P. 602, where it was held robbery to take a piece of paper on which a memorandum was written. And see Clary v. State, 33 Ark. 561.

Property that is of no value is not the subject of robbery, any more than of larceny. See Collins v. People, 39 Ill. 233.

Thus, a void bond or note, where choses in action are made the subject of larceny by statute, is not the subject of larceny (ante, § 312), nor of robbery. Phipoe's Case, supra.

[509] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; Barnes v. State, 9 Tex. App. 128; People v. Vice, 21 Cal. 344. And see Com. v. Clifford, 8 Cush. (Mass.) 215.

Where a gambler acquires no title or even right of possession of his winnings it is not robbery for the loser to retake by violence. Sikes v. Com., 17 Ky. L. R. 1353, 34 S. W. 902; Thompson v. Com., 13 Ky. L. R. 916, 18 S. W. 1022; People v. Hughes, 11 Utah, 100, 39 Pac. 492.

[510] See ante, § 313b.

[511] Durand v. People, 47 Mich. 332, 11 N. W. 184. And see People v. Shuler, 28 Cal. 490; Brooks v. People, 49 N. Y. 436, 10 Am. Rep. 398; State v. Gorham, 55 N. H. 152; State v. Hobgood, 46 La. Ann. 855, 15 So. 406.

mon law, as a note or other evidence of a chose in action, is made the subject of larceny by statute, it becomes also the subject of robbery.[512]

372. The Taking and Carrying Away.

To constitute robbery, the property must, as in larceny, be both taken and carried away.[513] There must be an asportation as well as a trespass.[514] If a man tells another, with threats, to give up or lay down his property, and the other drops or throws it to the ground, and the assailant is apprehended before he can pick it up, or goes away without picking it up, there is no robbery, because there is no asportation.[515] To constitute an asportation, the robber, like the thief in larceny, must acquire complete control of the property at least for an instant.[516] For this reason a man does not commit robbery in seizing another's watch, if he is unable to break the chain, and relinquishes his effort to take it.[517] The slightest asportation is sufficient. If the assailant acquires complete possession and control of the property, even for an instant, the offense is complete, though he immediately afterwards drops or abandons it, or returns it to the person robbed.[518]

[512] See Collins v. People, 39 Ill. 233; Turner v. State, 1 Ohio St. 422; State v. Gorham, 55 N. H. 152.

[513] As in larceny, so in robbery, the property may be taken from the constructive possession of the owner, though the robber may have it in his own hand. In James v. State, 53 Ala. 380, the accused, while he was traveling in company with the owner of goods, was intrusted with them to help carry them along, and, while so intrusted with them, he carried them off by violence feloniously exerted against the person of the owner. It was held that this was robbery, as the owner had constructive possession up to the time of the felonious violence.

A person cannot be robbed of his property if it is in the possession of another. Rex v. Fallows, 5 Car. & P. 508. And see Reg. v. Rudick, 8 Car. & P. 237.

[514] 3 Inst. 69; 1 Hale, P. C. 533; Rex v. Farrell, 1 Leach, C. C. 322, note; Com. v. Clifford, 8 Cush. (Mass.) 215.

[515] 1 Hale, P. C. 533; Rex v. Farrell, 1 Leach, C. C. 322, note.

[516] Ante, §§ 321, 322.

[517] Ante, § 322.

[518] "If A. have his purse tied to his girdle, and B. assaults him to

373. Taking from the Person or in the Presence of Another.

It is said that, to constitute robbery, the property must be taken from the *person* of another, and in theory this is true.[519] But it is not to be understood from this that the taking must be from the person in the popular and strict sense. If property is taken in the *presence* of the owner, it is, in contemplation of law, taken from his person.[520] A man is guilty of robbery, there-

rob him, and, in struggling, the girdle breaks, and the purse falls to the ground, this is no robbery, because no taking. But if B. take up the purse, or if B. had the purse in his hand, and then the girdle break, and, striving, lets the purse fall to the ground, and never takes it up again, this is a taking and a robbery." 1 Hale, P. C. 533. And see Rex v. Lapier, 1 Leach, C. C. 320, 2 East, P. C. 557, 708; Rex v. Peat, 1 Leach, C. C. 228.

In Rex v. Lapier, supra, which is a leading case, it was held that there was a sufficient taking and asportation to constitute robbery, where the accused tore an earring from a lady's ear, but dropped it in her hair, since it was "in his possession for a moment," though almost instantly lost.

And in Rex v. Peat, supra, it was held that a person who took a purse of money from another by putting him in fear was guilty of robbery, though he restored it to him immediately, saying, "If you value your purse, take it back, and give me the contents," and was apprehended before the contents were delivered to him.

[519] 1 Hale, P. C. 532; 1 Hawk. P. C. c. 34, p. 147; Rex v. Phipoe, 2 Leach, C. C. 673, 2 East, P. C. 599; Stegar v. State, 39 Ga. 583, 99 Am. Dec. 472; People v. Beck, 21 Cal. 385; Kit v. State, 11 Humph. (Tenn.) 167; State v. Leighton, 56 Iowa, 595, 9 N. W. 896.

An indictment for robbery, therefore, is fatally defective if it does not allege that the property was taken from the person of another. Stegar v. State, and other cases cited above.

In People v. Beck, supra, an indictment which alleged that the property was taken "from another person," instead of "from the person" of another, was held fatally defective as an indictment for robbery.

[520] 1 Hale, P. C. 532; Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699; Reg. v. Selway, 8 Cox, C. C. 235, Beale's Cas. 700; Crews v. State, 3 Coldw. (Tenn.) 350; State v. Calhoun, 72 Iowa, 432, 34 N. W. 194, 2 Am. St. Rep. 252; Clements v. State, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; Turner v. State, 1 Ohio St. 422; Hill v. State, 42 Neb. 503, 60 N. W. 916; Croker v. State, 47 Ala. 53; Houston v. Com., 87 Va. 257, 12 S. E. 385; U. S. v. Jones, 3 Wash. C. C. 209, 216, Fed. Cas. No. 15,494.

fore, and not merely of larceny, if he comes into another's presence, and, after putting him in fear, drives away his cattle, or compels him to open his safe and takes money therefrom, or compels him to throw down his purse and picks it up.[521] It is not even necessary that the taking shall be in the immediate presence of the owner. It is enough if the property is so near that it can be said to be in his personal custody and care,—as where it is in another room of the house where he is,—and if the taking of it is accomplished by violence or by putting him in fear.[522]

374. Force or Violence.

In robbery the taking of the property must not only be without the consent of the owner, so as to amount to a trespass, but

[521] Wright's Case, Style, 156, Mikell's Cas. 831. "In robbery, it is sufficient if the property be taken in the presence of the owner. It need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him, or, having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse, which the other, in his fright, had thrown into a bush, or his hat, which had fallen from his head." 2 East, P. C. 707.

It is robbery where train robbers drive an express messenger out of his car and then blow open the safe and take the money therefrom. State v. Kennedy, 154 Mo. 268, 55 S. W. 293.

[522] Reg. v. Selway, 8 Cox, C. C. 235, Beale's Cas. 700; Hill v. State, 42 Neb. 503, 60 N. W. 916, Mikell's Cas. 834; State v. Calhoun, 72 Iowa 432, 34 N. W. 194, 2 Am. St. Rep. 252; Clements v. State, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385.

In Clements v. State, supra, it was held that where a person was in his smoke house, within fifteen steps from his dwelling house, all the property in the dwelling house was in his immediate possession and control, and where he was prevented by threats and intimidation from leaving the smoke house, and returning to the dwelling house, until the dwelling house was entered, and property stolen therefrom, the offense was robbery.

In State v. Calhoun, supra, the accused went into the dwelling house of a lady, and, by violence and intimidation, extorted information as to where her valuables were, and then, leaving her tied in one room, went into another room, and took her watch and money. It was held that this was a taking in her presence, and constituted robbery.

it must be accompanied by violence, actual or constructive. As we shall see in a subsequent section, putting in fear is constructive violence. When there is no putting in fear, there must be actual violence. Sufficient force must be used to overcome resistance, and the mere force that is required to take possession, when there is no resistance, is not enough.[523] For example, it is not robbery to obtain property from the person or in the presence of another by a mere trick, and without force, or to pick another's pocket without using more force than is necessary to lift the property from the pocket.[524] Nor is it robbery to suddenly snatch property from another, when there is no resistance, and no more force, therefore, than is necessary to the mere act of snatching,[525] or to strike property from another's hand, and then snatch it up and run off with it.[526] If there is any injury to the person of the owner, or if he resists the attempt to rob him, and his resistance is overcome, there is sufficient violence to make the taking robbery, however slight the resistance. Robbery is committed if there is any struggle to retain possession, or if there is any injury or actual violence to the person of the owner in the taking of the property.[527] It has been held rob-

[523] Rex v. Horner, 1 Leach, C. C. 291, note, 2 East, P. C. 703; Rex v. Gnosill, 1 Car. & P. 304; State v. John, 5 Jones (N. C.) 163, 69 Am. Dec. 777; Hall v. People, 171 Ill. 540, 49 N. E. 495; State v. Miller, 83 Iowa, 291, 49 N. W. 90; Williams v. Com., 20 Ky. L. R. 1850, 50 S. W. 240; Brennon v. State, 25 Ind. 403; Spencer v. State, 106 Ga. 692, 32 S. E. 849.

[524] State v. John, supra; Fanning v. State, 66 Ga. 167; Thomas v. State, 91 Ala. 34, 9 So. 81.

[525] Reg. v. Walls, 2 Car. & K. 214; Rex v. Macauley, 1 Leach, C. C. 287; Rex v. Baker, 1 Leach, C. C. 290, 2 East, P. C. 702; Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110; State v. Trexler, 2 Car. Law Repos. (N. C.) 90, 6 Am. Dec. 558; People v. Hall, 6 Park. Cr. R. (N. Y.) 642; McCloskey v. People, 5 Park. Cr. R. (N. Y.) 299; Bonsall v. State, 35 Ind. 460; Spencer v. State, 106 Ga. 692, 32 S. E. 849; Jackson v. State, 114 Ga. 826, 40 S. E. 1001, 88 Am. St. Rep. 60. Contra, under the Iowa statute, State v. Carr, 43 Iowa, 518.

[526] Rex v. Francis, 2 Strange, 1015, 2 East, P. C. 708, Beale's Cas. 699; People v. McGinty, 24 Hun (N. Y.) 62.

[527] Rex v. Davies, 1 Leach, C. C. 290, note, 2 East, P. C. 709, Mikell's

bery for a person to seize another's watch or purse, and use sufficient force to break a chain or guard by which it is attached to his person,[528] or to run against another, or rudely push him about, for the purpose of diverting his attention and robbing him, and thus take a purse from his pocket.[529] The fact, therefore, that surprise aids the force employed to accomplish the taking will not prevent the force from aggravating the offense, so as to make it robbery.[530] And it makes no difference that the victim does not know that he is being robbed.[531]

The taking itself must be by violence, and it follows, therefore, that the violence must precede or accompany the act of taking. Violence after the taking—as where a man picks another's pocket or snatches property, and when detected or seized, uses violence to retain possession or to escape—cannot make the offense robbery.[532]

Cas. 832; Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110; Com. v. Snelling, 4 Binn. (Pa.) 379; Jackson v. State, 69 Ala. 249; State v. Trexler, 2 Car. Law Repos. (N. C.) 90, 6 Am. Dec. 558; State v. Gorham, 55 N. H. 152; Spencer v. State, 106 Ga. 692, 32 S. E. 849; Jones v. Com., 112 Ky. 689, 66 S. W. 633, 57 L. R. A. 432, 99 Am. St. Rep. 330; Smith v. State, 117 Ga. 320, 43 S. E. 736, 97 Am. St. Rep. 165.

To snatch an earring from a woman's ear by tearing her ear has been held sufficient violence to make the offense robbery. Rex v. Lapier, 1 Leach, C. C. 320, 2 East, P. C. 557, 708.

So, where a diamond pin was snatched from a lady's headdress with such force as to remove with it part of her hair. Rex v. Moore, 1 Leach, C. C. 335.

[528] Rex v. Mason, Russ. & R. 419; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; State v. Broderick, 59 Mo. 318; Smith v. State, 117 Ga. 320, 43 S. E. 736, 97 Am. St. Rep. 165.

[529] See Seymour v. State, 15 Ind. 288; Com. v. Snelling, 4 Binn. (Pa.) 379; Snyder v. Com., 21 Ky. L. R. 1538, 55 S. W. 679.

[530] State v. McCune, 5 R. I. 60, 70 Am. Dec. 176.

[531] Com. v. Snelling, 4 Binn. (Pa.) 379.

[532] State v. John, 5 Jones (N. C.) 163, 69 Am. Dec. 777, Mikell's Cas. 832, n.; Colby v. State (Fla.) 35 So. 189; Jones v. Com. (Ky.) 74 S. W. 263; and other cases cited in the notes preceding. To seize prosecutor's weapon lying near and use it to intimidate him to facilitate escape is not robbery. Jackson v. State, 114 Ga. 826, 40 S. E. 1001.

375. Putting in Fear.

(*a*) *In General.*—If property is taken by putting the owner in fear, and thereby preventing resistance, there is constructive violence, provided the fear is reasonable, and, if the other elements of the offense exist, it is as much robbery as if actual violence were used.[533] The putting in fear, however, must precede or accompany the act of taking, just as the force must do so when there is actual violence. If property is taken without violence or putting in fear, as by snatching, the fact that the owner is put in fear to prevent him from retaking it, or to escape, does not make the offense robbery.[534] The property need not necessarily be taken as soon as the owner is put in fear. If the fear continues, a subsequent taking will be robbery, though a considerable time may have elapsed.[535]

(*b*) *Sufficiency of Threat or Menace.*—It is not every threat or menace that will be sufficient to make a case of robbery, as distinguished from larceny. It must be of such a nature as to excite reasonable apprehension of danger, and to reasonably cause a man to surrender his property.[536] The fear inspired in order to compel a man to surrender his property may be of injury either (1) to the person, or (2) to property, or (3) to character or reputation.

1. All of the authorities agree that fear of death or great

[533] 2 East, P. C. 707; Hughes' Case, 1 Lewin, C. C. 301, Mikell's Cas. 833; Simon's Case, 2 East, P. C. 731; Rex v. Donnally, 1 Leach, C. C. 193; Houston v. Com., 87 Va. 257, 12 S. E. 385; Long v. State, 12 Ga. 293, 320; and cases hereafter cited.

[534] Rex v. Harman, 2 East, P. C. 736, 2 Rolle, 154, Mikell's Cas. 832; Thomas v. State, 91 Ala. 34, 8 So. 753; Bonsall v. State, 35 Ind. 460.

[535] Long v. State, 12 Ga. 293, 322.

[536] See McCloskey v. People, 5 Park. Cr. R. (N. Y.) 299. In Long v. State, 12 Ga. 293, 321, it was said: "The rule is this: If the fact be attended with such circumstances of terror—such threatening, by word or gesture—as, in common experience, are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person, it is a case of robbery."

bodily harm, if reasonably entertained, is sufficient to make a taking of property delivered by reason thereof robbery.[537]

2. It is also agreed that fear of injury to property may be sufficient,—as in the case of a threat to burn or tear down a house.[538]

3. As a general rule, subject to one exception, fear of injury to character or reputation is not sufficient. If a man threatens to accuse another of an unnatural crime,—sodomy,—and thereby obtains property from him, the law regards it as robbery, because this offense is so loathsome that the fear of loss of character from such a charge, however unfounded it may be, is sufficient to reasonably induce a man to give up his property.[539] It is equally robbery, in such a case, whether the party be innocent or guilty.[540] This is the only exception to the rule that fear of loss of character is not sufficient to make out a case of robbery. To obtain property by threatening to accuse another of other crimes is punished by statute in some jurisdictions, but it is not robbery at common law, if no violence is used.[541] Thus, it has been held that it is not robbery at common law to obtain money from a man by threatening to accuse him of forgery or of passing counterfeit money,[542] or of violation of the internal revenue law,[542a] or to obtain money from a woman by threaten-

[537] Rex v. Simons, 2 East, P. C. 712, fear of rape. See Rex v. Blackham, 2 East, P. C. 711.

[538] Rex v. Astley, 2 East, P. C. 729; Rex v. Simons, 2 East, P. C. 731; Rex v. Brown, 2 East, P. C. 731.

[539] Rex v. Donnally, 1 Leach, C. C. 193, 2 East, P. C. 713; Rex v. Jones, 1 Leach, C. C. 139; Rex v. Hickman, 1 Leach, C. C. 278, 2 East, P. C. 728; Rex v. Gardner, 1 Car. & P. 479; Long v. State, 12 Ga. 293, 319; Thompson v. State, 61 Neb. 210, 85 N. W. 62, 87 Am. St. Rep. 453.

[540] Rex v. Gardner, supra. And see Reg. v. Cracknell, 10 Cox, C. C. 408; Reg. v. Richards, 11 Cox, C. C. 43.

[541] Rex v. Knewland, 2 Leach, C. C. 731, 2 East, P. C. 732; Britt v State, 7 Humph. (Tenn.) 45; Long v. State, 12 Ga. 293, 318.

[542] Britt v. State, supra.

[542a] Jackson v. State, 118 Ga. 125, 44 S. E. 833.

ing to accuse her husband of indecent assault.[543] It is otherwise, of course, if such threats are accompanied by violence.[544]

In no case is the mere threat of injury, whether to the person, or to property, or to character, sufficient to raise the offense to robbery, unless it in fact inspires fear of the injury, and is the cause of the property being surrendered.[545]

(c) *Fear not Necessary if There is Actual Violence.*—Some writers have defined robbery as a taking by violence from the person of another, putting him in fear, or as a taking by violence from the person of one put in fear,[546] thus requiring both violence *and* putting in fear, and not violence *or* putting in fear. This, however, is wrong. If there is actual violence, it is immaterial whether the victim is put in fear or not.[547] The victim of a robbery by actual violence need not know that his property is being taken.[548] Thus, if a man is knocked down and robbed while he is insensible, it is robbery.[549] So, as was stated

[543] Rex. v. Edwards, 5 Car. & P. 518, 1 Mood. & R. 257, Mikell's Cas. 833.

[544] Bussey v. State, 71 Ga. 100, 51 Am. Rep. 256; Long v. State, 12 Ga. 293, 318. Handcuffing a person after falsely arresting him would be sufficient violence. Rex v. Gascoigne, 1 Leach, C. C. 280, 2 East, P. C. 709.

[545] Rex v. Fuller, Russ. & R. 408; Rex v. Reane, 2 Leach, C. C. 616, 2 East, P. C. 734; Rippetoe v. People, 172 Ill. 173, 50 N. E. 166.

Thus, if property is parted with on a threat to accuse one of an unnatural crime, but for the purpose of prosecuting, and not from fear of loss of character, the taking of the property is not robbery. Rex v. Fuller, supra; Rex v. Reane, supra. See ante, § 161.

[546] 3 Inst. 68; 1 Hale, P. C. 532; 1 Hawk. P. C. c. 34, p. 147; 2 Bish. New Crim. Law, § 1156. For the definitions of Hale and Hawkins, see ante, § 370, note 505.

[547] Fost. C. L. 128; Com. v. Humphries, 7 Mass. 242; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; Com. v. Snelling, 4 Binn. (Pa.) 379; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 418. And see State v. Burke, 73 N. C. 83; Clary v. State, 33 Ark. 561; State v. Gorham, 55 N. H. 152; Houston v. Com., 87 Va. 257, 12 S. E. 385.

[548] Com. v. Snelling, 4 Binn. (Pa.) 379.

[549] See Rex v. Hawkins, 3 Car. & P. 392; State v. Burke, 73 N. C 83; Clary v. State, 33 Ark. 561, 564.

in a previous section,[550] it is robbery to run against a man, or rudely push him about, for the purpose of diverting his attention and robbing him, and then take a purse from his pocket;[551] or to seize a man's watch suddenly, and take it by breaking the chain,[552] or to take an earring from a lady's ear by tearing the ear, etc.[553] The fact that surprise aids the force is immaterial.[554]

376. Consent of the Owner.

The property must be taken without the consent of the owner. This is necessary, not only because robbery includes larceny, and larceny cannot be committed when the owner consents to part with the property, but also because robbery, as has been shown, can only be committed by violence or by putting in fear. If a person, therefore, freely consents to the taking of his property, though he may consent solely for the purpose of prosecuting the taker, and the latter may not know of his consent, there is no robbery.[555]

377. Taking Need not be "Against the Will" of the Owner.

It has sometimes been said that the taking must be "against the will" of the owner, in order to constitute robbery.[556] But this is not true. It is enough if the taking be without his consent, provided there is violence. If a man is rendered unconscious by a blow, he has no will, and yet it is clearly robbery to knock a man down for the purpose of robbing him, and then

[550] Ante, § 374, and cases there cited.

[551] Com. v. Snelling, 4 Binn. (Pa.) 379; Seymour v. State, 15 Ind. 288.

[552] Rex v. Mason, Russ. & R. 419; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; State v. Broderick, 59 Mo. 318.

[553] Rex v. Lapier, 1 Leach, C. C. 320, 2 East, P. C. 557, 708; Rex v. Moore, 1 Leach, C. C. 335.

[554] State v. McCune, supra.

[555] McDaniel's Case, Fost. C. L. 121, Beale's Cas. 152; Rex v. Fuller, Russ. & R. 408. And see Connor v. People, 18 Colo. 373, 33 Pac. 159.

[556] 2 East, P. C. 707; Rex v. McDaniel, Fost. C. L. 121, Beale's Cas. 152; U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494.

take property from him while he is insensible.[557] So, as we have seen, it is robbery to take property by surprise, if there is actual violence.[558]

378. The Felonious Intent.

The felonious intent to steal, or *animus furandi,* is just as necessary to constitute robbery as it is to constitute larceny. The robber must have a fraudulent intent, and must intend to deprive the owner permanently of his property.[559] To take property, therefore, under a *bona fide* claim of right, however unfounded, as under a claim of ownership, or in a *bona fide* attempt to enforce payment of a debt,—is not robbery, though the taking may be accompanied by violence or putting in fear.[560] Nor is it robbery to take property by violence or putting in fear, if the intent is merely to use it temporarily, and then return it.[561] The felonious intent to steal must exist at the time the property is taken. If property is taken without any felonious intent, such an intent formed and carried out aft-

[557] 1 Whart. Crim. Law, §§ 850, 855; Fost. C. L. 128; Rex v. Hawkins, 3 Car. & P. 392. And see State v. Burke, 73 N. C. 83; Clary v. State, 33 Ark. 561, 564.

[558] Ante, § 374.

[559] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; Reg. v. Hemmings, 4 Fost. & F. 50; Jordan v. Com., 25 Grat. (Va.) 943; State v. Hollyway, 41 Iowa, 200, 202, 20 Am. Rep. 586; State v. Sowls, Phil. (N. C.) 151; Com. v. White, 133 Pa. 182, 19 Atl. 350, 19 Am. St. Rep. 628; Hammond v. State, 3 Cold. (Tenn.) 129.

In the case of an assault, the original intent need not have been to rob. Thus, where a man assaulted a woman with intent to rape her, and, during the attempt to rape, took money which she offered him, it was held that he was guilty of robbery. Rex v. Blackham, 2 East, P. C. 711.

[560] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; Brown v. State, 28 Ark. 126; People v. Hall, 6 Park. Cr. R. (N. Y.) 642; Long v. State, 12 Ga. 293, 320; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; State v. Deal, 64 N. C. 270; People v. Hughes, 11 Utah, 100, 39 Pac. 492.

[561] Ante, § 328.

erwards does not relate back so as to make the taking robbery.[562]

As in the case of larceny, some of the courts have held that the taking in robbery must be *lucri causa,* or for the sake of gain,[563] while others have held that this is not necessary.[564]

379. Robbery under the Statutes.

(*a*) *In General.*—In most of the states statutes have been enacted, defining and punishing robbery. Some of them are merely declaratory of the common law, while others define it differently.[565] These statutes are to be construed in the light of the common law, and the terms used in them are to be taken in the sense in which they were understood at common law, unless such a construction is contrary to the express terms of the statute. Thus, if a statute defines robbery as a taking "from the person" of another, it is to be construed as including a taking in the presence of another.[566] And if a statute requires violence or putting in fear, it is to be construed as requiring such violence and such putting in fear as was necessary at common law, unless the terms of the statute show a contrary intention.[567] And unless expressly so provided, a statute is not to be construed as dispensing with the necessity that the property shall be that of another, and that it shall be carried away.[568]

[562] Jordan v. Com., 25 Grat. (Va.) 943.

[563] Ante, § 330.

[564] Jordan v. Com., 25 Grat. (Va.) 943.

[565] See Houston v. Com., 87 Va. 257, 12 S. E. 385; Crews v. State, 3 Cold. (Tenn.) 350.

[566] State v. Calhoun, 72 Iowa, 432, 34 N. W. 194, 2 Am. St. Rep. 252; Houston v. Com., 87 Va. 257, 12 S. E. 385. And see ante, § 47e.

[567] Com. v. Humphries, 7 Mass. 242; Houston v. Com., 87 Va. 257, 12 S. E. 385; Crews v. State, 3 Cold. (Tenn.) 350.

The Texas statute differs from the common law. See Williams v. State, 12 Tex. App. 240.

Where statutes have used the word "intimidation," it has been construed as equivalent to the words "putting in fear," and as meaning the same thing as those words in the common-law definition of robbery. Long v. State, 12 Ga. 293, 320; Clary v. State, 33 Ark. 561, 564.

[568] Com. v. Clifford, 8 Cush. (Mass.) 215.

Degrees of Robbery.—In some jurisdictions robbery is divided into degrees according to the circumstances under which it is committed.[569]

(*b*) *Robbery in Particular Places.*—In many jurisdictions there are statutes prescribing a special punishment for robbery committed in particular places, as in a dwelling house;[570] in or near a highway,[571] etc. Under these statutes the same elements, such as a felonious intent, violence or putting in fear, etc., are necessary, as in other robberies.[572]

V. Receiving and Concealing Property Stolen, Embezzled, etc.

380. Receiving Stolen Property—(a) In General.—It was a misdemeanor at common law to receive stolen goods, knowing them to have been stolen. The offense is now very generally defined by statute substantially as at common law, except that in most jurisdictions it is made a felony. To constitute this offense—

1. **The property must be received.**
2. **It must at the time be stolen property.**
3. **The receiver must know that it is stolen property.**
4. **His intent in receiving it must be fraudulent.**[573]

[569] See Pen. Code Minn. § 197.

[570] Ward v. Com., 14 Bush (Ky.) 233.

[571] Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699.

[572] Ward v. Com., 14 Bush (Ky.) 233.

[573] The Virginia statute provides that, if any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted. Code 1887, § 3714. And there are similar statutes in many other states. In Hey v. Com., 32 Grat. (Va.) 946, 951, it was said by Judge Burks: "To convict an offender against this statute, four things must be proved: (1) That the goods or other things were previously stolen by some other person; (2) that the accused bought or received them from another person, or aided in concealing them; (3) that, at the time he so bought or received them, or aided in concealing them, he knew they had been stolen; (4) that he so

(*b*) *At common law,* the receiver of stolen goods was indictable for *misprision* of the felony of larceny, because of his knowing the thief and neglecting to prosecute him, or of *compounding* the felony, if he agreed not to prosecute him, both of which offenses were substantive misdemeanors.[574] He was not indictable as an accessary after the fact, for he receives the goods, and not the thief,[575] and, to render one an accessary after the fact, the aid must be rendered to the thief personally.[576]

(*c*) *Statutes.*—In England, by the statute of 3 William & Mary, c. 9, § 4, and by later statutes, a receiver was made punishable as an accessary after the fact; but by the statute of 7 & 8 Geo. IV. c. 29, § 54, and by later statutes, he may be indicted either as an accessary after the fact, or for a substantive felony, if the property was obtained by a felony, or for a substantive misdemeanor, if the property was obtained by a misdemeanor.[577] In this country, statutes have been enacted in most states punishing the receiving of stolen property, knowing it to have been stolen, as a distinct substantive offense,—generally as a felony.[578]

381. The Receiving.

(*a*) *In General.*—To render one guilty of receiving stolen property, it is, of course, essential that he shall receive it. A person cannot be convicted if the property was never actually or potentially in his possession. He must at least have had the

bought or received them, or aided in concealing them, malo animo, or with a dishonest intent."

574 2 East, P. C. 743, 744, Mikell's Cas. 882; 1 Bish. New Crim. Law, § 699; 2 Bish. New Crim. Law, § 1137. As to the offenses of misprision and compounding, see post, §§ 438, 439.

575 4 Bl. Comm. 38; 1 Hale, P. C. 619, 620; 1 Bish. New Crim. Law, § 699; Loyd v. State, 42 Ga. 221; People v. Stakem, 40 Cal. 599.

576 Ante, § 184; Loyd v. State, supra.

577 24 & 25 Vict. c. 96, § 91.

578 Com. v. Barry, 116 Mass. 1; Anderson v. State, 38 Fla. 3, 20 So. 765.

property under his control.[579] Manual possession, however, or touch, is not necessary. It is sufficient if there is control over the property.[580] A person is guilty of receiving, if possession is taken by his servant or agent by his direction.[581] One who is himself a principal thief cannot claim to be a receiver.[581a]

(*b*) *Receiving from a Receiver.*—It has been said without qualification that, to render one guilty of receiving stolen goods, he must receive them from the thief, or from an innocent agent of the thief, and not from a guilty receiver; and the reason given is that in his hands, and as to him, the goods

[579] Reg. v. Hill, 2 Car. & K. 978; Reg. v. Wiley, 2 Den. C. C. 37, 4 Cox, C. C. 414, 1 Eng. Law & Eq. 567, Mikell's Cas. 895. In the case first cited, A. stole some fowls, and sent them by coach to another place in a box not addressed to any one, but stated when he sent them, that a person would call for them when they should reach their destination. B. inquired for the box, and, when it was shown to her, claimed it, but it was not delivered to her. It was held that she could not be convicted as a receiver.

A mere unexecuted agreement to participate in the sale is not a receiving. Com. v. Light, 195 Pa. 220, 45 Atl. 933.

[580] Reg. v. Wiley, supra; Reg. v. Smith, Dears. C. C. 494, 6 Cox, C. C. 554, 33 Eng. Law & Eq. 531, Beale's Cas. 760; Reg. v. Miller, 6 Cox, C. C. 353, Beale's Cas. 759; State v. Stroud, 95 N. C. 626; State v. St. Clair, 17 Iowa, 149, Mikell's Cas. 898, n.

[581] In Reg. v. Miller, 6 Cox, C. C. 353, Beale's Cas. 759, stolen property was brought by the thief into A.'s shop, and A., with guilty knowledge, called a servant, and directed her to take the goods to a pawn shop, and pawn them for the thief. The servant did so, and brought back the money, and handed it to the thief in A.'s presence. It was held that this was a receiving of the property by A., though she never had manual possession of either the goods or the money. And see post, § 381(d), notes 589-592.

[581a] Where the servants of a carrier without his knowledge secreted a portion of goods being carried on his boat and he afterwards assisted in removing them, he was held to be a thief and not a receiver. Rex v. Dyer, 2 East, P. C. 767, Mikell's Cas. 883. But where the servant of a carter took more of his master's hay on his wagon than was needed and allowed for a journey and the prisoner received it from him, he was a receiver and not a principal thief. Reg. v. Gruncell, 9 Car. & P. 365, Mikell's Cas. 884.

are not stolen goods.[582] But this is not true under all of the statutes. The common-law offense is not committed by one who receives stolen goods from a guilty receiver, and who does not know the thief, for in such a case there is no misprision of felony nor compounding of felony.[583] So, where a receiver is punishable as an accessary after the fact of the thief, as under the earlier English statutes, and similar statutes in this country, the goods must be received from the thief.[584] But where the act of receiving is made a substantive offense, whether a felony or a misdemeanor, as by the present English statute, and by most of the statutes in this country, without reference to the person who stole the property, the gist of the offense is the receiving and having property that has been stolen, knowing that it has been stolen, and there is no good reason why the offense should not be considered as committed by any one who receives such property with the necessary guilty knowledge, whether he receives it directly from the thief, or from the guilty receiver. There are decisions which fully sustain this view.[585] A person

[582] 2 Bish. New Crim. Law, § 1140 (5); Foster v. State, 106 Ind. 272, 6 N. E. 641.

[583] Ante, § 380b.

[584] State v. Ives, 13 Ired. (N. C.) 338, Beale's Cas. 775.

[585] This view is supported by the dictum in State v. Ives, supra, and by the decisions in Anderson v. State, 38 Fla. 3, 20 So. 765; Levi v. State, 14 Neb. 1, 14 N. W. 543; Ream v. State, 52 Neb. 727, 73 N. W. 227, and Curran v. State (Wyo.) 76 Pac. 577. See, also, State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96; State v. Feuerhaken, 96 Iowa, 299, 65 N. W. 299; Shriedley v. State, 23 Ohio St. 130, 139; Smith v. State, 59 Ohio St. 350, 52 N. E. 826; Faunce v. People, 51 Ill. 311; Sanderson v. Com., 11 Ky. L. R. 341, 12 S. W. 136; Reg. v. Reardon, L. R. 1 C. C. 31, 10 Cox, C. C. 241.

In Anderson v. State, supra, the statute provided that whoever should buy, receive, or aid in the concealment of stolen property, knowing the same to have been stolen, should be punished, and it was held that an indictment under the statute need not name the thief, nor the person from whom the goods were received. "The buying and receiving of stolen goods," said the court, "knowing the same to have been stolen, is thereby made a substantive offense. The offense denounced by the statute is not buying, receiving, etc., stolen property from the thief

is certainly guilty of this offense if he receives stolen property from an innocent agent of the thief with the necessary guilty knowledge and intent.[586]

(*c*) *Husband and Wife.*—A husband may be convicted of receiving property which his wife has stolen voluntarily and without any constraint on his part, if he receives it with knowledge that she has stolen it.[587] But it seems that a wife cannot be guilty of receiving from her husband.[588]

(*d*) *Principal and Agent—Partners.*—A principal is indictable for receiving stolen property, if it is received by his agent by his direction or authority.[589] And if stolen property is received by a person as agent for another without authority, the latter becomes liable if he ratifies the receipt with guilty

himself, or from any other particular person, but buying or receiving, etc., such property, knowing it to be stolen, from any person whatsoever."

There is a decision against this view in Foster v. State, 106 Ind. 272, 6 N. E. 641, in which the court cited Bishop and Wharton and two earlier Indiana cases—Kaufman v. State, 49 Ind. 248, and Owen v. State, 52 Ind. 379. Neither of these cases, however, are in point, and while the decision is supported by Bishop and Wharton, neither of these writers are sustained by the authorities cited by them. There is no reason for saying that property ceases to be "stolen property," i. e., property that has been stolen, as soon as it is delivered to a person who knows it has been stolen.

[586] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[587] Reg. v. McAthey, Leigh & C. 250, 9 Cox, C. C. 251.

[588] 2 Bish. New Crim. Law, § 1142 (2); Reg. v. Brooks, Dears. C. C. 184, 14 Eng. Law & Eq. 580; Reg. v. Wardroper, Bell, C. C. 249, 8 Cox, C. C. 284.

[589] State v. Stroud, 95 N. C. 626. In this case it was said: "To constitute the criminal offense of receiving, it is not necessary that the goods should be traced to the actual personal possession of the person charged with receiving. It would certainly make him a receiver, in contemplation of law, if the stolen property was received by his servant or agent, acting under his directions, he knowing at the time of giving the orders that it was stolen, for 'qui facit per alium facit per se.' It is the same as if he had done it himself." See, also, Reg. v. Miller, 6 Cox, C. C. 353, Beale's Cas. 759; Reg. v. Smith, 6 Cox, C. C. 554, Dears. C. C. 494; State v. Habib, 18 R. I. 558, 30 Atl. 462.

knowledge, and assumes control of the property.[590] Thus, if a wife assumes to act as agent of her husband in receiving stolen property, and he afterwards ratifies her act with full knowledge of the facts, and assumes control of the property, he is guilty of receiving.[591] In like manner, a partner is indictable if, with guilty knowledge, he ratifies the receipt of stolen property by his copartner on behalf of the firm, and assumes control separately or jointly with his partner.[592]

(*e*) *Distinguished from Larceny from Thief.*—The offense of receiving stolen goods is not committed by one who takes goods from a thief by trespass without his consent, and carries them away, *animo furandi*. This, as we have seen, is larceny.[593]

382. Character of the Property as Stolen Property.

To convict a person of receiving stolen property, it is necessary to show that, in fact and in law, the property was *stolen*.[594]

[590] Reg. v. Woodward, Leigh & C. 122, 9 Cox, C. C. 95, 8 Jur. (N. S.) 104, Beale's Cas. 763, Mikell's Cas. 898; Sanderson v. Com., 11 Ky. L. R. 341, 12 S. W. 136.

[591] In Reg. v. Woodward, supra, stolen goods were delivered by the thief to a wife in the absence of her husband, and she paid something on account, but the price was not fixed. The husband and the thief afterwards met, and the husband, with the knowledge that the goods had been stolen, agreed upon the price and paid the balance. It was held that he was guilty of receiving the goods, knowing them to have been stolen.

[592] Sanderson v. Com., 11 Ky. L. R. 341, 12 S. W. 136. And see Faunce v. People, 51 Ill. 311.

"While one partner cannot commit a crime for which his copartner, who is innocent, can be held criminally responsible, we cannot well see why one partner may not be guilty of receiving stolen goods, where his copartner has first received them with a guilty knowledge, and they are controlled and used by both with the guilty design and purpose on the part of both to deprive the owner of his property." Sanderson v. Com., supra.

[593] 2 Bish. New Crim. Law, § 1140 (6). See Reg. v. Wade, 1 Car. & K. 739, Beale's Cas. 758.

[594] Com. v. King, 9 Cush. (Mass.) 284; Anderson v. State, 38 Fla.

It is also necessary that the property shall have been *stolen property* at the time it was received by the accused. It is not enough to show that he thought it was stolen property. The offense, therefore, is not committed if the property, before its receipt, has come back into the possession of the owner or his agent.[595] The fact that the character of stolen property is

3, 20 So. 765; Wilson v. State, 12 Tex. App. 481; O'Connell v. State, 55 Ga. 296.

A wife, even though she may have committed adultery, cannot steal her husband's goods (ante, § 313d), and therefore her paramour, receiving from her goods which she has taken from her husband, cannot be guilty of receiving stolen goods. Reg. v. Kenny, 2 Q. B. Div. 307, 13 Cox, C. C. 397; Reg. v. Streeter [1900] 2 Q. B. 601, Mikell's Cas. 892.

An indictment for receiving stolen goods cannot be maintained if the evidence shows that the person from whom the defendant is alleged to have received them obtained them under circumstances making him guilty of embezzlement, or of obtaining goods by false pretenses, as distinguished from larceny. In Com. v. King, 9 Cush. (Mass.) 284, which was an indictment for receiving stolen bank bills, it appeared that the person from whom the defendant was alleged to have received the bills had obtained them from a bank for his master, on a check drawn by the latter, and that they had not reached the possession of the master before their appropriation. It was held that, as the servant's appropriation of the bills was embezzlement, and not larceny, the indictment could not be maintained.

The question as to the locality in which the property was stolen is elsewhere considered. See post, § 503.

[595] In U. S. v. De Bare, 6 Biss. 358, Fed. Cas. No. 14,935, the accused was indicted and convicted of receiving stolen postage stamps. The proof was that the thief deposited them in an express office, directed to the accused, and, after his arrest, gave a written order for them to a postmaster, who took them, and who afterwards, by order of the postoffice department, redeposited them in the express office, so that they were forwarded to the accused, and received by him. It was held that the conviction was wrong, as the stamps were no longer stolen property after they reached the hands of the postmaster, who was the agent of the government. See to the same effect, Reg. v. Schmidt, L. R. 1 C. C. 15, 10 Cox, C. C. 172, Beale's Cas. 769, Mikell's Cas. 885; Reg. v. Dolan, 6 Cox, C. C. 449, Dears. C. C. 436, 29 Eng. Law & Eq. 533, Beale's Cas. 765 (overruling Reg. v. Lyons, Car. & M. 217, 41 E. C. L. 122); Reg. v. Villensky [1892] 2 Q. B. 597 (following Reg. v. Schmidt, supra, and Reg. v. Dolan, supra); Reg. v. Hancock, 38 L. T. (N. S.) 787, 14 Cox, C. C. 119.

changed before it reaches the receiver is immaterial, if he knows that it is stolen property. It is no defense, therefore, on a prosecution for receiving stolen bonds, to show that they were fraudulently altered by the thief before they were received by the accused.[596]

383. Knowledge That the Property was Stolen.

At common law, and by the express terms of the various statutes, it is necessary that the receiver shall know that the property has been stolen;[597] and he must know this at the time he receives it.[598] It has been said that if a person receives stolen property with full knowledge of all the circumstances under which it was taken, and those circumstances show, as a matter of law, that it was obtained by larceny, it is not necessary to show that he knew that the circumstances made the taking larceny. He is chargeable with knowledge of the law from his knowledge of the facts. This, however, is doubtful.[599] If

[596] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116. So, where a sheep is stolen and killed, and a person receives part of the mutton. Rex v. Cowell, 2 East, P. C. 617, Mikell's Cas. 883.

[597] Reg. v. Adams, 1 Fost. & F. 86, Beale's Cas. 777; Huggins v. People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505; Durant v. People, 13 Mich. 351; May v. People, 60 Ill. 119; Aldrich v. People, 101 Ill. 16; State v. Houston, 29 S. C. 108, 6 S. E. 943; State v. Caveness, 78 N. C. 484; Copperman v. People, 56 N. Y. 591; Williamson v. Com. (Va.) 23 S. E. 762; Hey v. Com., 32 Grat. (Va.) 946.

The mere naked possession of stolen goods, without further evidence, is not sufficient to sustain a conviction, for it does not show guilty knowledge. Castleberry v. State, 35 Tex. Cr. R. 382, 33 S. W. 875, 60 Am. St. Rep. 53. Compare, however, People v. Weldon, 111 N. Y. 569, 19 N. E. 279.

[598] "To be guilty, he must have known at the moment of receiving it that it has been stolen, and he must at that time have also received it with a felonious intent." State v. Caveness, 78 N. C. 484, 491, Mikell's Cas. 902.

[599] Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485, Beale's Cas. 778. In this case the decision was this: The Massachusetts statute created two distinct offenses,—receiving stolen goods,

a person receives property, believing it to have been stolen, he is guilty, though he does not know the facts and circumstances of the taking.[600] And if it appears from the evidence that the accused received the property under such circumstances that any reasonable man of ordinary observation would have known that it was stolen, the jury are authorized to find that he knew it was stolen.[601] The question, however, is one of fact, and the jury are not bound to infer knowledge from such circumstances.[602]

384. Fraudulent Intent.

To constitute this offense, it is necessary that the property shall be received with a fraudulent intent.[603] Thus, the offense

knowing them to have been stolen, and receiving embezzled property, knowing it to have been embezzled. The accused was charged with the first offense, and it was held that, if he knew all the facts under which the property was taken, and the facts showed larceny, as distinguished from embezzlement, it was no defense that he thought the facts constituted embezzlement. Compare, however, Reg. v. Adams, 1 Fost. & F. 86, Beale's Cas. 777.

[600] Com. v. Leonard, supra. And see Reg. v. White, 1 Fost. & F. 665, Beale's Cas. 778.

[601] Collins v. State, 33 Ala. 434, 73 Am. Dec. 426; Murio v. State, 31 Tex. Cr. App. 210, 20 S. W. 356; Com. v. Finn, 108 Mass. 466; Frank v. State, 67 Miss. 125, 6 So. 842, Mikell's Cas. 901; Huggins v. People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357.

In State v. Feuerhaken, 96 Iowa, 299, it was held that it was not error to instruct the jury that, if all the facts and circumstances surrounding the receiving of the goods by the defendant were such as would reasonably satisfy a man of the defendant's age and intelligence that the goods were stolen, or if he failed to follow up the inquiry so suggested, for fear he would learn the truth, and know that the goods were stolen, then the defendant should be as rigidly held responsible as if he had actual knowledge.

A mere suspicion of facts that should put one on inquiry will not authorize an inference of guilt. State v. Goldman, 65 N. J. Law, 394, 47 Atl. 641.

[602] Collins v. State, 33 Ala. 434, 73 Am. Dec. 426.

[603] People v. Johnson, 1 Park. Cr. R. (N. Y.) 564; State v. Hodges, 55 Md. 127; U. S. v. Lowenstein, 21 D. C. 515; Aldrich v. People, 101

is not committed by one who receives stolen property, though he knows it to have been stolen, if his intent is to secure it for the true owner, and return it without a reward, and not to defraud them.[604] The necessity for a fraudulent intent is to be implied even when a statute punishes any one who shall receive stolen property, knowing it to have been stolen, and is silent as to the intent.[605]

It is not necessary that the receiving shall be *lucri causa*, or, in other words, that the receiver shall act from motives of personal gain. If his object is to aid the thief, it is sufficient, for there is the necessary fraudulent intent.[606]

Ill. 16; Rice v. State, 3 Heisk. (Tenn.) 215, 226; Arcia v. State, 26 Tex. App. 193, 9 S. W. 685.

If it is shown that stolen goods were received with knowledge that they were stolen, a fraudulent intent may be inferred. U. S. v. Lowenstein, supra.

[604] "To constitute the offense of receiving stolen property, knowing the same to have been stolen, the act of receiving or concealing must be accompanied by a criminal intent,—an intent to aid the thief, or to obtain a reward for restoring the property to the owner, or an intent to in some way derive profit from the act. There must be a guilty knowledge, a fraudulent intent, concurrent with the act. If the property was received or concealed with the purpose and intent of restoring it to the owner without reward, or with any other innocent intent, the mere knowledge that it was stolen property would not make the act criminal." Arcia v. State, 26 Tex. App. 193, 205, 9 S. W. 685.

Receiving stolen goods with the intent, by concealing the same, to induce the owner to pay a reward for their return to him, is a receipt with intent to defraud the owner. It was so held in State v. Pardee, 37 Ohio St. 63, under a statute making such an intent an element of the offense, and of course such an intent is sufficient at common law. People v. Wiley, 3 Hill (N. Y.) 194, Mikell's Cas. 904; Baker v. State, 58 Ark. 513, 25 S. W. 603.

[605] People v. Johnson, 1 Park. Cr. R. (N. Y.) 564, and other cases cited in note 603, supra; State v. Smith, 88 Iowa, 1, 55 N. W. 16, is to the contrary, but it cannot be sustained.

[606] Rex v. Richardson, 6 Car. & P. 335, Beale's Cas. 758; State v. Hodges, 55 Md. 127; Rex v. Davis, 6 Car. & P. 177, Mikell's Cas. 903; State v. Rushing, 69 N. C. 29, 12 Am. Rep. 641; Com. v. Bean, 117 Mass. 141; U. S. v. Lowenstein, 21 D. C. 515.

In Illinois, the statute punishes any one who, "for his own gain, or

385. License from the Owner.

On a prosecution for receiving stolen goods, knowing them to have been stolen, the fact that the accused was authorized by the owner of the goods to receive them for him is no defense, if he received them with a fraudulent intent to deprive the owner of them.[607]

386. Receiving Goods Obtained by Embezzlement, False Pretenses, Robbery, etc.

In some states, by statute, it is made a substantive offense to receive goods that have been obtained by embezzlement, false pretenses, robbery, burglary, etc., knowing them to have been so obtained.[608] What has been said in the preceding sections with reference to receiving stolen goods applies generally to prosecutions under such a statute. It must be shown that the property was obtained under circumstances constituting, in fact and in law, the offense of embezzlement, false pretenses, robbery, burglary, etc., as the case may be; and it must be shown that the accused, when he received them, knew that they had been so obtained.

387. Aiding in Concealment of Stolen Property.

By statute in some states, it is made a substantive offense to aid in the concealment of stolen property, knowing the same to have been stolen.[609] A person is guilty of aiding in the con-

to prevent the owner from again possessing his property," shall buy, receive, or aid in concealing stolen goods, knowing them to have been stolen. Under this statute, the accused must have received the goods for his own gain, or to prevent the owner from again possessing them. See Aldrich v. People, 101 Ill. 16.

[607] Wright v. State, 5 Yerg. (Tenn.) 154, 26 Am. Dec. 258; Cassels v. State, 4 Yerg. (Tenn.) 149. See, also, People v. Wiley, 3 Hill (N. Y.) 194.

[608] Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485, Beale's Cas. 778. See State v. Lane, 68 Iowa, 384, 27 N. W. 266.

[609] See People v. Reynolds, 2 Mich. 422; State v. St. Clair, 17 Iowa, 149.

cealment of stolen property, within the meaning of such a statute, if he does any act which will assist the thief to convert it to his use, or which will assist in preventing its recovery by the owner. It is not necessary that the property shall have been actually hidden or secreted anywhere.[610] The statutes in express terms made knowledge that the property was stolen an essential element of the offense, and what has been said, therefore, in dealing with the receiving of stolen property, knowing it to have been stolen, applies here.[611]

VI. Malicious Mischief.

388. In General.—The offense known as "malicious mischief" is the malicious injuring or destroying of the property of another. It is a misdemeanor at common law, but from an early day it has been punished by statute in England, and it is very generally punished by statutes in this country.

389. Statutes.

Beginning with the statute of Westminster I., 13 Edw. I. § 46, and up to 24 & 25 Vict. c. 97, statutes have been enacted in England from time to time punishing, either as a felony or as a misdemeanor, malicious injuries to various kinds of property, as buildings, manufactures and materials,[612] machinery,[613] trees, shrubs, vegetables, fences, etc.,[614] mines and mining apparatus and machinery,[615] sea or river banks, walls,

[610] People v. Reynolds, 2 Mich. 422.

[611] Ante, § 383.

[612] See 24 & 25 Vict. c. 97, §§ 13, 14; Rex v. Woodhead, 1 Mood. & R. 549; Reg. v. Smith, 6 Cox, C. C. 198; Rex v. Tacey, Russ. & R. 452; Reg. v. McGrath, 14 Cox, C. C. 598.

[613] 24 & 25 Vict. c. 97, § 15; Reg. v. Fisher, 10 Cox, C. C. 146, L. R. 1 C. C. 7; Rex v. Mackerel, 4 Car. & P. 448.

[614] 24 & 25 Vict. c. 97, §§ 19-24; Rex v. Taylor, Russ. & R. 373.

[615] 24 & 25 Vict. c. 97, §§ 26-29; Reg. v. Whittingham, 9 Car. & P. 235; Reg. v. Norris, 9 Car. & P. 241; Reg. v. Matthews, 14 Cox, C. C. 9.

wharves, and similar works,[616] railways and telegraphs,[617] books, manuscripts, etc., in libraries and museums,[618] cattle and other animals,[619] and vessels.[620] And there is a general section in the present statute punishing malicious injury to "any real or personal property whatsoever, either of a public or private nature," for which no punishment is otherwise provided.[621]

In this country, perhaps, there is no state in which the subject is so minutely and specifically covered by the statutes, but, no doubt, in all states there are statutes more or less like the English statutes, or particular sections of the statute of 24 & 25 Vict. c. 97, punishing, in some cases as a felony, and in others as a misdemeanor only, willful and malicious injury to private and public property.

390. Common Law.

Since the subject of malicious injury to property has from a very early day been entirely covered by statute in England, there are no English precedents of indictments for such an offense at common law. This, however, is not sufficient reason

[616] 24 & 25 Vict. c. 97, §§ 30-32.

[617] 24 & 25 Vict. c. 97, §§ 32-37; Reg. v. Upton, 5 Cox, C. C. 298; Reg. v. Hadfield, L. R. 1 C. C. 253, 11 Cox, C. C. 574; Reg. v. Gilmore, 15 Cox, C. C. 85.

[618] 24 & 25 Vict. c. 97, § 39.

[619] 24 & 25 Vict. c. 97, § 40; Rex v. Owens, 1 Mood. C. C. 205; Rex v. Haughton, 5 Car. & P. 559; Rex v. Haywood, 2 East, P. C. 1076, Russ. & R. 16; Reg. v. Bullock, L. R. 1 C. C. 115, 11 Cox, C. C. 125. "Cattle" includes horses, mares, geldings, and colts, Rex v. Paty, 2 East, P. C. 1074, 1 Leach, C. C. 72; Rex v. Moy, 2 East, P. C. 1076; Rex v. Mott, 2 East, P. C. 1075, 1 Leach, C. C. 73, note; Rex v. Haywood, 2 East, P. C. 1076, Russ. & R. 16; asses, Rex v. Whitney, 1 Mood. C. C. 3; and pigs, Rex v. Chapple, Russ. & R. 77.

[620] 24 & 25 Vict. c. 97, §§ 42-47.

[621] 24 & 25 Vict. c. 97, § 51; White v. Feast, L. R. 7 Q. B. 353. This section applies only to tangible property. It does not apply to a mere incorporeal right. Laws v. Eltringham, 8 Q. B. Div. 283, 15 Cox, C. C. 22.

for holding that malicious injury to the personal property of another is not a common-law offense,[622] and there are decisions in this country holding that it is a misdemeanor at common law, not only because it is an outrage upon the feelings of the community, but also because the direct tendency of such an act is to provoke violent retaliation and cause a breach of the public peace.[623] Thus, it has been held a misdemeanor, independently of any statute, to wickedly and maliciously maim or kill a domestic animal.[624] There are some decisions against this view.[625]

[622] Com. v. Cramer, 2 Pears. (Pa.) 441, Mikell's Cas. 47. Blackstone said that acts of malicious injury to property were not crimes at common law. 4 Bl. Comm. 243. But this may well have been because statutes were enacted in England to cover the whole subject. See Ranger's Case, 2 East, P. C. 1074.

[623] Respublica v. Teischer, 1 Dall. (Pa.) 335, Beale's Cas. 108; People v. Smith, 5 Cow. (N. Y.) 258; State v. Robinson, 3 Dev. & B. (N. C.) 130, 32 Am. Dec. 661; Loomis v. Edgerton, 19 Wend. (N. Y.) 419; and see State v. Watts, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216; Snap v. People, 19 Ill. 79.

In Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, Beale's Cas. 119, it was held that maliciously discharging a gun, after being warned of the circumstances and danger, and thereby causing a woman to have convulsions, resulting in death, was indictable at common law as a wanton act of mischief.

[624] Respublica v. Teischer, 1 Dall. (Pa.) 335, Beale's Cas. 108; People v. Smith, 5 Cow. (N. Y.) 258; Com. v. Leach, 1 Mass. 59; State v. Scott, 2 Dev. & B. (N. C.) 35. And see Boyd v. State, 2 Humph. (Tenn.) 39. See, also, Com. v. Falvey, 108 Mass. 304; Com. v. Cramer, 2 Pears. (Pa.) 441, Mikell's Cas. 47.

[625] State v. Wheeler, 3 Vt. 344, 23 Am. Dec. 212. And see Black v. State, 2 Md. 376; State v. Beekman, 27 N. J. Law, 124. But see State v. Briggs, 1 Ark. (Vt.) 226.

In North Carolina it was held that destruction of property with malice towards the owner was a misdemeanor at common law. State v. Simpson, 2 Hawks (N. C.) 460; State v. Scott, 2 Dev. & B. (N. C.) 35; State v. Latham, 13 Ired. (N. C.) 33; State v. Jackson, 12 Ired. (N. C.) 329. But mere wounding of an animal, or other injury to property short of its destruction, though malicious, was held not to be indictable. State v. Manuel, 72 N. C. 201, 21 Am. Rep. 455; State v. Allen, 72 N. C. 114. So, also, in New Jersey. State v. Beekman, 27 N. J. Law, 124.

It seems not to be a misdemeanor at common law, but a mere trespass, to maliciously injure or destroy the real property of another, as to girdle fruit trees on another's land,[626] or to break the windows in another's house.[627] But in Pennsylvania it was held a misdemeanor at common law to maliciously injure a tree on public ground, which was useful to the public for ornament and shade.[628]

Certainly, an act of malicious mischief, whether directed against real or personal property, is indictable at common law, if accompanied by circumstances making it a breach of the public peace.[629]

391. Malice.

Both at common law, where malicious mischief is recognized at all as a common-law offense, and under the various statutes on the subject, the injury must be inflicted maliciously. Malice is an essential element of the offense, and the term as applied to this offense means something more than intentional.[630] According to Blackstone, the mischief must be done "either out of a spirit of wanton cruelty or black and diabolical revenge."[631] The offense is not committed if the injury is done unintentionally, even though there may have been some other wrongful intent. Thus, it was held in an English case that a conviction

[626] Brown's Case, 3 Greenl. (Me.) 177.

[627] Kilpatrick v. People, 5 Denio (N. Y.) 277.

[628] Com. v. Eckert, 2 Brown (Pa.) 249, Beale's Cas. 110.

[629] Henderson v. Com., 8 Grat. (Va.) 708. See Com. v. Taylor, 5 Bin. (Pa.) 2277. And see post, § 417 et seq.

[630] Ante, § 62, and cases and quotations in the notes; 4 Bl. Comm. 243; Rex v. Kelly, 1 Craw. & D. 186, Beale's Cas. 182; Reg. v. Pembliton, L. R. 2 C. C. 119, 12 Cox, C. C. 607, Beale's Cas. 210, Mikell's Cas. 171; Rex v. Mogg, 4 Car. & P. 364; Com. v. Walden, 3 Cush. (Mass.) 558; State v. Hill, 79 N. C. 656; Duncan v. State, 49 Miss. 331; Thompson v. State, 51 Miss. 353; State v. Pierce, 7 Ala. 728; Northcot v. State, 43 Ala. 330; Wright v. State, 30 Ga. 325; Branch v. State, 41 Tex. 622; State v. Johnson, 7 Wyo. 512, 54 Pac. 502.

[631] 4 Bl. Comm. 243.

for maliciously killing a horse could not be sustained, where the evidence showed that the accused shot at the prosecutor and killed his horse.[632] Nor will an indictment lie for malicious mischief where the injury is done under a *bona fide* claim of right,[633] or in defense of the person or property of the party inflicting it, as where a trespassing animal or vicious and attacking dog is injured or killed.[634]

Under some of the statutes, and at common law, it has been held that the malice must be directed against the owner or possessor of the property, and that mere cruelty or general malice and wantonness is not enough.[635] The contrary, however, has been held in some jurisdictions.[636]

VII. Forgery and Uttering.

392. Definition.—At common law, forgery is the false making, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a

[632] Rex v. Kelly, 1 Craw. & D. 186, Beale's Cas. 182. And see Reg. v. Pembliton, L. R. 2 C. C. 119, 12 Cox, C. C. 607, Beale's Cas. 210, Mikell's Cas. 171; Com. v. Walden, 3 Cush. (Mass.) 558.

[633] See Reg. v. Matthews, 14 Cox, C. C. 5; Palmer v. State, 45 Ind. 388; Lossen v. State, 62 Ind. 437; Goforth v. State, 8 Humph. (Tenn.) 37; Sattler v. People, 59 Ill. 68; Woodward v. State, 33 Tex. Cr. R. 554, 28 S. W. 204; State v. Foote, 71 Conn. 737, 43 Atl. 488.

[634] Reg. v. Prestney, 3 Cox, C. C. 505; Hanway v. Boultbee, 4 Car. & P. 350, 1 Mood. & R. 15; Wright v. State, 30 Ga. 325.

[635] Rex v. Austen, Russ. & R. 490; State v. Robinson, 3 Dev. & B. (N. C.) 130; State v. Latham, 13 Ired. (N. C.) 33; State v. Hill, 79 N. C. 656; Stone v. State, 3 Heisk. (Tenn.) 457; State v. Wilcox, 3 Yerg. (Tenn.) 278, 24 Am. Dec. 569; State v. Pierce, 7 Ala. 728; Northcot v. State, 43 Ala. 330; Hobson v. State, 44 Ala. 380; Duncan v. State, 49 Miss. 331; State v. Lightfoot, 107 Iowa, 344, 78 N. W. 41.

[636] Reg. v. Tivey, 1 Car. & K. 704, 1 Den. C. C. 63; Reg. v. Welch, 1 Q. B. Div. 23, 13 Cox, C. C. 121; Mosely v. State, 28 Ga. 190; State v. Avery, 44 N. H. 392; State v. Boles, 68 Kan. 167, 74 Pac. 630; Com. v. Cramer, 2 Pears. (Pa.) 441, Mikell's Cas. 47; State v. Gilligan, 23 R. I. 400, 50 Atl. 844; Funderburk v. State, 75 Miss. 20, 21 So. 658; State v. Phipps, 95 Iowa, 491, 64 N. W. 411.

legal liability.[637] It is a misdemeanor at common law, but in most jurisdictions it has been made a felony by statute.[637a] To constitute the offense—

1. **There must be a false making of some instrument. This may consist in a material alteration.**
2. **The instrument, as made, must be apparently capable of defrauding.**
3. **There must be an intent to defraud.**

Uttering a forged instrument, knowing it to be forged, and with intent to defraud, is a misdemeanor at common law.

393. The Subject of Forgery.

There is no doubt that *any writing* whatever may be the subject of forgery, provided it is of such a nature that it may prejudice another's legal rights. Blackstone defines forgery at common law as "the fraudulent making or alteration of a writing to the prejudice of another's rights," without limiting it

[637] 2 Bish. New Crim. Law, § 533.

"Every one commits a misdemeanor who forges any document by which any other person may be injured, or utters any such document, knowing it to be forged, with intent to defraud, whether he effects his purpose or not." Steph. Dig. Crim. Law, art. 366.

"Forgery is the fraudulent falsifying of an instrument, to another's prejudice." 1 Whart. Crim. Law, § 653.

Blackstone defines forgery at common law as "the fraudulent making or alteration of a writing, to the prejudice of another's right." 4 Bl. Comm. 247. See, also, 2 East, P. C. 861; Rex v. Coogan, 2 East, P. C. 949; Rex v. Jones, 2 East, P. C. 991; Com. v. Ray, 3 Gray (Mass.) 441.

In Reg. v. Epps, 4 Fost. & F. 81, Willes, J., said: "Forgery consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document, as it appears on the face of it, when in fact there is no such genuine document really in existence as it appears on the face of it to be."

In State v. Wooderd, 20 Iowa, 541, Judge Dillon said: "The making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery."

[637a] See Britton (Nicholl's Trans.) 41, reprinted in Mikell's Cas. 932.

to any particular kind of writing.[638] And Judge Dillon defined it as "the making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced."[639] To show the broad scope of the offense in this respect, some of the instruments which have been held to be the subject of forgery are referred to in the note below.[640] The word "writ-

[638] 4 Bl. Comm. 247.

[639] State v. Wooderd, 20 Iowa, 541. See, also, 2 East, P. C. 861; Bac. Abr. "Forgery," B.; Reg. v. Boult, 2 Car. & K. 604; Com. v. Ray, 3 Gray (Mass.) 441.

[640] Promissory notes: Rex v. Marshall, Russ. & R. 75; State v. Hayden, 15 N. H. 355; State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474.

Bills of exchange: Reg. v. Blenkinsop, 1 Den. C. C. 280, 2 Car. & K. 531, 2 Cox, C. C. 420.

Acceptances: Reg. v. Mitchell, 1 Den. C. C. 282.

Indorsements on note or bill: Mead v. Young, 4 Term R. 28; Rex v. Bolland, 2 East, P. C. 958, 1 Leach, C. C. 83; Rex v. Birkett, Russ. & R. 251.

Duebill: Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639.

Orders or requests for the payment or loan or gift of money: Com. v. Ayer, 3 Cush. (Mass.) 150; Thomas v. State, 59 Ga. 784; Jones v. State, 50 Ala. 161; Williams v. State, 61 Ala. 33.

Orders for goods: Rex v. Ward, 2 Strange, 747, Mikell's Cas. 932; Hale v. State, 1 Cold. (Tenn.) 167, 78 Am. Dec. 488; Hobbs v. State, 75 Ala. 1.

Deeds, mortgages, etc.: Reg. v. Ritson, L. R. 1 C. C. 200; State v. Fisher, 65 Mo. 437; People v. Sharp, 53 Mich. 523, 19 N. W. 168.

Wills: Huckaby v. State (Tex. Cr. App.) 78 S. W. 942.

Policies of insurance: People v. Graham, 6 Park. Cr. R. (N. Y.) 135.

Receipts and other acquittances: Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; State v. Floyd, 5 Strob. (S. C.) 58; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601; State v. Smith, 46 La. Ann. 1433, 16 So. 372.

A physician's certificate of sickness for the purpose of obtaining money from a mutual benefit society: Com. v. Ayer, 3 Cush. (Mass.) 153.

Railroad ticket or pass: Com. v. Ray, 3 Gray (Mass.) 441; Reg. v. Boult, 2 Car. & K. 604.

Books of account and pass books, see post, § 396e.

Letters of recommendation, etc., see post, § 396f.

A writing purporting to give the value of an article without more,

ing" in the definition of forgery does not mean writing in the popular sense only, as writing with a pen or pencil. It includes instruments printed or engraved, as railroad tickets, corporation bonds, etc.[641]

Whether Restricted to Writings.—All the old definitions of forgery use the word "writing," and according to the weight of authority, writings or documents only are the subject of this offense.[642] For this reason it is not forgery to paint an artist's name in the corner of a picture, in order to pass it off as an original picture by that artist,[643] or to have wrappers for goods printed in imitation of those used by another manufacturer, with intent to deceive and defraud purchasers.[644] In an English case there was an indictment and conviction for making on a glass plate, by means of photography, an impression of an undertaking of a foreign state for the payment of money; but this was under a statute expressly covering such cases, and the case is no authority on the subject of forgery at common law.[645]

Statutes.—In England, statutes have been enacted covering the whole subject of forgery, specifying the particular instruments that are the subject of forgery, and making almost every conceivable instrument the subject of the offense. And in this country, also, there are statutes in most states, if not in all, punishing as forgery the false making of particular instruments. If an instrument does not fall within the terms of a statute, and the statute is not intended to cover the whole field, and to entirely repeal the common law,[646] an indictment for its

is not the subject of forgery. Burden v. State, 120 Ala. 388, 25 So. 190.

[641] Rex v. Dade, 1 Mood. C. C. 307; Com. v. Ray, 3 Gray (Mass.) 441; People v. Rhoner, 4 Park. Cr. R. (N. Y.) 166.

[642] Reg. v. Closs, Dears. & B. C. C. 460, 7 Cox, C. C. 494.

[643] Reg. v. Closs, supra.

[644] Reg. v. Smith, Dears. & B. C. C. 566, 4 Jur. (N. S.) 1003, 8 Cox, C. C. 32, Mikell's Cas. 934; White v. Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

[645] Reg. v. Rinaldi, Leigh & C. 330 (under the statute of 24 & 25 Vict. c. 98, § 19).

[646] Ante, § 14.

forgery may still be maintained as a common-law indictment.[647]

394. False Making of Instrument.

(a) *In General.*—To constitute forgery at common law, there must be a *false making* of an instrument. Mere fraud and false pretenses are not enough. The instrument must be false. It must be made to appear to be other than it really is.[648] It is forgery to sign another man's name to a note, without authority, and with intent to defraud, and thus make the instrument appear to be the note of the person whose name is signed, but it is not forgery for a person to sign his own name to an instrument, and falsely and fraudulently represent that he has authority to bind another by doing so,[649] or for a person to sign another's name "by" himself as attorney in fact,[650] for in such a case the instrument is not falsely made, but is just what it purports to be, and the signer is guilty of false pretenses only. The same is true of a receipt. It is not forgery for a person to falsely and fraudulently represent that he has authority to receive money for another, and to sign, not the other's name, but his own, to the receipt for the money.[651] On the same principle it has been held that a man does not commit forgery in signing the name of a pretended firm, and falsely representing that there is such a firm composed of himself and another.[652]

[647] See Com. v. Ray, 3 Gray (Mass.) 441; People v. Shall, 9 Cow. (N. Y.) 778.

[648] Reg. v. White, 1 Den. C. C. 208, 2 Cox, C. C. 210, 2 Car. & K. 404; Rex v. Arscott, 6 Car. & P. 408; In re Tully, 20 Fed. 812; People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; State v. Young, 46 N. H. 266, 88 Am. Dec. 212; Com. v. Baldwin, 11 Gray (Mass.) 197, 71 Am. Dec. 703; State v. Willson, 28 Minn. 52, 9 N. W. 28.

[649] Reg. v. White, supra.

[650] State v. Willson, supra; State v. Taylor, 46 La. Ann. 1332, 16 So. 190, 49 Am. St. Rep. 351, 25 L. R. A. 591.

[651] Rex v. Arscott, supra.

[652] Com. v. Baldwin, 11 Gray (Mass.) 197, 71 Am. Dec. 703, Mikell's Cas. 940. It would seem that this is forgery, on the ground that it is the use of a fictitious name. See post, p. 908.

(*b*) *False Writing in One's Own Name.*—A person, however, may be guilty of forgery in making a *false* instrument in his own name. Thus, in an English case, it was said that "every instrument which purports to be what it is not, whether executed by a person who is not the person purporting to execute it, or bearing a date which is not the true date, is a forgery," and it was held to be forgery for the grantor in a deed to antedate the same for the purpose of defrauding another.[653]

(*c*) *Using One's Own Name as That of Another.*—It is also a forgery for a person to sign his own name to an instrument with a fraudulent intent to have the instrument received as executed by another person having the same name.[654] It was so held in an English case, where the accused, having obtained possession of a bill payable to another person of the same name, fraudulently indorsed and negotiated it.[655] There are similar cases in this country.[656]

(*d*) *Using Fictitious or Assumed Name.*—Forgery may be committed by signing a fictitious or assumed name, if it be done with intent to defraud, for this is the false making of an instrument.[657] Thus, it has been held that a person is guilty

[653] Reg. v. Ritson, L. R. 1 C. C. 200.

[654] Mead v. Young, 4 Term R. 28; Parkes' Case, 2 Leach, C. C. 775, 2 East, P. C. 963; People v. Peacock, 6 Cow. (N. Y.) 72; Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353.

[655] Mead v. Young, 4 Term R. 28.

[656] See People v. Peacock, 6 Cow. (N. Y.) 72, where a man was held guilty of forgery in fraudulently indorsing, with his own name, a permit for the delivery of coal, when he knew that the real consignee was another person of the same name. See, also, Graves v. American Exch. Bank, 17 N. Y. 205.

[657] Lewis' Case, Fost. C. L. 116; Rex v. Lockett, 1 Leach, C. C. 94, 2 East, P. C. 940, Mikell's Cas. 939; Rex v. Shepherd, 2 East, P. C. 967, 1 Leach, C. C. 226; Rex v. Bolland, 2 East, P. C. 958, 1 Leach, C. C. 83; Reg. v. Rogers, 8 Car. & P. 629; Reg. v. Ashby, 2 Fost. & F. 560; U. S. v. Mitchell, Baldw. 366, Fed. Cas. No. 15,787; State v. Hayden, 15 N. H. 355; Brown v. People, 8 Hun (N. Y.) 562, 72 N. Y. 571, 28 Am. Rep. 183; People v. Warner, 104 Mich. 337, 62 N. W. 405.

of forgery if he fraudulently indorses a bill or note by signing a fictitious name, and negotiates the same, representing that the indorsement is by a man of credit;[658] or if he makes a note in the name of a fictitious bank;[659] or if, with intent to defraud, he assumes a name, and executes a note in such name and negotiates the same.[660] In such cases, however, the credit must have been given, not to the accused, but to the name.[661]

(*e*) *Genuine Signature of Third Person.*—Forgery may also be committed by procuring the genuine signature of another to an instrument with the fraudulent intent to pass the instrument as that of a different person having the same name.[662] Thus, it has been held to be forgery to get another to accept a bill in his true name, intending at the time to represent such name to be the name of another person, for the purpose of fraud,[663] or to put an address to the name of the drawer of a bill, while the bill is in the course of completion, with intent to make the name appear to be that of a different person.[664]

(*f*) *Obtaining Another's Signature by Fraud.*—According to the decided weight of authority, it is not forgery to obtain a

[658] Rex v. Bolland, 2 East, P. C. 958, 1 Leach, C. C. 83; Rex v. Lockett, 1 Leach, C. C. 94, 2 East, P. C. 940, Mikell's Cas. 939.

[659] State v. Hayden, 15 N. H. 355.

[660] Rex v. Marshall, Russ. & R. 75; Rex v. Whiley, Russ. & R. 90; Rex v. Francis, Russ. & R. 209.

[661] Reg. v. Martin, L. R. 1 C. C. 214, 49 L. J. C. C. 11. See 21 Alb. Law J. 91; 1 Crim. Law Mag. 266.

[662] Reg. v. Mitchell, 1 Den. C. C. 282. And see Reg. v. Blenkinsop, 1 Den. C. C. 280, 2 Car. & K. 531, 2 Cox, C. C. 420; Reg. v. Epps, 4 Fost. & F. 81; Reg. v. Mahoney, 6 Cox, C. C. 487; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774; Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49; People v. Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

The names need not be precisely the same. Reg. v. Mahoney, supra. Compare Rex v. Story, Russ. & R. 81.

[663] Reg. v. Mitchell, 1 Den. C. C. 282.

[664] Reg. v. Blenkinsop, 1 Den. C. C. 280, 2 Car. & K. 531, 2 Cox, C. C. 420.

person's signature to an instrument by means of false and fraudulent representations as to its contents, or as to the purpose for which the instrument is to be used.[665] Nor is it forgery to fraudulently procure a person's signature to an instrument which has previously been altered without his knowledge.[666]

395. Manner of Making Instrument.

(*a*) *In General.*—The manner in which the false instrument is made is immaterial. It may be by writing with a pencil,[667] though the writing may be dim,[668] as well as by writing with a pen. It may be by printing or engraving.[669] Thus, the false making of a railroad pass or ticket is forgery, though the whole instrument, including the signature, is printed or engraved.[670] And it may be by making a mark as and for the signature of another.[671]

(*b*) *Alteration of Instruments.*—The expression "false making" in the definition of forgery includes the fraudulent alteration of instruments. It is forgery to alter a genuine instrument in a material part, with intent to defraud, as by increasing the amount of a bill or note;[672] changing a receipt from an acknowledgment of part payment to an acknowledgment of pay-

[665] Reg. v. Collins, 2 Mood. & R. 461; Reg. v. Chadwick, 2 Mood. & R. 545; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441; Com. v. Sankey, 22 Pa. 390, Mikell's Cas. 943. Contra, State v. Shurtliff, 18 Me. 368.

[666] Reg. v. Chadwick, 2 Mood. & R. 545.

[667] Baysinger v. State, 77 Ala. 63.

[668] Baysinger v. State, 77 Ala. 63.

[669] Rex v. Dade, 1 Mood. C. C. 307; Com. v. Ray, 3 Gray (Mass.) 441; People v. Rhoner, 4 Park. Cr. R. (N. Y.) 166.

[670] Reg. v. Boult, 2 Car. & K. 604; Com. v. Ray, 3 Gray (Mass.) 441.

[671] Rex v. Dunn, 2 East, P. C. 962, 1 Leach, C. C. 57; State v. Robinson, 16 N. J. Law, 507.

[672] Rex v. Teague, Russ. & R. 33, 2 East, P. C. 979; Rex v. Elsworth, 2 East, P. C. 986; Rex v. Post, Russ. & R. 101; Haynes v. State, 15 Ohio St. 455; State v. Waters, 3 Brev. (S. C.) 507; State v. Schwartz, 64 Wis. 432, 25 N. W. 417.

ment in full;[673] changing the date of a receipt so as to make it cover other claims than those intended;[674] changing the date of a bill or note that has been paid,[675] or the date of an insurance policy;[676] changing the name of a party to a contract;[676a] changing an indorsement on a bill or note so as to make it general instead of special;[677] or tearing off a condition attached to a note, so as to render it negotiable.[678]

Immaterial Alterations.—To constitute forgery, the alteration of an instrument must be in a material matter, as in the cases above mentioned. An immaterial alteration is not forgery, though made with a fraudulent intent. Thus, it has been held that it is not forgery, whatever the intent may be, to sign a person's name to an instrument as a witness, when the instrument is of such a character that it does not require a witness;[679] to alter the terms of a written contract so as to make it correspond with the intention of the parties at the time it was executed,[680] or to transform an accountable receipt for money into a promissory note where it does not appear that the legal effect of the receipt was changed.[680a]

(*c*) *Filling Blanks.*—When an instrument is executed in blank, it is forgery to fraudulently fill in a blank so as to make the instrument different from what is intended.[681] For exam-

[673] State v. Floyd, 5 Strob. (S. C.) 58.

[674] Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601. And see State v. Kattlemann, 35 Mo. 105; State v. Maxwell, 47 Iowa, 454.

[675] Rex v. Atkinson, 7 Car. & P. 669.

[676] People v. Graham, 6 Park. Cr. R. (N. Y.) 135.

[676a] Changing middle initial. State v. Higgins, 60 Minn. 1, 61 N. W. 816, 51 Am. St. Rep. 490, 27 L. R. A. 74.

[677] Rex v. Birkett, Russ. & R. 251.

[678] State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282.

[679] State v. Gherkin, 7 Ired. (N. C.) 206.

[680] Pauli v. Com., 89 Pa. 432, 7 W. N. C. (Pa.) 396, 1 Crim. Law Mag. 126.

[680a] State v. Riebe, 27 Minn. 315, 7 N. W. 263.

[681] Wright's Case, 1 Lewin, C. C. 135, Mikell's Cas. 943; Rex v. Hart, 1 Mood. C. C. 486, 7 Car. & P. 652; Reg. v. Wilson, 1 Den. C. C. 284, 2 Cox, C. C. 426, 2 Car. & K. 527; State v. Kroeger, 47 Mo. 552; Biles

ple, if a person having the blank acceptance of another is authorized to write on it a bill of exchange for a limited amount, and he writes a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, he is guilty of forgery.[682] The same is true where a person receives a check signed in blank, with directions to fill in a certain amount, and he fraudulently fills in a larger amount.[683]

396. Validity and Legal Efficacy of Instrument.

(*a*) *In General.*—To constitute forgery, the instrument, as made, must have a tendency to defraud, or prejudice the rights of another, and it must therefore have at least an apparent "legal efficacy."[684] For this reason the false making of an instrument which is clearly void on its face is not forgery.[685]

v. Com., 32 Pa. 529, 75 Am. Dec. 568; State v. Flanders, 38 N. H. 324. Contra, Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427.

[682] Rex v. Hart, 1 Mood. C. C. 483, 7 Car. & P. 652.

[683] Reg. v. Wilson, 1 Den. C. C. 284, 2 Cox, C. C. 426, 2 Car. & K. 527.

[684] 2 Bish. New Crim. Law, § 533; Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; People v. Shall, 9 Cow. (N. Y.) 778; Com. v. Henry, 118 Mass. 460; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

[685] It is not forgery, for example, to sign another's name to a check, where the check is not made payable to any person, nor to the order of any person, nor to bearer. Williams v. State, 51 Ga. 535. See, also, Wall's Case, 2 East, P. C. 953, Mikell's Cas. 937; Rex v. Pateman, Russ. & R. 455; People v. Shall, 6 Cow. (N. Y.) 778; State v. Pierce, 8 Iowa, 231; State v. Wheeler, 19 Minn. 98; Rollins v. State, 22 Tex. App. 548, 3 S. W. 759, 58 Am. Rep. 659; Waterman v. People, 67 Ill. 91; State v. Humphreys, 10 Humph. (Tenn.) 442; Cunningham v. People, 4 Hun (N. Y.) 455.

It is not forgery to falsely and fraudulently make a will which is void on its face because of its not being attested by the number of witnesses required by statute, Wall's Case, 2 East, P. C. 953, Mikell's Cas. 937; or a note or other agreement which is void because it fails to express a consideration, where this is necessary, or to specify any amount, etc., Rex v. Burke, Russ. & R. 496; People v. Shall, 9 Cow. (N. Y.) 778; or an acceptance on a bill of exchange which is void for noncompliance with a statute, Moffatt's Case, 2 East, P. C. 954, 1 Leach, C. C. 433; or an undated railroad ticket that shows upon its face that it is void without a date. State v. Leonard, 171 Mo. 622, 71 S. W. 1017, 94 Am. St. Rep. 798.

And it is not forgery to make a release of all claims of a certain person, where such person has no claims.[686] Thus, the making or altering of a receipt of payment of a debt after the creditor has made an assignment in bankruptcy is not forgery, for the assignment vests the right of action on the debt in the assignee, and no acquittance by the bankrupt can have any effect.[687]

(*b*) *Apparent Validity or Efficacy.*—It is not necessary that the instrument shall have any *real* validity or legal efficacy. It is sufficient if it has such an apparent legal efficacy that it may deceive and defraud.[688]

(*c*) *Similitude of Instrument.*—It has been held that the false instrument, to constitute forgery, must bear such a resemblance to the genuine instrument, or to what it would be if genuine, that it might deceive a person of ordinary caution and observation.[689] But it is not necessary that the resemblance shall be so close that the instrument might deceive persons of experience,[690] or that it might deceive on close inspection.[691]

[686] Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

[687] Id.

[688] See Reg. v. Pike, 2 Mood. C. C. 70, 3 Jur. 27; State v. Coyle, 41 Wis. 267; State v. Pierce, 8 Iowa, 231; State v. Johnson, 26 Iowa, 407.

It is immaterial that the person whose name is forged to a note is without legal capacity to make it, as a married woman. King v. State, 42 Tex. Cr. R. 108, 57 S. W. 840, 96 Am. St. Rep. 792; People v. Krummer, 4 Park. Cr. R. (N. Y.) 217; or that the person is dead; Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 760.

The instrument need not be stamped with revenue stamps. King v. State, 42 Tex. Cr. R. 108, 57 S. W. 840, 96 Am. St. Rep. 792; Rex v. Teague, Russ. & R. 33, Mikell's Cas. 937.

The fraudulent alteration of a bill of exchange after it has been reissued in violation of the stamp act is none the less forgery. Rex v. Teague, Russ. & R. 33, Mikell's Cas. 937.

[689] See Dement v. State, 2 Head (Tenn.) 505, 75 Am. Dec. 747; Garmire v. State, 104 Ind. 444, 4 N. E. 54; State v. Covington, 94 N. C. 913, 55 Am. Rep. 650; Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154; State v. Leonard, 171 Mo. 622, 71 S. W. 1017, 94 Am. St. Rep. 798.

[690] Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Garmire v. State, 104 Ind. 444, 4 N. E. 54; Barnes v. Com., 101 Ky. 556, 41 S. W. 772.

Thus, in a Massachusetts case it was held that signing another's name to a check on a bank may be a forgery, although the signature may not be so much like the genuine signature as to be likely to deceive the officers of the bank. "It is not necessary," it was said, "that there should be so close a resemblance to the genuine handwriting of the party whose name is forged as would impose on persons having particular knowledge of the handwriting of such party; nor is it necessary that the officers of the bank upon which a check purports to have been drawn would probably have been misled and deceived by it. The intent to defraud the bank may exist, though the officers of the bank, from their better acquaintance with the genuine handwriting of the drawer, would readily have detected the check as a counterfeit one."[692] The fact that the name is misspelled does not prevent the fraudulent signing of another's name from being a forgery.[693]

(*d*) *Efficacy Dependent upon Extrinsic Facts.*—It is not necessary that the efficacy of the instrument shall be apparent upon its face. It may depend upon extrinsic facts. As was said in an Alabama case: "When the instrument does not appear to have any legal validity, nor show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then the offense is complete; and an indictment averring the extrinsic facts, disclosing its capacity to deceive and defraud, will be supported. The fact that the paper is incomplete and imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only

[691] See State v. Robinson, 16 N. J. Law, 510.

[692] Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154.

[693] Gooden v. State, 55 Ala. 178 (where the name "Thweatt" was spelled "Threet"); Baysinger v. State, 77 Ala. 63 (where the name "McGowen" was spelled "McGowe"); Hale v. State, 120 Ga. 183, 47 S. E. 531 (where the name "Greer" was spelled "Grier"). See, also, State v. Covington, 94 N. C. 913, 55 Am. Rep. 650.

renders it necessary that the indictment should aver the extrinsic facts."[694]

(*e*) *False Entries in Books of Account.*—A person is not guilty of forgery in making false entries in his own books of account, though his purpose may be to defraud,[695] except, perhaps, where the book is a book of original entry which is admissible in evidence to prove claims.[696] But it is forgery to fraudulently make a false entry, or fraudulently alter an entry, in a bank pass book,[697] or, it seems, in pass books with grocers and other tradesmen.[698] And false entries fraudulently made by employes in the books of their employers may constitute forgery.[699]

(*f*) *Recommendations and Certificates of Character.*—A letter recommending another as a person of financial standing and responsibility may impose a legal liability if false, and therefore such a letter is clearly the subject of forgery.[700] In England it has been held that it is forgery at common law to fraudulently make, in another's name, false certificates or testi-

[694] Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639. In this case the entire instrument charged to have been forged was: "Due 8.25 Askew Brothers." There was a conviction, and, after an elaborate consideration, it was sustained.

There are many other cases which support the text. See Com. v. Ray, 3 Gray (69 Mass.) 441; Baysinger v. State, 77 Ala. 63; State v. Wheeler, 19 Minn. 98.

Where the instrument set forth is of no apparent efficacy and no extrinsic facts giving it efficacy are alleged, the indictment is bad. People v. Drayton, 168 N. Y. 10, 60 N. E. 1048.

[695] State v. Young, 46 N. H. 266, 88 Am. Dec. 212.

[696] 1 Whart. Crim. Law, § 666.

[697] Reg. v. Smith, Leigh & C. 168, 9 Cox, C. C. 162; Reg. v. Moody, Leigh & C. 173, 9 Cox, C. C. 166; Reg. v. Dodd, 18 Law Times (N. S.) 89; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

[698] 1 Whart. Crim. Law, § 664.

[699] Biles v. Com., 32 Pa. 529, 75 Am. Dec. 568; People v. Phelps, 49 How. Prac. (N. Y.) 462. But see In re Windsor, 6 Best & S. 522, 10 Cox, C. C. 118, 11 Jur. (N. S.) 807.

[700] See Ames' Case, 2 Greenl. (Me.) 365. Compare, however, the cases cited in note 704, infra.

monials of character, for the purpose of obtaining a situation as a police constable,[701] or schoolmaster.[702] To forge a certificate of service, sobriety, and good conduct at sea, with intent to deceive and defraud, has also been held to be indictable at common law.[703] It seems, however, that the false making of a mere complimentary letter of introduction, or of certificates of character which confer no right and impose no duty, is not forgery.[704]

397. Fraudulent Intent.

To constitute forgery, a fraudulent intent is always essential. There must not only be a false making of an instrument, but it must be with intent to defraud.[705] It follows that a person is not guilty of forgery in signing another's name to a note or other instrument, if he believes that he has authority to do so, though he may in fact have no authority.[706] If there is no

[701] Reg. v. Moah, Dears. & B. C. C. 550, 7 Cox, C. C. 503.

[702] Reg. v. Sharman, Dears. C. C. 285, 6 Cox, C. C. 212.

[703] Reg. v. Toshack, 1 Den. C. C. 492, 4 Cox, C. C. 38.

[704] Waterman v. People, 67 Ill. 91; Com. v. Hinds, 101 Mass. 209; Com. v. Chandler, Thach. C. C. (Mass.) 187; Mitchell v. State, 56 Ga. 171; Foulke's Case, 2 Rob. (Va.) 836. See People v. Abeel, 45 Misc. 86, 91 N. Y. Supp. 699.

[705] Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174, Mikell's Cas. 945; Rex v. Forbes, 7 Car. & P. 224; Reg. v. Parish, 8 Car. & P. 94; Rex v. Bontien, Russ. & R. 260; Com. v. Ladd, 15 Mass. 526; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; Fox v. People, 95 Ill. 71; People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; Parmelee v. People, 8 Hun (N. Y.) 623; Com. v. Sankey, 22 Pa. 390, 60 Am. Dec. 91; Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302; Montgomery v. State, 12 Tex. App. 323; State v. Eades, 68 Mo. 150, 30 Am. Rep. 780; State v. Washington, 1 Bay (S. C.) 120, 1 Am. Dec. 601; State v. Floyd, 5 Strob. (S. C.) 58, 53 Am. Dec. 689; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; State v. Shelters, 51 Vt. 105, 31 Am. Rep. 679; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441.

[706] Rex v. Forbes, 7 Car. & P. 224; Reg. v. Parish, 8 Car. & P. 94; Reg. v. Beard, 8 Car. & P. 143; Parmelee v. People, 8 Hun (N. Y.) 623; Thanks v. State, 25 Tex. 326; Kotter v. People, 150 Ill. 441, 37 N. E. 932.

such authority, however, and no belief that there is, one who signs another's name to an instrument is none the less guilty of forgery because he believes that the person whose name he signs will ratify his act and pay the obligation.[707] To constitute forgery by the use of a fictitious or assumed name, an intent to defraud is just as much necessary as in other cases.[708] One who signs another's name to an obligation is guilty of forgery, though he may intend ultimately to take up the instrument, and may believe that no one will be injured by his act, and even though he may himself subsequently pay the obligation.[709]

General Intent to Defraud.—In some jurisdictions it has been held that there must be a specific intent to defraud some particular person, and that a general intent to defraud is not enough.[710] In other jurisdictions it is held that a general intent to defraud will suffice.[711]

Intent may be Inferred.—The intent to defraud, while always necessary in forgery, need not necessarily be proved by direct or positive evidence. Such an intent will be inferred if the defrauding of another is the necessary effect and consequence of a forgery and utterance.[712]

398. Actual Injury not Necessary.

While an intent to defraud is always necessary to constitute forgery, it is not at all necessary that the fraud shall be in fact accomplished. The inquiry is not whether anyone has been actu-

[707] Reg. v. Beard, 8 Car. & P. 143; People v. Weaver, 177 N. Y. 434, 69 N. E. 1094.

[708] Rex v. Bontien, Russ. & R. 260.

[709] Reg. v. Geach, 9 Car. & P. 499.

[710] Reg. v. Hodgson, Dears. & B. C. C. 3, 7 Cox, C. C. 122, 36 Eng. Law & Eq. 626, Mikell's Cas. 946; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601; Williams v. State, 51 Ga. 535; Barnes v. Com., 101 Ky. 556, 41 S. W. 772. And see Reg. v. Tylney, 1 Den. C. C. 319.

[711] Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302.

[712] Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174, Mikell's Cas. 945.

ally defrauded, but whether anyone might have been defrauded; and it is never necessary, unless expressly required by the terms of a statute, to allege or prove actual injury.[713] For this reason a person may be convicted of forging a note with intent to defraud, although the note was found in his custody when apprehended;[714] and a person may be convicted of forging and uttering an instrument with intent to defraud, though there may have been no person in a position to be defrauded by his act.[715] Falsely making an order for goods or a bill of exchange in another's name is forgery, though the order or bill may not be accepted.[716]

399. Uttering Forged Instrument.

To utter or pass a forged instrument, knowing that it is forged, is a distinct misdemeanor at common law.[717]

Knowledge and Intent.—To constitute the offense, it is not at all necessary that the utterer shall have been in any way concerned in the forgery, but it is necessary that he shall know that the instrument which he utters is forged.[718] It is also necessary that he shall intend to defraud some person,[719] but such an

[713] Reg. v. Nash, 2 Den. C. C. 493, 16 Jur. 553; Rex v. Crocker, Russ. & R. 97, 2 Leach, C. C. 987; Rex v. Ward, 2 East, P. C. 861, 2 Strange, 747, 2 Ld. Raym. 1461; Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639; State v. Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53; Williams v. State, 61 Ala. 33; Com. v. Ladd, 15 Mass. 526; State v. Jones, 9 N. J. Law, 357, 17 Am. Dec. 483; People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302.

[714] Rex v. Crocker, Russ. & R. 97, 2 Leach, C. C. 987.

[715] Reg. v. Nash, 2 Den. C. C. 493, 16 Jur. 553.

[716] Hale v. State, 1 Cold. (Tenn.) 167, 78 Am. Dec. 488.

[717] Reg. v. Sharman, Dears. C. C. 285; Com. v. Houghton, 8 Mass. 107; Brown v. Com., 8 Mass. 59; Lewis v. Com., 2 Serg. & R. (Pa.) 551; Com. v. Speer, 2 Va. Cas. 65.

[718] U. S. v. Mitchell, Baldw. 367, Fed. Cas. No. 15,787; U. S. v. Carll, 105 U. S. 611; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Sands v. Com., 20 Grat. (Va.) 800; Wash v. Com., 16 Gratt. (Va.) 530.

[719] Rex v. Holden, Russ. & R. 154, 2 Leach, C. C. 1019, 2 Taunt. 334;

intent may be inferred from the circumstances, as from the fact that he knew the instrument to be a forgery, and the probable consequence of its utterance was to defraud.[720]

Actual Injury.—There is an English case in which it was held that at common law an indictment would not lie for uttering a forged instrument where no fraud was actually perpetrated,[721] but this is not the law. If an instrument is uttered with knowledge that it is forged, and with intent to defraud, and the instrument is such that it might defraud, the offense of uttering is complete, although there is no person in a position to be defrauded by the act,[722] and though no person is in fact defrauded.[723] The instrument, as we shall see, need not even be actually delivered and accepted.[724] There is an uttering of forged bank notes, although the person to whom they are delivered is an agent of the bank for the purpose of detecting utterers, and has applied to the utterer to purchase the notes.[725]

The instrument must be a forged instrument, and therefore it must be such an instrument as may be the subject of forgery, within the rules heretofore stated,[726] and it must have a tendency to defraud, or an apparent legal efficacy.[727]

The Uttering.—To constitute this offense there must be something more than the mere possession of a forged instrument

Reg. v. Hodgson, Dears. & B. C. C. 3, 7 Cox, C. C. 122; Reg. v. Bradford, 2 Fost. & F. 859; State v. Redstrake, 39 N. J. Law, 365.

[720] Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; Reg. v. Geach, 9 Car. & P. 499; Reg. v. Hill, 8 Car. & P. 274; Reg. v. Cooke, 8 Car. & P. 582; Reg. v. Marcus, 2 Car. & K. 356; Miller v. State, 51 Ind. 405; Com. v. Whitney, Thach. C. C. (Mass.) 588.

[721] Reg. v. Boult, 2 Car. & K. 604.

[722] Reg. v. Nash, 2 Den. C. C. 493.

[723] Id.; People v. Caton, 25 Mich. 388; Com. v. Ladd, 15 Mass. 526; Bishop v. State, 55 Md. 138; Snell v. State, 2 Humph. (Tenn.) 347; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639.

[724] Note 730, infra.

[725] Rex v. Holden, Russ. & R. 154, 2 Leach, C. C. 1019, 2 Taunt. 334.

[726] Ante, § 393.

[727] Ante, § 396.

with intent to utter it.[728] There must be an actual uttering or publication, though there need not be any delivery and acceptance or actual passing of the instrument. To utter and publish an instrument is to declare or assert, directly or indirectly, either by words or actions, that the instrument is good.[729] Generally, perhaps, there is an actual passing or delivery and acceptance of the instrument, but this is not necessary. It is enough if it be merely presented or offered as genuine.[730] It has been held an uttering to offer a forged instrument in payment of goods and leave it on the counter of a shop;[731] to exhibit a forged receipt to a person for the purpose of obtaining credit, though the party refuses to part with the possession of the paper out of his hand;[732] to pledge a forged instrument as security for a debt;[732a] to present a forged draft at a bank, although payment is refused;[733] to stake a forged instrument at a gaming table;[734] to leave a forged instrument for record with the register of deeds;[734a] to procure the probate of a forged will;[734b] or to exhibit forged certificates of character for the

[728] Com. v. Morse, 2 Mass. 138. See ante, § 117. It is otherwise by statute in many jurisdictions.

[729] 1 Whart. Crim. Law, § 703; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

[730] Rex v. Crowther, 5 Car. & P. 316; Reg. v. Radford, 1 Den. C. C. 59, 1 Car. & K. 707; Reg. v. Ion, 2 Den. C. C. 475, 6 Cox, C. C. 1; Chahoon v. Com., 20 Grat. (Va.) 734; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Smith v. State, 20 Neb. 284, 29 N. W. 923, 57 Am. Rep. 832; People v. Caton, 25 Mich. 388; State v. Horner, 48 Mo. 520.

[731] Reg. v. Welch, 2 Den. C. C. 78, 4 Cox, C. C. 430.

[732] Reg. v. Radford, 1 Den. C. C. 59, 1 Car. & K. 707. Compare Rex v. Shukard, Russ. & R. 200.

[732a] Thurmond v. State, 25 Tex. App. 366, 8 S. W. 473.

[733] Rex v. Crowther, 5 Car. & P. 316.

[734] State v. Beeler, 1 Brev. (S. C.) 482.

[734a] People v. Swetland, 77 Mich. 53, 43 N. W. 779; Espalla v. State, 108 Ala. 38, 19 So. 82.

[734b] Corbett v. State, 5 Ohio Cir. Ct. R. 155.

purpose of obtaining a position.[735] Other cases are referred to in the note below.[736]

[735] Reg. v. Sharman, Dears. C. C. 285, 6 Cox, C. C. 312.

[736] Delivering a forged instrument to a creditor conditionally: Reg. v. Cooke, 8 Car. & P. 582.

Pledging a forged instrument: Rex v. Birkett, Russ. & R. 86.

Depositing forgeries in post office: Reg. v. Finkelstein, 16 Cox, C. C. 107.

It is not an uttering to exhibit a forged check or note merely for the purpose of creating a false idea of wealth or professional standing. Rex v. Shukard, Russ. & R. 200. Nor to deliver a writing to an accomplice that he may utter it. Reg. v. Heywood, 2 Car. & K. 352.

CHAPTER VIII.

OFFENSES AGAINST THE HABITATION OF INDIVIDUALS.

I. Burglary, §§ 400-409.
II. Arson, §§ 410-416.

I. Burglary.

400. Definition and Elements.—Burglary is one of the common-law felonies. It is the breaking and entering of the dwelling house of another by night, with intent to commit a felony, whether the intent be executed or not.[1] Five things are essential:

1. **The premises must be the dwelling house of another. But the dwelling house includes outhouses within the curtilage or common inclosure.**
2. **There must be a breaking, and it must be of some part of the house itself. But the breaking may be constructive, as well as actual. There is a constructive breaking where an entry is effected—**
   - **(a) By fraud or false pretenses.**
   - **(b) By intimidation.**
   - **(c) By conspiracy with a servant or other inmate, who opens the door.**
   - **(d) By coming through a chimney.**
3. **There must be an entry. But the slightest entry—as of a hand, or even of an instrument—is sufficient.**

[1] "A burglar," said Lord Coke, "is he that in the nighttime breaketh and entreth into a mansion house of another of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." 3 Inst. 63, Mikell's Cas. 908; 1 Hawk. P. C. c. 38, § 1; 4 Bl. Comm. 224; Britt. (Nicholl's Trans.) 42, Mikell's Cas. 908; Clarke v. Com., 25 Grat. (Va.) 908.

4. **The breaking and entry must both be at night. But they need not be on the same night.**
5. **There must be an intent to commit a felony in the house, and this intent must accompany both the breaking and the entry. But the intended felony need not be committed.**[2]

This definition and analysis is of burglary at common law, and does not necessarily apply to statutory burglaries or housebreakings. As we shall see later, statutes have been very generally enacted changing or adding to the common-law definition of burglary.[3] These statutes, however, must be construed in the light of the common law,[4] and they cannot be properly understood or applied without a knowledge of the elements necessary to constitute burglary at common law.

401. Character of the Premises.

(*a*) *Dwelling House.*—To be the subject of burglary at common law, the building broken and entered must, except as stated below, be a dwelling house, or mansion house,—*domus mansionalis,*—as the old books and precedents of indictments express it.[5] Burglary at common law is peculiarly an offense against the security of the *habitation,* and not an offense against

[2] In State v. Whit, 4 Jones (N. C.) 349, it was said: "To a conviction, it is necessary to prove, first, the breaking; second, the entering; third, that the house broken and entered is a mansion house; fourth, that the breaking and entering was in the nighttime; fifth, that the breaking and entering were with intent to commit a felony. In all these particulars there must be proof satisfactory to the minds of the jury; and if the state fails upon any one point, the prisoner is entitled to an acquittal."

[3] Post, § 409.

[4] See Finch v. Com., 14 Grat. (Va.) 643; Nicholls v. State, 68 Wis. 416, 32 N. W. 543; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789.

[5] 4 Bl. Comm. 224, 225; 1 Hale, P. C. 550, 556; Rex v. Lyons, 1 Leach, C. C. 185, Beale's Cas. 784; Rex v. Martin, Russ. & R. 108; Fuller v. State, 48 Ala. 273; Hollister v. Com., 60 Pa. 103; Scott v. State, 62 Miss. 781; State v. Clark, 89 Mo. 423, 1 S. W. 332.

the property as *property*.[6] There were two exceptions at common law to the necessity for the premises to be a dwelling house. It was burglary to break and enter a church with felonious intent,[7] or to break and enter the gate or wall of a walled town with such intent.[8]

(*b*) *Outhouses within the Curtilage.*—The term "dwelling house" is used in a broad and somewhat technical sense, and includes, in addition to the dwelling proper, all outhouses which are within the curtilage or common inclosure, and which are used in connection with the dwelling proper,—as the stable, outdoor kitchen, smokehouse, offices, etc.[9] And even

[6] See the cases cited above.

[7] 3 Inst. 64; 1 Hale, P. C. 556; 1 Hawk. P. C. c. 38, § 17; Anon., 1 Dyer, 99a, pl. 58, Beale's Cas. 781; Resolution of Judges, Poph. 52, Mikell's Cas. 919; Reg. v. Baker, 3 Cox, C. C. 581.

Lord Coke gave as the reason, that a church is the mansion house of Almighty God; but Hale says: "This is only a quaint turn, without any argument, and seems invented to suit his definition of burglary, viz., the breaking into a mansion house." 1 Hale, P. C. 556, note. And see 1 Hawk. P. C. c. 38, § 10.

[8] 1 Hale, P. C. 556; 1 Hawk. P. C. c. 38, § 17.

[9] 1 Hale, P. C. 558; 1 Hawk. P. C. c. 38, § 12; 4 Bl. Comm. 225; Rex. v. Clayburn, Russ. & R. 360; Rex v. Brown, 2 East, P. C. 487, 2 Leach, C. C. 1016, note; Rex v. Gibson, 2 East, P. C. 508, 1 Leach, C. C. 357; Fisher v. State, 43 Ala. 17; State v. Whit, 4 Jones (N. C.) 349; Pitcher v. People, 16 Mich. 142; People v. Aplin, 86 Mich. 393, 49 N. W. 148. And see Quinn v. People, 71 N. Y. 561, Beale's Cas. 789, Mikell's Cas. 922; State v. Johnson, 45 S. C. 483, 23 S. E. 619.

"The capital house protects and privileges all its branches and appurtenances, if within the curtilage or home stall." 4 Bl. Comm. 225.

Thus, a smokehouse, the front part and door of which is within the yard of the dwelling house, is the subject of burglary. Fisher v. State, supra; State v. Whit, supra.

The same is true of a barn with doors opening into the yard, and forming part of the common inclosure, situated about eight rods from the dwelling. Pitcher v. People, supra. And see People v. Taylor, 2 Mich. 250.

If the front part and front door of an outhouse—as a smokehouse, for instance—is within the common inclosure, the whole building is protected, and burglary may be committed by breaking and entering at the back. Fisher v. State, supra.

when there is no common inclosure the dwelling house will include and protect an outhouse adjoining it and used in connection with it, as outhouses within the curtilage are generally used.[10] Buildings, however, that are entirely separated from the dwelling proper,—as where they are beyond the common inclosure, if any, or are on the other side of a public highway,—are no part of the dwelling house, and are not the subject of burglary at common law.[11] There need be no direct communication with the dwelling proper.[12]

The reason why it is held to be burglary to break and enter buildings adjoining and used in connection with the dwelling proper is "the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation," and this must be taken

[10] Rex v. Brown, 2 East, P. C. 493.

[11] 4 Bl. Comm. 225; Rex v. Westwood, Russ. & R. 495; State v. Jenkins, 5 Jones (N. C.) 430. And see People v. Parker, 4 Johns. (N. Y.) 424; State v. Sampson, 125 S. C. 567, 32 Am. Rep. 513; Whalen v. Com., 17 Ky. L. R. 921, 32 S. W. 1095.

In Curkendall v. People, 36 Mich. 309, it was held that a barn situated fifteen rods from the dwelling house, with a public highway between them, was not within the curtilage.

And in Rex v. Westwood, supra, it was held that buildings separated from the dwelling house by a public road, however narrow, could not be regarded as a part of the dwelling house, so as to be the subject of burglary, where there was no common fence or roof to connect them, though some of the offices necessary to the dwelling house adjoined thereto, and though there was an awning extending therefrom to the dwelling house. And see for a like holding on similar facts, Rex v. Garland, 1 Leach, C. C. 144, Mikell's Cas. 920.

[12] Rex v. Gibson, 1 Leach, C. C. 357, 2 East, P. C. 508; Rex v. Hancock, Russ. & R. 170; Rex v. Chalking, Russ. & R. 334; Rex v. Lithgo, Russ. & R. 357; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789, Mikell's Cas. 922; Mitchell v. Com., 88 Ky. 349, 11 S. W. 209. Compare Reg. v. Higgs, 2 Car. & K. 322.

A cellar under a dwelling house is a part of the dwelling house for the purpose of burglary, though it is entered from the outside only, and has no internal communication with the rest of the house. Mitchell v. Com., supra.

into consideration in determining what is a part of the dwelling house for the purpose of burglary.[13]

(*c*) *Shops, Stores, etc.*—A shop, store, factory or other business building, not being within the curtilage of a dwelling house, is certainly not the subject of burglary at common law, if no person sleeps in it.[14] But it is a dwelling house, or part of a dwelling house, within the definition of burglary, if habitually used in part as a place in which to sleep, either by the proprietor or by his servants, or if it is in a building another part of which is used by the proprietor as his dwelling. And it makes no difference that the building is used principally for other purposes, or that the occupant does not take his meals there. The test is whether it is habitually used as a place to sleep.[15] The rule, according to the better opinion, is the same, if a clerk or servant sleeps in a store merely for the purpose of

[13] See Quinn v. People, 71 N. Y. 561, Beale's Cas. 789, Mikell's Cas. 922; State v. Brooks, 4 Conn. 446.

[14] Rex v. Martin, Russ. & R. 108; Rex v. Eggington, 2 East, P. C. 494, 2 Leach, C. C. 913; State v. Jenkins, 5 Jones (N. C.) 430; Hollister v. Com., 60 Pa. 103; People v. Parker, 4 Johns. (N. Y.) 424.

[15] Rex v. Stock, Russ. & R. 185, 2 Leach, C. C. 1015, 7 Taunt. 339; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; Moore v. People, 47 Mich. 639, 11 N. W. 415; People v. Griffin, 77 Mich. 585, 42 N. W. 1061; People v. Dupree, 98 Mich. 26, 56 N. W. 1046; State v. Williams, 90 N. C. 724, 47 Am. Rep. 541; People v. Snyder, 2 Park. Cr. R. (N. Y.) 23; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789, Mikell's Cas. 922.

A shop or store in a dwelling house is a part of the dwelling house for the purpose of burglary. People v. Snyder, supra; Quinn v. People, supra. But not if the shop is leased to another than the occupant of the dwelling and no one lodges in the shop. Anon., Hutton, 33 Mikell's Cas. 920.

In People v. Dupree, supra, where the front room of the building was occupied by the owner as a shoe shop, and was connected with the rear and overhead portion, which was used as a dwelling, the whole building was held a dwelling house, so as to make a breaking and entering of the shop burglary.

In Ex parte Vincent, supra, the building was a two-story house. The front room of the first floor was used as a store, and the back room as a sleeping apartment by the proprietor. The rooms on the second floor were used by the clerks as sleeping apartments, but they

watching and protecting the property, provided it is his regular sleeping place.[16] But occasionally sleeping in a store does not give it the character of a dwelling house or make it the subject of burglary.[17]

402. Occupancy of the Premises.

(*a*) *In General.*—To be the subject of burglary at common law, the house must be occupied as a dwelling. It is not enough that it is suitable for a dwelling, and that it is intended to occupy it, even in the near future,[18] or that persons other

neither took their meals nor had their washing done there. It was held that the building was a dwelling house.

Where one or more of the rooms of a building are used for business purposes, and another or others under the same roof, and within the same four outer walls, as the dwelling of the proprietor, there need be no internal communication between them to render the former a part of the dwelling, for the purpose of burglary. Quinn v. People, supra. See, also, Rex v. Burrowes, 1 Mood. C. C. 274.

Compare State v. Clark, 89 Mo. 423, 1 S. W. 332, where it was held that a basement or cellar, with only an outside door, used for the storage of ice and beer, and having rooms above it occupied by families as a residence, with no internal communication between it and the rooms above, and in which the families had no interest, and over which they had no control, was not a dwelling house.

[16] Rex v. Gibbons, Russ. & R. 422; U. S. v. Johnson, 2 Cranch, C. C. (U. S.) 21, Fed. Cas. No. 15,485; State v. Outlaw, 72 N. C. 598; State v. Williams, 90 N. C. 724, 47 Am. Rep. 541. Compare, contra, Rex v. Davies, 2 Leach, C. C. 876, Beale's Cas. 785; Rex v. Flannagan, Russ. & R. 187.

In State v. Potts, 75 N. C. 129, it was held, Judge Rodman delivering the opinion, that the person sleeping in the store to watch and protect the property must be either the owner, or a member of his family, or his servant, and that the store is not a dwelling house, so as to be the subject of burglary, if the person sleeping there is employed to sleep there solely as a watchman. This decision, however, though supported by some of the early English cases, is contrary to the weight of authority. In the later case of State v. Williams, supra, Judge Ashe said that Judge Rodman drew "a nice and subtle distinction," and expressed doubt as to its soundness.

[17] State v. Jenkins, 5 Jones (N. C.) 430; Rex v. Davies, 2 Leach, C. C. 876, Beale's Cas. 785.

[18] Rex v. Lyons, 2 East, P. C. 497, 1 Leach, C. C. 185, Beale's Cas.

than members of the owner's family or servants have been procured to sleep in it for the purpose of protecting it.[18a] It is not necessary, however, if the house is occupied, that any person shall be actually in it at the time of the breaking and entry.[19] If the occupant of a house locks it up and leaves it, without intending to return, it ceases to have the character of a dwelling house, though the furniture, plate, and other household goods may be left in it.[20] But if he leaves temporarily, with the intention of returning, though he may remain away for some time, the house remains a dwelling house, and a breaking and entry in his absence, with a felonious intent, is burglary.[21] Whether or not there is the *animus revertendi* is the test.[22]

(*b*) *Apartment Houses, Hotels, etc.*—It may be burglary for a person to break and enter, with felonious intent, apartments or rooms in a building in which he himself dwells in another apartment or room. A flat or tenement in an apartment or tenement house is the separate dwelling of the occupant, as far as the occupants of the other apartments or tenements are concerned, and, if one of them breaks and enters the apartment

784; Rex v. Martin, Russ. & R. 108; Rex v. Thompson, 2 Leach, C. C. 771, 2 East, P. C. 498; Fuller v. State, 48 Ala. 273; Scott v. State, 62 Miss. 781. Compare, as erroneous, Com. v. Brown, 3 Rawle (Pa.) 207.

Where neither the owner of a house nor any of his family or servants have ever slept in the house, it is not his dwelling house, so as to be the subject of burglary, though he has used it for his meals, and all the purposes of his business. Rex. v. Martin, supra.

[18a] Rex v. Harris, 2 Leach, C. C. 701, Mikell's Cas. 921.

[19] Anon., Moore, 660, pl. 903, Beale's Cas. 782; Resolution of Judges, Poph. 52, Mikell's Cas. 919; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109; Com. v. Brown, 3 Rawle (Pa.) 207; State v. Williams, 40 W. Va. 268, 21 S. E. 721.

[20] Rex v. Flannagan, Russ. & R. 187; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109.

[21] 1 Hale, P. C. 556; 1 Hawk. P. C. c. 38, § 18; Schwabacher v. People, 165 Ill. 618, 46 N. E. 809; State v. Meerchouse, supra; Com. v. Brown, 3 Rawle (Pa.) 207.

[22] State v. Meerchouse, supra; Schwabacher v. People, supra.

or tenement of another with felonious intent, he is guilty of burglary.[23] For the same reason it is burglary for a guest or lodger in a hotel or lodging house to break and enter the room of another guest or lodger, with felonious intent,[24] or for a servant to break and enter the room of his master or a guest with a like intent.[24a]

403. Ownership of Premises.

The house must be the house of another;[25] but, as burglary is an offense against the security of the habitation, and not against the property, occupation, not ownership, is the test.[26] The owner of a house, occupied by a lessee as a dwelling, would be guilty of burglary in breaking and entering the same with felonious intent.[27] Since a guest at a hotel or lodging house has a special right of occupancy of his room, it would seem that the landlord may be guilty of burglary in breaking and en-

[23] People v. Bush, 3 Park. Cr. R. (N. Y.) 552; Mason v. People, 26 N. Y. 200, Beale's Cas. 788.

[24] State v. Clark, 42 Vt. 629.

So it was decided in England with respect to chambers in a college or inn of court. 1 Hale, P. C. 556.

[24a] Rex v. Gray, 1 Strange, 481; Colbert v. State, 91 Ga. 705, 17 S. E. 840.

[25] Clarke v. Com., 25 Grat. (Va.) 908.

[26] See Rex v. Jarvis, 1 Mood. C. C. 7; Rex v. Jobling, Russ. & R. 525; White v. State, 49 Ala. 344; Smith v. People, 115 Ill. 17, 3 N. E. 733.

Though it is impossible for persons to occupy a house as a dwelling as partners, it is held that a building occupied by a firm in their business, and also by one of the partners as his dwelling, may be described in an indictment for burglary as the "dwelling house" of the firm. Quinn v. People, 71 N. Y. 561, Beale's Cas. 789; Rex v. Athea, Mood. C. C. 329; Rex v. Stock, Russ. & R. 185, 2 Leach, C. C. 1015, 2 Taunt. 339.

And a building owned by a corporation, and lived in by its servant, may be described as the house of the corporation, "for, though an aggregate corporate body cannot be said to inhabit anywhere, yet they may have a mansion house for the habitation of their servants." Hawkins' Case, 2 East, P. C. 501; Picket's Case, Id.

[27] See Rex v. Jarvis, supra; Rex v. Jobling, supra; Smith v. People, supra.

tering the same, but this is not the case under all circumstances. If a guest is merely a transient, an indictment for breaking and entering his room must describe the premises as the dwelling house of the landlord;[28] and in such a case, therefore, a breaking and entry by the landlord would not be burglary. It is otherwise, however, if the guest or lodger has permanent apartments.[29]

404. The Breaking.

(*a*) *Necessity for a Breaking.*—Burglary cannot be committed without a breaking, actual or constructive.[30] It is not burglary, therefore, in the absence of fraud, intimidation, or conspiracy with a person in the house, as a servant,[31] to enter, without breaking, through an aperture left in the walls or roof of a house, or through a door or window that is already open. And it can make no difference, in the latter case, that the door or window is only partly open, however slightly, and has to be pushed further open in order to enter.[32] It was said in a North

[28] 1 Hale, P. C. 557; 1 Hawk. P. C. c. 38, § 13; Prosser's Case, 2 East, P. C. 502.

[29] 1 Hale, P. C. 556; 1 Hawk. P. C. c. 38, § 13; People v. St. Clair, 38 Cal. 137. And see Rex v. Carrell, 1 Leach, C. C. 237, 2 East, P. C. 506.

[30] 1 Hale, P. C. 551, 552; 1 Hawk. P. C. c. 38, §§ 3, 4; Clarke v. Com., 25 Grat. (Va.) 908; Brown v. State, 55 Ala. 123; White v. State, 51 Ga. 285; and cases cited in the notes following.

[31] Post, § 404d.

[32] 1 Hawk. P. C. c. 38, § 4; Rex v. Hyams, 7 Car. & P. 441, Mikell's Cas. 909; Reg. v. Davis, 6 Cox, C. C. 369; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; Com. v. Steward, 7 Dane's Abr. 136, Beale's Cas. 786; Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 556; State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555; McGrath v. State, 25 Neb. 780, 41 N. W. 780; White v. State, 51 Ga. 285.

Thus, it has been held not to be burglary to enter, without any breaking, through an aperture left in a cellar window to admit light. Rex v. Lewis, 2 Car. & P. 628, Mikell's Cas. 913; or through an open transom, McGrath v. State, supra; or through a hole in the roof left for the purpose of light, Rex v. Spriggs, 1 Mood. & R. 357.

In Claiborne v. State (Tenn.) 83 S. W. 352, it was held a sufficient

Carolina case: "Passing an imaginary line is a 'breaking of the close,' and will sustain an action of trespass *quare clausum fregit.* In burglary more is required,—there must be a breaking, removing or putting aside of something material which constitutes a part of the dwelling house, and is relied on as a security against intrusion. * * * Leaving a door or window open shows such negligence as to forfeit all claim to the peculiar protection extended to dwelling houses."[33]

Some Part of the House must be Broken.—Not only must there be a breaking, but it must be of some part of the house itself. It is not burglary to break through an outside gate or fence which forms no part of the house, and then enter the house through an open door or window.[34] Nor it is burglary to enter a house without breaking, and then break something in the house which forms no part of it, as a trunk, or a chest, or a cupboard; and it can make no difference, in such a case, that the chest or cupboard is fixed in the wall.[35]

(*b*) *Technical Meaning of Breaking—Slightest Breaking Sufficient.*—The word "breaking" in the definition of burglary is used in a technical, rather than its popular sense. Any removing or putting aside of something material which constitutes a part of the house, and which is relied upon as security against intrusion, is sufficient.[36] Thus, there is a sufficient breaking if glass is broken or pushed out of a window or door in order to effect an entrance, though it may have been cracked,

breaking to raise a window sash enough to admit entry, though it was already open.

[33] State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555.

[34] Rex v. Bennett, Russ. & R. 289; Rex v. Davis, Russ. & R. 322.

In Rex v. Paine, 7 Car. & P. 135, it was held that a shutter box which partly projected from a house, and adjoined the side of a shop window, was not a part of the house, and that a breaking and entering of the same was not burglary.

[35] 1 Hale, P. C. 554; Anon., Fost. 108, Mikell's Cas. 919; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216.

[36] See Com. v. Stephenson, 8 Pick. (Mass.) 354, Beale's Cas. 787.

cut, or even broken to some extent before.[37] And it is sufficient if a house is burned in order to enter;[38] if a latch is lifted, or knob turned, or even if a door, window, transom, or trapdoor, which is entirely closed, is pushed open, though it may not be locked or latched, but may be held in place by a wedge or by its weight only;[39] if a netting or screen is removed from an

[37] In Reg. v. Bird, 9 Car. & P. 44, 38 E. C. L. 38, it was held a sufficient breaking to push in the glass of a window which had been cut, where every part of the glass remained in its place until pushed in. See, also, Rex v. Smith, Russ. & R. 417; Rex v. Robinson, 1 Mood. C. C. 327.

[38] White v. State, 49 Ala. 344, where it is held that "a breaking may be done by fire as well as by other means, and the breaking is not lost or merged in the consumption" of the house by the fire.

[39] 1 Hale, P. C. 552; Rex v. Haines, Russ. & R. 451; Rex v. Hall, Russ. & R. 355; Rex v. Hyams, 7 Car. & P. 441, Mikell's Cas. 909; Finch v. Com., 14 Grat. (Va.) 643; Com. v. Steward, 7 Dane's Abr. (Mass.) 136, Beale's Cas. 786; State v. Reid, 20 Iowa, 413; People v. Bush, 3 Park. Cr. R. (N. Y.) 552; State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555; State v. Fleming, 107 N. C. 905, 12 S. E. 131; Dennis v. People, 27 Mich. 151; Frank v. State, 39 Miss. 705. And see Lyons v. People, 68 Ill. 271; People v. Dupree, 98 Mich. 26, 56 N. W. 1046, Mikell's Cas. 909.

In Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376, this was held to be a "breaking," within the Ohio statute requiring a "forcible" breaking.

In the Virginia case, Finch v. Com., supra, it was held a sufficient breaking where an entry was made through a door which was so closed that it came within the casing, and to open which some degree of force was necessary.

Pushing open a closed screen door is a breaking, though the permanent door is open. State v. Conners, 95 Iowa, 485, 64 N. W. 295.

To open the lower half of a barn door is a breaking, though the upper half stood open. Ferguson v. State, 52 Neb. 432, 72 N. W. 590, 66 Am. St. Rep. 512.

That it is a sufficient breaking to push open a closed transom, trapdoor, or similar contrivance, though unfastened, and held in its place by its weight only, see Rex v. Brown, 2 East, P. C. 487, 2 Leach, C. C. 1016, note; Rex v. Russell, 1 Mood. C. C. 377; Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; Dennis v. People, 27 Mich. 151; Nash v. State, 20 Tex. App. 384, 54 Am. Rep. 529. Compare Rex v. Lawrence, 4 Car. & P. 231.

To push aside the band which connects machinery in two rooms

otherwise open window;[40] or if a hole is dug under a building, made of logs resting on the ground, and without a floor other than the ground.[41] In all of these cases there is a removing or putting aside of some part of the house intended as security against intrusion, and that is sufficient.

(*c*) *Breaking Inner Doors.*—The breaking need not be of an outer door or window. If a man enters a house without breaking, and when in the house unlocks or opens a closed inner door with felonious intent, and enters, he is just as guilty as if he had broken an outer door.[42] A servant, though lawfully in a house, is guilty of burglary if, with intent to commit a felony, he breaks and enters the chamber of his master or mistress, or any other room into which he has no right to enter.[43] And, as

sufficient to admit one's body is a breaking. Marshall v. State, 94 Ga. 589, 20 S. E. 432.

To remove a post leaning against a door to hold it shut is a breaking. State v. Powell, 61 Kan. 81, 58 Pac. 968; Rose v. Com., 19 Ky. L. R. 272, 40 S. W. 245.

[40] Com. v. Stephenson, 8 Pick. (Mass.) 354, Beale's Cas. 787; State v. Herbert, 63 Kan. 516, 66 Pac. 235.

[41] Pressley v. State, 111 Ala. 34, 20 S. W. 647; Knotts v. State (Tex. Cr. App.) 32 S. W. 532.

[42] 1 Hale, P. C. 553; 1 Hawk. P. C. c. 38, § 4; Rex v. Johnson, 2 East, P. C. 488, Beale's Cas. 785; Rolland v. Com., 85 Pa. 66; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; People v. Young, 65 Cal. 225, 3 Pac. 813; State v. Scripture, 42 N. H. 485; Martin v. State, 1 Tex. App. 525.

In such a case he is guilty of breaking and entering the house with felonious intent. State v. Scripture, supra; People v. Young, supra.

It matters not whether he intends to commit the felony in the particular room into which this inner door opens, or in some other part of the house. Rolland v. Com., supra.

As both a breaking and entry are necessary, an entry without a breaking of an outer door, and a breaking without an entry of an inner door, has been held insufficient. Reg. v. Davis, 6 Cox, C. C. 369.

[43] 1 Hale, P. C. 553, 554; Rex v. Gray, 1 Strange, 481, Beale's Cas. 784; Edmond's Case, Hutton's Rep. 20; Mikell's Cas. 917, cited 63 Ala. 145, 35 Am. Rep. 10; Colbert v. State, 91 Ga. 705, 17 S. E. 840; Hild v. State, 67 Ala. 39.

It is burglary for a servant, left in charge of a house, to break and

we have seen, a guest or lodger in a hotel or lodging house, or occupant of a flat in an apartment house, may be guilty of burglary in breaking and entering the room or flat of another guest, lodger, or tenant.[44]

(*d*) *Constructive Breaking*—(*1*) *In General.*—There need not necessarily be an actual breaking in all cases to constitute larceny. There are circumstances under which the law regards an entry as a constructive breaking, when there is no breaking at all in the popular sense of the word.[45]

(*2*) *Entry by Artifice or Fraud.*—If a person gets into a house by some trick or fraud, with intent to commit a felony therein, there is constructive breaking, and he is guilty of burglary.[46] Thus, there is a constructive breaking if a person effects an entrance by concealing himself in a box;[47] or by pretended hue and cry, or abuse of legal process, for the purpose of gaining admission.[48] The same is true where a person, by some artifice or fraud, as upon a false pretense of business or social intercourse, procures the door of a house to be opened by the occupant or a member of the family, for the purpose of entering and committing a felony. If he enters with such intent immediately after the door is opened, or so soon afterwards as not to allow a reasonable time for shutting it again, there is a constructive breaking, and the offense is burglary.[49] It is

enter, with felonious intent, a closed room, into which he has no right to go by virtue of his employment. Hild v. State, supra.

[44] Ante, § 402b. As to breaking and entering by the landlord of a hotel into the room of a guest, see ante, § 403.

[45] 1 Hawk. P. C. c. 38, § 5; 2 Russ. Crimes (9th Ed.) 1 et seq. And see Clarke v. Com., 25 Grat. (Va.) 908; State v. Henry, 9 Ired. (N. C.) 463.

[46] Le Mott's Case, J. Kelyng, 42, Beale's Cas. 783, Mikell's Cas. 913.

[47] Le Mott's Case, supra; Nicholls v. State, 68 Wis. 416, 32 N. W. 543.

[48] 1 Hale, P. C. 552, 553; 1 Hawk. P. C. c. 38, § 5; Farr's Case, 2 Leach, C. C. 1064, note.

[49] Johnson v. Com., 85 Pa. 54, 27 Am. Rep. 622; State v. Johnson, Phil. (N. C.) 186, 93 Am. Dec. 587; State v. Mordecai, 68 N. C. 207; Clarke v. Com., 25 Grat. (Va.) 908; State v. Carter, 1 Houst. C. C. (Del.) 402. And see Ducher v. State, 18 Ohio, 308.

necessary, however, that the entry be made immediately or soon after the door is opened. If it is left open, and the entry is not made until a reasonable time for shutting it has elapsed, the doctrine of constructive breaking does not apply, and the entry is not burglary.[50]

(*3*) *Entry by Intimidation.*—In many cases intimidation is equivalent to actual force. It is so in burglary. Where, in consequence of violence commenced or threatened by a man in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the man then enters with felonious intent, there is a constructive breaking, and he is guilty of burglary.[51] To obtain entrance in this way by threatening to set fire to the house would be burglary.

(*4*) *Opening of Door by Servant or Other Inmate.*—Another case of constructive breaking is where a servant in a house, or other inmate, opens a door and lets in a confederate for the purpose of committing a felony. In such a case both are guilty of burglary.[52] If the servant has no criminal intent, but opens the door merely for the purpose of entrapping one whom he suspects of an intent to commit burglary, neither is guilty.[53]

If a person gains admittance on a false pretense, with felonious intent, and then opens the door and admits an accomplice, both are guilty of burglary. Com. v. Lowrey, 158 Mass. 18, 32 N. E. 940.

[50] State v. Henry, 9 Ired. (N. C.) 463. In this case the occupant of a house was decoyed to a distance therefrom, leaving the door unfastened, and his family neglected to fasten it after his departure. Fifteen minutes after his departure, the party entered through the open door. It was held that, because of the delay, there was no burglary.

[51] 2 Russ. Crimes, 8; 1 Hale, P. C. 553; Rex v. Swallow, 2 Russ. Crimes, 8; Clarke v. Com., 25 Grat. (Va.) 908; State v. Foster, 129 N. C. 704, 40 S. E. 209.

[52] 1 Hale, P. C. 553; 1 Hawk. P. C. c. 38, § 14; Cornwall's Case, 2 Strange, 881; Clarke v. Com., 25 Grat. (Va.) 908; State v. Rowe, 98 N. C. 629, 4 S. E. 506.

[53] See post, § 404g.

(5) *Entry through Chimney.*—It is also a constructive breaking to enter through a chimney, the reason being that a chimney is as much shut as the nature of the thing will admit. It is burglary, therefore, where an entry is effected, with felonious intent, by coming down a chimney, and it is immaterial whether the burglar succeeds in getting into any of the rooms or not.[54]

(e) *Entry without Breaking and Breaking Out.*—In England, prior to the statute of 12 Anne, c. 1, § 7 (the date of which was 1713), there was a difference of opinion whether it was burglary to enter a house without breaking, and then break out in order to escape. Lord Bacon and some others maintained that it was, but the contrary was asserted by Sir Matthew Hale, Lord Holt, and others.[55] Most of the courts in this country in which the question has arisen have taken the latter view, and have held that this is not burglary at common law.[56] This is clearly the correct view, for the breaking is with intent to escape, and not with intent to commit a felony, as the definition of burglary at common law requires.

Statutes.—The difference of opinion was settled in England by the statute of Anne, above referred to, which made it burglary for a person to enter without breaking, with intent to

[54] 1 Hale, P. C. 552; 1 Hawk. P. C. c. 38, § 4; Rex v. Brice, Russ. & R. 450, Mikell's Cas. 911; State v. Willis, 7 Jones (N. C.) 190; Donohoo v. State, 36 Ala. 281; Olds v. State, 97 Ala. 81, 12 So. 409.

In State v. Willis, supra, it was held in effect that it makes no difference how low the chimney is; and a conviction of burglary was sustained where the entry was into a log cabin through a chimney which was made of logs and sticks, and which was partly in decay, and not more than five and a half feet high. Pierson, C. J., dissented.

[55] See 1 Hale, P. C. 553, 554; 4 Bl. Comm. 227; Clarke's Case, 2 East, P. C. 490.

[56] Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758; Brown v. State, 55 Ala. 123; Adkinson v. State, 5 Baxt. (Tenn.) 569. And see White v. State, 51 Ga. 285; State v. McPherson, 70 N. C. 239; Wine v. State, 25 Ohio St. 69.

State v. Ward, 43 Conn. 489, and State v. Bee, 29 S. C. 81, 6 S. E. 911, are to the contrary.

commit a felony, or, being in the house, to commit any felony, and then in the nighttime break out of the house. This statute is not in force in this country,[57] but in some states similar statutes have been enacted.[58]

(*f*) *Entry by One Having a Right to Enter.*—If a person has a right to enter a house or room, his opening a door and entering cannot constitute a breaking, so as to render him guilty of a burglary, whatever may be his intent in entering. For example, a person who occupies a room jointly with another cannot commit burglary in opening the door and entering, even though he may do so with intent to steal the other's property.[59] The same is true where a guest who is lawfully in an inn enters the barroom with intent to steal, for he has a right, as a guest, to enter any of the public rooms.[60]

A servant may be guilty of burglary in entering a house or room which he has a right to enter by virtue of his employ-

[57] Rolland v. Com., supra; Brown v. State, supra. A contrary opinion was expressed in State v. Ward, supra.

[58] See Pen. Code N. Y. § 498.

In Rex v. Wheeldon, 8 Car. & P. 747, it was held that, if a person commits a felony in a house and breaks out in the nighttime, it is burglary, within the statute, though he may have been lawfully in the house as a lodger.

It was also held in this case that lifting a latch to get out of the house with the stolen property is a sufficient breaking out.

See, also, as to the sufficiency of the breaking out, Rex v. Callan, Russ. & R. 157; Rex v. Brown, 2 Leach, C. C. 1016, note, 2 East, P. C. 487; Rex v. Lawrence, 4 Car. & P. 231; Rex v. Compton, 7 Car. & P. 139.

Entry, without breaking, with intent to commit a felony, and breaking out to escape, was held not to be within a statute providing that any person who, after having entered premises with intent to commit a felony, "shall break such premises," shall be punished in the same way as if he had broken into the premises in the first instance, as the statute contemplates a breaking after entry, when the breaking is for the purpose of committing a felony, and not when it is for the purpose of escape only. Adkinson v. State, 5 Baxt. (Tenn.) 569.

[59] Clarke v. Com., 25 Grat. (Va.) 908.

[60] State v. Moore, 12 N. H. 42, Mikell's Cas. 918.

ment, if he enter with intent to commit a felony.[61] Likewise, if he has no right to enter the particular place,[62] or at the particular time.[63]

(*g*) *Occupant's Consent to the Entry.*—There can be no breaking, so as to constitute burglary, if the occupant of a house consents to the entry.[64] For this reason there is no breaking, and therefore no burglary, where the occupant, or his servant by his direction or authority, or acting by direction of the police, opens the door for the purpose of entrapping one whom he suspects of an intention to commit a burglary.[65] Merely to lie in wait is not consent.[66] And as we have seen, there is a breaking,—that is, a constructive breaking,—where the occupant is induced to open the door by trick or fraud, or by threat of violence, and where the door is opened by a servant, and a confederate admitted.[67]

[61] State v. Howard, 64 S. C. 344, 42 S. E. 173, 58 L. R. A. 685; Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9.

[62] Thus, in Hild v. State, 67 Ala. 39, it was held to be burglary for an employe, who was left in charge of a house, to break and enter a room which he had no right to enter by virtue of his employment.

[63] Thus, in Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9, it was held that a servant or office boy of an attorney, intrusted with the key to the office, adjoining which the attorney slept, was guilty of burglary in opening the door at night, and entering with felonious intent, if he did not sleep there, and was not called there at night by his duties. See, also, Rex v. Gray, 1 Strange, 481; Colbert v. State, 91 Ga. 705, 17 S. E. 840.

[64] See Turner v. State, 24 Tex. App. 12, 5 S. W. 511.

[65] Rex v. Johnson, Car. & M. 218; Rex v. Eggington, 2 Leach, C. C. 913, 2 East, P. C. 666, Beale's Cas. 154; Reg. v. Jones, Car. & M. 611; Allen v. State, 40 Ala. 334, 91 Am. Dec. 476.

Unauthorized acts of a servant are not consent, though done for the purpose of entrapment. State v. Abley, 109 Iowa, 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862, Mikell's Cas. 83.

See ante, § 341 et seq.

[66] Thompson v. State, 18 Ind. 386; State v. Sneff, 22 Neb. 481, 35 N. W. 219; State v. Abley, 109 Iowa, 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862, Mikell's Cas. 83.

[67] Ante, § 404d (4).

405. The Entry.

(*a*) *Necessity for Entry.*—To constitute burglary it is essential that there shall be an entry as well as a breaking. To break open a door or window with intent to enter and commit a felony is not burglary, if no entry is in fact made, but is merely an attempt to commit burglary.[68]

(*b*) *Sufficiency of Entry.*—The slightest entry, however, is sufficient, if it be with felonious intent. It need not be of the whole body, but may be of the hand, or foot, or head, or even a finger only.[69] Indeed, it need not be of any part of the body, but an entry may be made by an instrument, where the instrument is inserted for the purpose of committing the felony, as by a gun for the purpose of murder, or a hook for the purpose of stealing, etc.[70] Where the accused broke the outer

[68] 1 Hale, P. C. 555; 1 Hawk. P. C. c. 38, § 3; Rex v. Rust, 1 Mood. C. C. 183; State v. McCall, 4 Ala. 643, 39 Am. Dec. 314; Anon., 1 Dyer, 99a, pl. 58, Beale's Cas. 781; Reg. v. Meal, 3 Cox, C. C. 70; Rex v. Fidler, Beale's Cas. 783, is therefore an erroneous decision.

[69] 1 Hale, P. C. 555; 1 Hawk. P. C. c. 38, § 7; Resolution of Judges, And. 114, Beale's Cas. 782; Rex v. Davis, Russ. & R. 499, Mikell's Cas. 914; Reg. v. O'Brien, 4 Cox, C. C. 398, Mikell's Cas. 915; Rex v. Perkes, 1 Car. & P. 300; Gibbon's Case, Fost. C. L. 107, 2 East, P. C. 490; Rex v. Bailey, Russ. & R. 341; Com. v. Glover, 111 Mass. 395; Fisher v. State, 43 Ala. 17; Franco v. State, 42 Tex. App. 276; Nash v. State, 20 Tex. App. 384, 54 Am. Rep. 529.

Under the Texas statute declaring the entry into the house of any part of the body sufficient, which is merely declaratory of the common law, it was held that entrance of the finger after raising a window was sufficient. And the court said that this would be a sufficient entry at common law. Franco v. State, supra.

[70] 1 Hale, P. C. 555; 1 Hawk. P. C. c. 38, § 7; Resolution of Judges, And. 114, Beale's Cas. 782; Walker v. State, 63 Ala. 49, 35 Am. Rep. 1, Beale's Cas. 794; State v. Crawford, 8 N. D. 539, 80 N. W. 193, 73 Am. St. Rep. 772, 46 L. R. A. 312, Mikell's Cas. 916.

In Walker v. State, and State v. Crawford, supra, the accused, with intent to steal grain, bored a hole through the floor of a granary from the outside, and thus drew the grain into a sack below. It was held that the entry of the auger was sufficient, and that he was guilty of burglary.

To shoot from the outside into a house, without putting the gun

blinds of a window, and inserted his hands or an instrument for the purpose of breaking the sash, but was detected before he made an entry beyond the sash, it was held that there was not a sufficient entry.[71] On the other hand, where the accused broke a pane of glass in the sash of a window, and introduced his hand for the purpose of undoing the latch, so as to raise the window, the entry was held sufficient though there were inside shutters, and they were not opened.[72] And pushing up a trap-door has been held a sufficient entry, though only the hand entered.[73] As was stated in a previous section, there is a sufficient entry to constitute burglary where a man comes partly down a chimney, though he may not be able to get all the way down, and may not succeed in getting into any of the rooms.[74]

406. The Time of Breaking and Entry.

The breaking and the entry, to constitute burglary at common law, must both be in the nighttime, and this must be proved.[75] But it is not necessary that both shall occur on the

into the house, is not burglary. Resolution of Judges, supra. See 1 Hale, P. C. 555.

[71] State v. McCall, 4 Ala. 643, 39 Am. Dec. 314; Minter v. State, 71 Ark. 178, 71 S. W. 944; Gaddie v. Com. (Ky.) 78 S. W. 162. And in Rex v. Rust, 1 Mood. C. C. 183, it was held that throwing up a window, and introducing an instrument between the window and an inside shutter, to force open the shutter, was not a sufficient entry, unless the hand, or some part of it, was within the window. See, also, Rex v. Roberts, Car. C. L. 293, 2 East, P. C. 487.

[72] Rex v. Bailey, Russ. & R. 341. See, also, Franco v. State, 42 Tex. 276, note 69, supra.

[73] Nash v. State, 20 Tex. App. 384, 54 Am. Rep. 529. These cases were under a Texas statute, but the statute was merely declaratory of the common law. See, ante, note 69.

[74] Rex v. Brice, Russ. & R. 450, Mikell's Cas. 911; Donohoo v. State, 36 Ala. 281; Olds v. State, 97 Ala. 81, 12 So. 409.

[75] "The time must be by night, and not by day, for in the daytime there is no burglary." 4 Bl. Comm. 224; 1 Hale, P. C. 549, 550. And see State v. Bancroft, 10 N. H. 105; People v. Griffin, 19 Cal. 578; State v. Whit, 4 Jones (N. C.) 349; State v. McKnight, 111 N. C. 690,

same night.[76] At common law the nighttime, for the purpose of burglary, does not begin until after, and ceases when, there is daylight enough to discern a man's countenance thereby.[77] In England and in some of our states the nighttime is now expressly defined by statute.[78] In most jurisdictions, breaking and entry in the daytime is made burglary by statute.

407. The Felonious Intent.

(*a*) *In General.*—Another essential element of burglary is a felonious intent. No breaking and entry, however forcible, will amount to burglary at common law, unless there is a specific intent to commit an act that is a felony, as murder, rape,

16 S. E. 319; People v. Bielfus, 59 Mich. 576, 36 N. W. 771; Adams v. State, 31 Ohio St. 462; Com. v. Weldon, 4 Leigh (Va.) 652.

There is no presumption that breaking and entry were in the nighttime. State v. Whit, supra. But where the circumstances proved are such that it may be fairly inferred that they were in the nighttime, the question is for the jury, and they may so infer. People v. Dupree, 98 Mich. 26, 56 N. W. 1046; State v. Bancroft, supra.

[76] A breaking on one night, and an entry on the next or a still later night is sufficient. 1 Hale, P. C. 551; Rex v. Jordan, 7 Car. & P. 432; Rex v. Smith, Russ. & R. 417. See, also, Com. v. Glover, 111 Mass. 395.

[77] 1 Hale, P. C. 550, 551; 1 Hawk. P. C. c. 38, § 2; 4 Bl. Comm. 224; 3 Coke, Inst. 63, Mikell's Cas. 908; People v. Griffin, 19 Cal. 578; State v. Bancroft, 10 N. H. 105; State v. Clark, 42 Vt. 629; State v. Morris, 47 Conn. 179; State v. McKnight, 111 N. C. 690, 16 S. E. 229.

Moonlight or lamplight is not equivalent to daylight. "It will not avail a prisoner on a charge of burglary that there was light enough from the moon, street lights, and lights of buildings, aided by newly-fallen snow, to enable one person to discern the features of another. There must have been daylight enough for the purpose." State v. Morris, supra; State v. McKnight, supra. And see 4 Bl. Comm. 224; Thomas v. State, 5 How. (Miss.) 20.

[78] In England it is provided that the nighttime shall be deemed to commence at nine o'clock in the evening, and to conclude at six in the morning. 24 & 25 Vict. c. 96, § 1.

The Texas statute fixes it at from thirty minutes after sunset to thirty minutes before sunrise. See Laws v. State, 26 Tex. App. 643, 10 S. W. 220.

In Minnesota it is from sunset to sunrise. Pen. Code, § 387.

larceny, etc.[79] Thus, it is not burglary if the intent is to *persuade* a woman to submit to sexual intercourse, and not to have intercourse by force, if necessary, for intercourse with the woman's consent is not rape, nor a felony.[80] The same is true where the intent is to merely beat or tar and feather the occupant,[81] or to take property under such circumstances that the taking will not constitute robbery or larceny.[82] And for the same reason a person is not guilty if he enters with a burglar merely as a detective for the purpose of fastening the guilt on his associate.[83] The intent may be to commit a statutory felony.[84]

[79] 1 Hale, P. C. 559; 1 Hawk. P. C. c. 38, § 18; Dobb's Case, 2 East, P. C. 513, Beale's Cas. 181; Rex v. Knight, 2 East, P. C. 510; State v. Shores, 31 W. Va. 491; Price v. People, 109 Ill. 109; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; Ashford v. State, 36 Neb. 38, 53 N. W. 1036.

[80] See Harvey v. State, 53 Ark. 425, 14 S. W. 645.

[81] 1 Hawk. P. C. c. 38, § 18. Cutting off a man's ear is not mayhem at common law, and to break and enter a house with intent to do so is not burglary. See Com. v. Newell, 7 Mass. 245, where it was held that a breaking and entry with such an intent was not burglary, though a statute made it mayhem to cut off a man's ear, as the statute did not make it a felony.

[82] Thus, it is not burglary to break and enter with intent to take property that is not the subject of larceny. State v. Lymus, 26 Ohio St. 400.

The same is true where the intent is to take property, not animo furandi, but under a bona fide claim of right or merely to use and then return it. State v. Shores, 31 W. Va. 491, 7 S. E. 413; State v. Ryan, 12 Nev. 401, 28 Am. Rep. 802.

As every larceny was a felony at common law, it was enough at common law, and is still so in some jurisdictions, to show an intent to commit any larceny; but where larceny is divided into grand and petit, and petit larceny is reduced to a misdemeanor (ante, § 336), breaking and entry with intent to commit that crime is not burglary. Harvick v. State, 49 Ark. 514, 6 S. W. 19; People v. Murray, 8 Cal. 520; Wood v. State, 18 Fla. 967.

A breaking and entry with intent to commit larceny is none the less burglary because there is not enough in the house to make the taking grand larceny, if the burglar does not know this, for, as we shall see, the intended felony need not be consummated. Harvick v. State, 49 Ark. 514, 6 S. W. 19. And see State v. Beal, 37 Ohio St. 108.

[83] Price v. People, 109 Ill. 109. See, also, Rex v. Dannelly, Russ. & R. 310, 2 Marsh. 571.

(*b*) *Intent must Accompany Both the Breaking and the Entry.*—Both the breaking and the entry must be with felonious intent. A breaking with felonious intent, followed by an entry without such an intent, or a breaking without, followed by an entry with, such an intent, is not burglary.[85] If a man breaks the window of a house, or lifts a transom or trapdoor, and his hand or head enters, though the entry may be merely for the purpose of effecting a further entrance, as by undoing a fastening, he is guilty of burglary, provided the ultimate object is to commit a felony in the house. In other words, the entry in such a case need not be for the immediate purpose of committing the intended felony.[86] It is otherwise when the entry is by an instrument. As we have already seen, if a man breaks a window and inserts an instrument for the purpose of committing a felony, as a gun to commit murder, or a hook to commit larceny, there is a sufficient entry to constitute burglary.[87] If an instrument is inserted, however, not for the purpose of committing the intended felony, but for the purpose of procuring admission to the house, as by undoing a bolt or removing an inner shutter, and no part of the body enters, there is not a sufficient entry.[88]

[84] 1 Hawk. P. C. c. 38, § 19; Dobb's Case, 2 East, P. C. 513; Beale's Cas. 181.

[85] State v. Moore, 12 N. H. 42; Colbert v. State, 91 Ga. 705, 17 S. E. 840.

To break and enter a house without any felonious intent, and to form and carry out such an intent after the entry, is not burglary. Colbert v. State, supra; State v. Moore, supra.

[86] Rex v. Perkes, 1 Car. & P. 300; Reg. v. O'Brien, 4 Cox, C. C. 398; Com. v. Glover, 111 Mass. 395; Nash v. State, 20 Tex. App. 384, 54 Am. Rep. 529; Franco v. State, 42 Tex. 276. And see the dictum in Walker v. State, 63 Ala. 49, 35 Am. Rep. 1, Beale's Cas. 794.

[87] Ante, § 405 b.

[88] Rex v. Roberts, Car. Crim. Law, 293, 2 East, P. C. 487; Hughes' Case, 1 Leach, C. C. 406; Walker v. State, 63 Ala. 49, 35 Am. Rep. 1, Beale's Cas. 794. And see Reg. v. O'Brien, 4 Cox, C. C. 398.

Thus, in Hughes' Case, supra, it was held not to be burglary mere-

(*c*) *Intent may be Inferred from the Circumstances.*—The intent must always be proved, so as to show that it was felonious, but it may be inferred from the circumstances.[89] An intent to commit a felony at the time of the breaking and entry may very clearly be inferred from its actual commission after the entry.[90] It may also be inferred from the conduct of the party accused, though no felony is committed, and in such a case the manner in which the entry was effected is of weight. Thus, where a man entered the room of a sleeping girl at night, by raising the window, and laid his hand upon her person, and upon her screaming, left hurriedly through the window, without any explanation, it was held that an intent to commit rape might be inferred.[91] So where a man at midnight broke and entered a house in which there were valuables, and no other motive appeared, it was held that an intent to steal might be inferred.[92]

ly to bore a hole for the purpose of opening a bolt, though the auger penetrated to the inside of the door.

In Walker v. State, supra, it was said: "When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break, but to effect the only entry contemplated and necessary to the consummation of the criminal intent, the offense is complete."

[89] See People v. Marks, 4 Park. Cr. R. (N. Y.) 153; Franco v. State, 42 Tex. 276; Steadman v. State, 81 Ga. 736, 8 S. E. 420; State v. McDaniel, 1 Winst. (N. C.) 249.

Where accused bored a hole with an auger into a granary and allowed grain to fall out, which he carried away, the intent to steal was sufficiently shown, though gravitation co-operated in its removal. State v. Crawford, 8 N. D. 539, 80 N. W. 193, 73 Am. St. Rep. 772, 46 L. R. A. 312.

[90] State v. Moore, 12 N. H. 42; Com. v. Hope, 22 Pick. (Mass.) 1.

[91] State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555.

[92] Steadman v. State, 81 Ga. 736, 8 S. E. 420. And see People v. Soto, 53 Cal. 415; Alexander v. State, 31 Tex. Cr. R. 359, 20 S. W. 756.

408. Commission of Intended Felony.

The breaking and entry with *intent to commit* a felony makes the crime of burglary, and it is not at all necessary that the intent shall be executed after the entry.[93] It follows that one who breaks and enters a house with felonious intent is none the less guilty of burglary because he abandons such intent after the entry, either from fear or from repentance,[94] or because he is unable to execute it by reason of resistance or other circumstances beyond his control.[95]

409. Statutes Relating to Burglary.

In most jurisdictions, perhaps in all, statutes have been enacted for the purpose of extending the common law. Some of them have made it burglary to break and enter premises that were not the subject of burglary at common law, as shops, stores, warehouses, etc. At common law, as we have seen, the breaking and entry must be in the nighttime. Some of the statutes, however, make it burglary to break and enter in the daytime. The statutes are to be construed in the light of the common law, and, unless a contrary intention appears, the terms used, such as "break," "enter," "dwelling house," etc., are to be taken in the sense in which they are understood at common law.[96] Some statutes dispense altogether with the necessity for a breaking, and make it burglary to enter without

[93] 3 Inst. 63; 1 Hale, P. C. 561, 562; Wilson v. State, 24 Conn. 57; Olive v. Com., 5 Bush (Ky.) 376; State v. McDaniel, 1 Winst. (N. C.) 249.

[94] State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555.

[95] As, for example, because of resistance by a woman whom he intends to rape, or because of the absence of property which he intends to steal. State v. McDaniel, 1 Winst. (N. C.) 249; Harvick v. State, 49 Ark. 514, 6 S. W. 19; State v. Beal, 37 Ohio St. 108.

[96] Reg. v. Wenmouth, 8 Cox, C. C. 348; Pitcher v. People, 16 Mich. 142; Finch v. Com., 14 Grat. (Va.) 643; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; Nicholls v. State, 68 Wis. 416, 32 N. W. 543; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789; Sims v. State, 136 Ind. 358, 36 N. E. 278; Schwabacher v. People, 165 Ill. 618, 46 N. E. 809.

breaking, if the entry is with felonious intent.[97] Other statutory changes have been mentioned in previous sections.

Degrees of Burglary.—In a few states, burglary, like homicide, has been divided into degrees, according to the character of the premises, the time the offense is committed, or other circumstances.[98]

II. Arson.

410. Definition and Elements.—Arson is one of the common-law felonies. It is the willful and malicious burning of the dwelling house of another, either by night or by day.[99] To constitute the offense, four things are essential at common law:

1. **The building burned must be a dwelling house, as in burglary. But the term "dwelling house" includes outhouses within the curtilage or common inclosure.**
2. **The house must be that of another. But occupancy, not ownership, is the test.**
3. **There must be an actual burning of some part of the house, and not merely a scorching. But the slightest burning is sufficient.**
4. **The burning must be willful and malicious.**

This definition and analysis is of arson at common law. As we shall presently see, the offense has been extended by statute in most jurisdictions so as to include the burning of other buildings than dwelling houses, as shops, warehouses, unoccupied houses, etc., and also to include, under some circumstances, the burning of one's own house.[100]

[97] See Nicholls v. State, 68 Wis. 416, 32 N. W. 543; Rolland v. Com., 85 Pa. 66; People v. Barry, 94 Cal. 481; People v. Brittain, 142 Cal. 8, 75 Pac. 314, 100 Am. St. Rep. 95.

[98] See Pen. Code N. Y. § 496 et seq.; Pen. Code Minn. § 383 et seq.

[99] 1 Hawk. P. C. c. 18, §§ 1, 2, Beale's Cas. 797; 1 Hale, P. C. 569, Mikell's Cas. 927; 4 Bl. Comm. 220; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; Shepherd v. People, 19 N. Y. 537.

[100] Post, § 416.

411. Character of the Premises.

(*a*) *In General.*—Arson, like burglary, is at common law an offense against the habitation of individuals, and not merely an offense against the property as such. The common-law definition is the willful and malicious burning of the "house" of another, but this means the dwelling house of another. At common law, therefore, it is not arson at all to burn shops, stores, warehouses, and the like, unless they are also occupied in part as a residence, but the premises must be a dwelling house.[101] If a shop or store, however, is also occupied as a dwelling, it is within the definition of arson.[102] What has been said, in treating of burglary, as to what constitutes a dwelling house, is equally applicable to arson, for any building that is the subject of burglary at common law is also the subject of arson.[103] That a jail is a dwelling house within the definition of arson has been held in a number of cases.[104]

(*b*) *Outhouses within the Curtilage.*—As in burglary, so in the definition of arson, the "house" or "dwelling house" includes and protects all outhouses, as the barn, stable, kitchen, smokehouse, etc., which are within the curtilage or common inclosure, and which are commonly used in connection with the dwelling proper.[105] But outhouses which are not within the

[101] 1 Hawk. P. C. c. 18, § 2, Beale's Cas. 797. And see State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; McLane v. State, 4 Ga. 335; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302; Stallings v. State, 47 Ga. 572; State v. Williams, 90 N. C. 724, 47 Am. Rep. 541; Com. v. Posey, 4 Call. (Va.) 109, 2 Am. Dec. 560.

[102] McLane v. State, 4 Ga. 335; State v. Williams, 90 N. C. 724, 47 Am. Rep. 541; State v. Outlaw, 72 N. C. 598; State v. Jones, 106 Mo. 302, 17 S. W. 366; State v. Kroscher, 24 Wis. 64.

[103] 1 Hale, P. C. 567, Mikell's Cas. 927; ante, § 401.

[104] People v. Van Blarcum, 2 Johns. (N. Y.) 105; People v. Cotteral, 18 Johns. (N. Y.) 115; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560.

[105] 1 Hale, P. C. 570, Mikell's Cas. 927; 4 Bl. Comm. 221; Anon., Year Book 11 Hen. VII. 1, Beale's Cas. 597; People v. Taylor, 2 Mich. 250; Hooker v. Com., 13 Grat. (Va.) 763; Com. v. Barney, 10 Cush. (Mass.) 480; Curkendall v. People, 36 Mich. 309; State v. Warren, 33 Me. 30.

curtilage or common inclosure are not the subject of arson at common law.[106] What has been said on this point in treating of burglary is equally applicable here.[107]

412. Occupancy of the Premises.

To constitute a dwelling house, within the definition of arson, the house must not be merely intended for use as a residence and fitted for such use, but it must be occupied as a dwelling, for, as has been stated, the offense is against the security of the habitation, and not against the house, considered merely as property. It is not arson at common law, therefore, to burn a building which is only partly completed, and not yet occupied, or even a building which is completed, and even furnished and suitable for present use as a dwelling, but which is not yet occupied.[108] A dwelling house which is occupied, but from which the occupant is temporarily absent, is the subject of arson.[109] It is otherwise, however, if there is no present intention to return,[110] or the house has been permanently abandoned as a dwelling.[110a] What has been said on this point in dealing with burglary is equally applicable to arson.[111]

413. Ownership of the Premises.

(*a*) *In General.*—To constitute arson at common law, the house must be the dwelling house of some other person than the offender. One who for any reason sets fire to his own dwelling

[106] Curkendall v. People, 36 Mich. 309.

[107] Ante, § 401b.

[108] Elsmore v. Inhabitants, etc., 8 Barn. & C. 461; Reg. v. Allison, 1 Cox, C. C. 24; State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; Com. v. Francis, Thatch. C. C. (Mass.) 240; Dick v. State, 53 Miss. 384; Stallings v. State, 47 Ga. 572.

[109] State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; State v. Warren, 33 Me. 30; Johnson v. State, 48 Ga. 116.

[110] Hooker v. Com., 13 Grat. (Va.) 763; State v. Clark, 7 Jones (N. C.) 167.

[110a] Henderson v. State, 105 Ala. 82, 16 So. 931.

[111] Ante, § 402.

house is not guilty of this crime.[112] And it makes no difference that the house of another is endangered by the fire, nor even that there is an intent to burn the adjoining house of another, if it is not in fact burned.[113] It is not arson at common law for a man to burn his own house, occupied by him, for the purpose of defrauding an insurance company.[114] On this principle, one who burns the house of another at his request or instigation is not guilty of arson.[115] If a man sets fire to his own house, or to a building of another not a dwelling house, and burns adjoining houses of others, he is guilty of arson.[116]

(*b*) *Husband and Wife.*—Since, at common law, husband and wife are regarded as one person, the wife cannot be guilty of arson in burning the husband's house; and it can make no difference that she is at the time living apart from him.[117] So, also, a husband is not guilty of arson in burning a dwelling house occupied by himself and his wife, jointly, though it may be her property; and this rule is not affected by the married woman's acts in the different jurisdictions giving the wife the property owned or acquired by her, free from the control of the husband.[118]

[112] 4 Bl. Comm. 221; Holme's Case, Cro. Car. 376, W. Jones, 351, Beale's Cas. 797; Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; Rex v. Spalding, 2 East, P. C. 1025, 1 Leach, C. C. 218; Rex v. Proberts, 2 East, P. C. 1030; State v. Hurd, 51 N. H. 176; State v. Haynes, 66 Me. 307, 22 Am. Rep. 569; State v. Keena, 63 Conn. 329, 28 Atl. 522; State v. Sarvis (S. C.) 24 S. E. 53; People v. De Winton, 113 Cal. 403, 45 Pac. 708; post, § 413c, note 119, and cases there cited.

[113] 4 Bl. Comm. 221; Holme's Case, Cro. Car. 376, W. Jones, 351, Beale's Cas. 797; Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; People v. De Winton, 113 Cal. 403, 45 Pac. 708.

[114] Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; State v. Sarvis, 45 S. C. 668, 24 S. E. 53, 55 Am. St. Rep. 806, 32 L. R. A. 647; State v. Haynes, 66 Me. 307, 22 Am. Rep. 569.

[115] State v. Haynes, supra; Roberts v. State, 7 Cold. (Tenn.) 359.

[116] 4 Bl. Comm. 221; Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; Robert's Case, 2 East, P. C. 1030; Rex v. Pedley, Cold. 218; State v. Laughlin, 53 N. C. 354; Combs v. Com., 93 Ky. 313, 20 S. W. 221; post, § 415.

[117] March's Case, 1 Mood. C. C. 182.

[118] Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302.

(c) *Occupancy, not Title, is the Test.*—Since arson is an offense against the security of the habitation, and not against the house as property, when it is said that the house must be that of another, it is meant that it must be occupied by another. A man does not commit arson by burning a house occupied by himself, though it may be owned by another.[119] On the other hand, the legal owner of a house may be guilty of arson if he burns it while it is occupied by a lessee.[120] If the house is occupied by husband and wife, the law regards the husband as occupant, and the offense is against him, though the property may belong to the wife.[121] A jail, in which the jailer and his family reside, is his dwelling house, and the subject of arson.[122]

414. The Burning.

The burning necessary to constitute arson at common law must be an actual burning of some part of the house. An attempt to burn by actually setting a fire is not enough, if no

[119] Holme's Case, Cro. Car. 376, W. Jones, 351, Beale's Cas. 797; Rex v. Pedley, 1 Leach, C. C. 242; Breeme's Case, 2 East, P. C. 1026; State v. Keena, 63 Conn. 329, 28 Atl. 522; State v. Lyon, 12 Conn. 487; State v. Fish, 27 N. J. Law, 323; Sullivan v. State, 5 Stew. & P. (Ala.) 175; State v. Young, 139 Ala. 136, 36 So. 19, 101 Am. St. Rep. 21; State v. Sandy, 3 Ired. (N. C.) 570; ante, § 413a, note 112, and cases there cited.

It is not arson for a mortgagor of a house to burn it while in possession. Spalding's Case, 2 East, P. C. 1025, 1 Leach, C. C. 218.

But where a pauper burned a house occupied by himself and family by sufferance of the parish officers, he was held a mere servant and the burning arson. Rex v. Gowen, 1 Leach, C. C. 246, n., 2 East, P. C. 1027, Mikell's Cas. 930.

[120] 4 Bl. Comm. 221; Rex v. Harris, Fost. 113, Mikell's Cas. 928; State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Erskine v. Com., 8 Grat. (Va.) 624; Sullivan v. State, 5 Stew. & P. (Ala.) 175; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 303.

The interest or title of the occupant is altogether immaterial. People v. Van Blarcum, 2 Johns. (N. Y.) 105.

The offense may be committed against one whose occupancy is wrongful. Rex v. Wallis, 1 Mood. C. C. 344.

[121] Rex v. French, Russ. & R. 491; Rex v. Wilford, Russ. & R. 517.

[122] People v. Van Blarcum, 5 Johns. (N. Y.) 105; Stevens v. Com., 4 Leigh (Va.) 683.

part of the house is burned. Neither a blackening of the wood by smoke nor a mere scorching of the wood will suffice, but some part of the fiber of the wood must be consumed.[123] For this reason, the words *"incendit et combussit"* were necessary, in the days of law Latin, in all indictments for arson, and the word "burn" is essential now. It is not necessary that any part of the house shall be wholly consumed, or that the fire shall have any continuance. If there is the slightest burning of any part of the house, the offense is complete, though the fire may be put out, or may go out of itself.[124] There need not even be a blaze, but mere charring is sufficient.[125]

415. Intent—Malice.

All the definitions of arson at common law require that the burning shall be both willful and malicious;[126] but there has been some difference of opinion as to what is necessary to constitute malice within the meaning of the definitions, and the cases on the subject cannot all be reconciled. It would seem clear that a burning arising from negligence and mischance cannot, under any circumstances, be regarded as willful and ma-

[123] 4 Bl. Comm. 222; Reg. v. Russell, Car. & M. 541, Mikell's Cas. 931; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; Howel v. Com., 5 Grat. (Va.) 664; Cochrane v. State, 6 Md. 404; State v. Hall, 93 N. C. 571; People v. Haggerty, 46 Cal. 354; Woolsey v. State, 30 Tex. App. 346, 17 S. W. 546. Compare Com. v. Tucker, 110 Mass. 403, Beale's Cas. 800.

[124] 4 Bl. Comm. 222; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; Com. v. Tucker, 110 Mass. 403, Beale's Cas. 800; State v. Spiegel, 111 Iowa, 701, 83 N. W. 722.

[125] Reg. v. Parker, 9 Car. & P. 45; Reg. v. Russell, Car. & M. 541, Mikell's Cas. 931. And see Graham v. State, 40 Ala. 659; Benbow v. State, 128 Ala. 1, 29 So. 553; State v. Sandy, 3 Ired. (N. C.) 570; Levy v. People, 80 N. Y. 327; Woolsey v. State, 30 Tex. App. 346, 17 S. W. 546; People v. Haggerty, 46 Cal. 354; State v. Denin, 32 Vt. 158; State v. Hall, 93 N. C. 571.

[126] 3 Inst. 66, 67; 4 Bl. Comm. 222; 1 Hale, P. C. 566, 569, Mikell's Cas. 927; Reg. v. Faulkner, 13 Cox, C. C. 550, Ir. 11 C. L. 13, Beale's Cas. 213; Jenkins v. State, 53 Ga. 33, 21 Am. Rep. 255; Heard v. State, 81 Ala. 55, 1 So. 640; Kellenbeck v. State, 10 Md. 431, 69 Am. Dec. 166; McDonald v. People, 47 Ill. 533.

licious, and so it has generally been held.[127] And by the better opinion, where the burning is the result of negligence or mischance, the fact that the accused, when he caused the fire, was engaged in the commission of some other offense, even a felony, cannot render him guilty of arson.[128] But, on the principle that a man is presumed to have intended the natural and probable consequences of his voluntary acts, if a man does an unlawful act, the natural tendency of which is to set fire to and burn a house, and such a consequence follows, the burning is to be regarded as intentional and malicious.[129] Thus, if one sets fire to his own house, which is not arson nor a crime at common law,[130] or any other building, the burning of which is not arson, and burns an adjoining house of another, the burning of the latter is malicious, and constitutes arson.[131]

[127] 4 Bl. Comm. 222; 1 Hale, P. C. 569, Mikell's Cas. 927; Reg. v. Faulkner, supra.

[128] In Reg. v. Faulkner, supra, which is a leading case on this point, the defendant was indicted for the malicious burning of a ship,—a statutory arson. It appeared that he was a seaman on board the vessel, and went into the hold for the purpose of stealing rum which was stored there. He tapped a barrel, and the rum caught fire from a lighted match which he held, and the ship was burned. The trial judge instructed the jury to convict on the simple ground that the firing of the ship, though accidental, was caused by an act done in the commission of a felony,—larceny of the rum,—and did not leave to the jury any question as to whether the firing was a natural consequence of his unlawful act, so that he could, for that reason, be presumed to have intended it. The court for crown cases reserved quashed the conviction on the ground that the mere fact that the defendant was engaged in the commission of a felony did not make the unintentional firing of the ship malicious. According to this case, and others to the same effect, to constitute a malicious burning, it must be intentional.

[129] See Reg. v. Faulkner, supra; Reg. v. Lyons, 8 Cox, C. C. 84.

[130] Ante, §§ 413a, 413c.

[131] Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; Proberts' Case, 2 East, P. C. 1030; Rex v. Pedley, Cold. 218; Combs v. Com., 93 Ky. 313, 20 S. W. 221; State v. Laughlin, 53 N. C. 354. And see State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464; McDonald v. People, 47 Ill. 533; Lacy v. State, 15 Wis. 13; Early v. Com., 86 Va. 921, 11 S. E. 795.

In reason and on principle, if a man willfully and intentionally sets fire to and burns a house, without justification or excuse, his act is malicious, and he is none the less guilty of arson because he does not intend to consume the house, but is influenced by other motives. Therefore, it would seem that, if a prisoner sets fire to and burns any part of a jail, he is guilty of arson, though his intention may be, not to consume the jail, but merely to effect an escape.[132]

416. Statutory Burnings.

By statute in most jurisdictions the offense of arson has been extended so as to include the burning of other buildings than dwelling houses. They make the crime an offense against the property, and not merely against the security of the habitation. Thus, statutes have been enacted in many states declaring it arson to burn a shop, a warehouse, a store, a vessel, etc. These statutes do not change the offense otherwise than as to the character of the premises, unless such an intention on the part of the legislature is clear. They are to be construed in the light of the common law.[133] For example, they do not, unless

[132] Luke v. State, 49 Ala. 30, 20 Am. Rep. 269; Smith v. State, 23 Tex. App. 357, 5 S. W. 219; Willis v. State, 32 Tex. Cr. App. 534, 25 S. W. 123.

Some courts have held that such a burning is not "malicious," within the definition of "arson." State v. Mitchell, 5 Ired. (N. C.) 350; People v. Cotteral, 18 Johns. (N. Y.) 115. Some of the decisions usually cited as sustaining this view are based upon peculiar statutes, and, if construed with reference to the statutes, will be found not to be authority at common law.

In Jenkins v. State, 53 Ga. 33, 21 Am. Rep. 255, the defendant attempted to burn a hole through the door of a guard house, in which he was a prisoner, for the purpose of escaping, and not with the intention of consuming or generally injuring the building. It was held that he was not guilty, under a statute punishing an attempt "to burn a house." This decision, however, was based on the fact that the statutes (Code Ga. 1882, §§ 4376, 4381) punished the attempt to burn a house only where there was an intent "to consume or generally injure the house," and there was no reference to arson at common law.

[133] See Heard v. State, 81 Ala. 55, 1 So. 640.

by express terms, dispense with the necessity for an actual burning of some part of the building.[134] Nor, unless such an intent on the part of the legislature is clear, do they change the common-law rule that the house must be that of another than the accused.[135]

The statutes are not to be construed as dispensing with the necessity for the same willfulness and malice as is required by the common law, unless such an intent is clear.[136] Sometimes the statutes use the term "willfully" only, and do not expressly require that the burning shall be malicious. This term, it has been held, means something less than maliciously, and more than intentionally. It means unlawfully, and to some extent willfully. And under a statute punishing the "willful" burning of a jail, a prisoner was held guilty where he set fire to and partly burned the floor of the jail for the purpose of escaping, though there was no intention to consume the building, and he kept control of the fire by pouring water on it, so as only to burn a hole in the floor.[137]

[134] Mary v. State, 24 Ark. 44, 81 Am. Dec. 60.

[135] Spalding's Case, 2 East, P. C. 1025, 1 Leach, C. C. 218; State v. Sarvis (S. C.) 24 S. E. 53; People v. Myers, 20 Cal. 76; People v. DeWinton, 113 Cal. 403, 45 Pac. 708; People v. Gates, 15 Wend. (N. Y.) 159.

[136] See Heard v. State, 81 Ala. 55, 1 So. 640.

[137] Luke v. State, 49 Ala. 30, 20 Am. Rep. 269.

CHAPTER IX.

OFFENSES OTHER THAN AGAINST THE PERSON, PROPERTY, OR HABITATION OF INDIVIDUALS.

I. Offenses Affecting the Public Peace, §§ 417-429.
II. Offenses Affecting the Administration of Justice or of Government, §§ 430-444.
III. Offenses Affecting the Public Safety, Health, Comfort, etc., §§ 445-456.
IV. Offenses Against God and Religion, § 457.
V. Offenses Against Morality and Decency, §§ 458-473.
VI. Offenses Affecting the Public Trade, §§ 474-481.
VII. Offenses Against the Law of Nations, §§ 482-485.

I. Offenses Affecting the Public Peace.

417. In General.—Any act which in itself constitutes a breach of the public peace, or which has a direct tendency to cause a breach of the public peace, is a misdemeanor at common law.

In a broad sense, all offenses are breaches of the public peace. Unless otherwise provided by statute, every indictment, whether for a common-law or statutory offense, concludes by alleging that the offense was committed "against the peace of the state." We are to treat here, however, of those offenses only, other than felonies and certain misdemeanors, as homicide, assault and battery, etc., heretofore considered, which are punished because they especially affect the public peace. It is for this reason that the law punishes forcible entry and detainer, affrays, unlawful assemblies, routs, riots, disturbance of public assemblies, certain kinds of disorderly houses, libel, and malicious mischief. In addition to these specific offenses, it may be laid down as a general rule that any other act which constitutes a breach of the public peace, or which has a direct tendency to cause a breach of the public peace, is a misdemeanor at com-

mon law.[1] Thus, where a man discharged his gun at wild fowl, with knowledge and after warning that the report would injuriously affect a sick person in the neighborhood, and the report had such effect, it was held that his act was an indictable offense, not only because it was a wanton act of mischief, but also because it was against the public peace and security.[2]

"It is not necessary that there shall be actual force or violence to constitute an indictable offense. Acts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable. To send a challenge to fight a duel is indictable, because it tends directly towards a breach of the peace. Libels fall within the same reason. A libel even of a deceased person is an offense against the public, because it may stir up the passions of the living, and produce acts of revenge."[3]

418. Trespass and Forcible Entry and Detainer.—A trespass upon land is a misdemeanor at common law when committed under such circumstances as to constitute a breach of the peace, but not otherwise. It is also punished by statute.

To merely break and enter the close of another is, in contemplation of law, a trespass committed *vi et armis*,—with force and arms; but unless it is committed under such circumstances as to constitute an *actual* breach of the peace, it is not indictable at common law, but is to be redressed by a civil action only.[4] If, however, it is attended by a breach of the

[1] 4 Bl. Comm. 142 et seq.; Rex v. Billingham, 2 Car. & P. 234; Henderson v. Com., 8 Grat. (Va.) 708, 56 Am. Dec. 160; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; State v. Benedict, 11 Vt. 236, 34 Am. Dec. 688; State v. Jasper, 4 Dev. (N. C.) 323; State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416; State v. Batchelder, 5 N. H. 549; Rex v. Summers, 3 Salk. 194, Mikell's Cas. 41; Com. v. Haines, 4 Clark (Pa.) 17, Mikell's Cas. 41.

[2] Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, Beale's Cas. 119.

[3] Com. v. Taylor, 5 Binn. (Pa.) 277; post, § 428.

[4] Rex v. Blake, 3 Burrow, 1731, Beale's Cas. 102; Rex v. Storr, 3 Burrow, 1698; Rex v. Wilson, 8 Term R. 357; Kilpatrick v. People, 5

peace, it is a misdemeanor. It is a misdemeanor to enter the dwelling house or yard of another, with offensive weapons, in such a manner as to cause terror and alarm to the inmates of the house.[5] It has also been held that it is a misdemeanor at common law to maliciously and secretly break and enter a dwelling house in the nighttime with force and arms, with intent to disturb the peace.[6] On the other hand, it was held in a New York case that an indictment which charged that the accused, "with force and arms, unlawfully, willfully, and maliciously, did break to pieces and destroy," two windows in a dwelling house, did not charge an offense at common law, where it did not appear that the act was done in the nighttime, or secretly, or with actual breach of the peace.[7] And the girdling of fruit trees on another's land, though done maliciously, was held to be a mere civil trespass, and not a crime.[8] The fact that a trespass is committed by a number of persons does not make it indictable, if there is no riot, or unlawful assembly, or anything of that kind.[9]

Denio (N. Y.) 277; Com. v. Edwards, 1 Ashm. (Pa.) 46; State v. Burroughs, 7 N. J. Law, 426; Com. v. Powell, 8 Leigh (Va.) 719; Com. v. Gibney, 2 Allen (Mass.) 150; Com. v. Taylor, 5 Bin. (Pa.) 277, Mikell's Cas. 44.

[5] Henderson v. Com., 8 Grat. (Va.) 708, 56 Am. Dec. 160. In this case, the indictment, which was sustained, charged that the defendant "did break and enter the close of one E., and at the house of said E. did then and there wickedly, mischievously, and maliciously, and to the terror and dismay of one N., wife of said E., fire a gun in the porch of said house, and then and there did shoot and kill a dog belonging to said house," etc.

[6] Com. v. Taylor, 5 Binn. (Pa.) 277, Mikell's Cas. 44.

In Rex v. Hood, Sayer, 161, the court refused to quash an indictment for disturbing a family by violently knocking at the front door of the house for the space of two hours.

[7] Kilpatrick v. People, 5 Denio (N. Y.) 277.

In State v. Batchelder, 5 N. H. 549, however, it was held an indictable offense to break the windows of a dwelling house with clubs in the nighttime, and thus disturb the peace and quiet of a family living in the house.

[8] Brown's Case, 3 Greenl. (Me.) 177.

[9] Rex v. Blake, 3 Burrow, 1731, Beale's Cas. 102.

Forcible Entry and Detainer.—Forcible entry upon the land of another, or forcible detention after a peaceable entry, was made punishable by early English statutes, and is punished by statute in this country. An indictment for forcible entry or forcible detainer will also lie at common law, provided there is such an actual force, or menace of actual force, as to constitute a breach of the peace, but not otherwise.[10] To merely charge that the entry was made *vi et armis,* or with force and arms, is not enough, as these words do not imply an actual breach of the peace.[11] Nor is it enough to show that the entry was by a number of persons, if no riot, or unlawful assembly, or anything of that kind is charged.[12]

419. Affray—(a) Definition.—At common law, an affray is the fighting of two or more persons in a public place, to the terror or alarm of the people.[13] It is a misdemeanor. In some states the statutory definition is slightly different.

(*b*) *The Fighting.*—To constitute this offense at common law, and under the statutes as well, there must be fighting by or be-

[10] Rex v. Blake, 3 Burrow, 1731, Beale's Cas. 102; Rex v. Storr, 3 Burrow, 1698; Rex v. Wilson, 8 Term R. 357; Rex v. Bathurst, Sayer, 225; Com. v. Taylor, 5 Binn. (Pa.) 277; State v. Pearson, 2 N. H. 550; Com. v. Dudley, 10 Mass. 403. Compare Harding's Case, 1 Greenl. (Me.) 22; State v. Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844; State v. Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841; Ex parte Webb, 24 Nev. 238, 51 Pac. 1027; Williams v. State, 120 Ga. 488, 48 S. E. 149.

[11] Rex v. Blake, 3 Burrow, 1731, Beale's Cas. 102.

[12] Rex v. Blake, 3 Burrow, 1731, Beale's Cas. 102.

In Rex v. Storr, supra, the indictment was for unlawfully entering the prosecutor's yard, and digging the ground and erecting a shed, and unlawfully, and with force and arms, putting out and expelling the prosecutor from the possession and keeping him out of the possession. This indictment was quashed. Rex v. Blake, supra, was an indictment for breaking and entering, with force and arms, a close (not a dwelling house), and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession. This also was quashed, and the rule laid down by all the court was that there must be force or violence

tween two or more persons.[14] And there must be actual fighting. Mere quarrelsome and threatening words, without more, will not amount to an affray.[15] If a person uses insulting language towards another, and thereby provokes an assault by the other, but does not resist or return the other's blows, this, according to the better opinion, is not an affray.[16] It is otherwise, however, if a person, being willing to fight, uses language

shown upon the face of the indictment—as some riot or unlawful assembly.

[13] 4 Bl. Comm. 145; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Perry, 5 Jones (N. C.) 9, 69 Am. Dec. 768; McClellan v. State, 53 Ala. 640; State v. Brewer, 33 Ark. 176; Childs v. State, 15 Ark. 204; Com. v. Simmons, 6 J. J. Marsh. (Ky.) 614; State v. Sumner, 5 Strob. (S. C.) 53, 56; Wilkes v. Jackson, 2 Hen. & M. (Va.) 355, 360; State v. Sumner, 5 Strob. (S. C.) 53, Mikell's Cas. 43, n.

An affray is where two or more come together without any premeditated design to disturb the public peace, and break out into a quarrel among themselves, and is distinguishable from a riot, where there is more or less concert of action, mutual co-operating and assisting of each other for a common purpose, whether it be a general disturbance of the peace, or an attack upon individuals, the destruction of property, or any other object which is unlawful, for the accomplishment of which they are unitedly, or in separate parties or bands. People v. Judson, 11 Daly (N. Y.) 1.

An affray involves an assault, but it is distinguishable from an assault in the fact that the fighting must be in a public place. Post, § 419e.

[14] Simpson v. State, 5 Yerg. (Tenn.) 356; People v. Moore, 3 Wheeler, Cr. Cas. (N. Y.) 82; Thompson v. State, 70 Ala. 26. Two persons who fight, not against each other, but against a third person, may be indicted and convicted. Thompson v. State, supra.

[15] Simpson v. State, 5 Yerg. (Tenn.) 356; Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; O'Neill v. State, 16 Ala. 65; Pollock v. State, 32 Tex. Cr. R. 29, 22 S. W. 19; State v. Sumner, 5 Strob. (S. C.) 53. In State v. Davis, 65 N. C. 298, the statement that words alone may amount to an affray was mere dictum, and cannot be sustained.

[16] O'Neill v. State, 16 Ala. 65; Pollock v. State, 32 Tex. Cr. R. 29, 22 S. W. 19. In North Carolina, contrary to these decisions, this is held to be an affray, where the insulting words are intended or calculated to provoke an assault. State v. Fanning, 94 N. C. 940, 55 Am. Rep. 653; State v. Perry, 5 Jones (N. C.) 9, 69 Am. Dec. 768. And see State v. Davis, 80 N. C. 351, 30 Am. Rep. 86.

intended or calculated to provoke an assault, and engages in a fight when the assault is made.[17] Insulting and threatening words, accompanied by the drawing of weapons by both parties, and attempts to use them, will amount to an affray.[18] It has been said that going about in a public place armed with unusual and dangerous weapons, to the terror of the people, is an affray,[19] but the better opinion is to the contrary.[20]

(*c*) *Fighting by Agreement.*—In some states the statutory definition of an affray requires that the fighting shall be by agreement between the parties, and, in such a case, that it was by agreement must be shown.[21] At common law, and under most statutes, agreement or mutual consent is not necessary.[22]

(*d*) *Self-Defense.*—If a person, in fighting, is acting purely in self-defense, or in the defense of a child or other person whom he has a right to protect, he is not guilty of an affray.[23] The plea of self-defense will not avail, however, if the accused

[17] State v. Sumner, 5 Strob. (S. C.) 53; Pollock v. State, 32 Tex. Cr. R. 29, 22 S. W. 19; State v. King, 86 N. C. 603. If a person's language or conduct is calculated to provoke an assault, and a fight results, it is no defense against an indictment for an affray to say that he did not intend to bring on a fight. State v. King, supra; State v. Sumner, supra.

[18] Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517.

[19] State v. Woody, 2 Jones (N. C.) 335. In the case of State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416, this was held to be an offense at common law,—an offense against the public order and sense of security,—but it was not held to be an affray.

[20] Simpson v. State, 5 Yerg. (Tenn.) 356.

[21] Klum v. State, 1 Blackf. (Ind.) 377; Supreme Council v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298.

[22] Cash v. State, 2 Overt. (Tenn.) 198; Pollock v. State, 32 Tex. Cr. R. 29, 22 S. W. 19. And see Supreme Council v. Garrigus, supra.

As was said in Cash v. State, supra, it is because the violence is committed in a public place, and to the terror of the people, that the crime is called an "affray," instead of "assault and battery," and not because it took place by the mutual consent of the parties.

There is dictum to the contrary in Duncan v. Com., 6 Dana (Ky.) 295.

[23] People v. Moore, 3 Wheeler, Cr. Cas. (N. Y.) 82; State v. Sumner, 5 Strob. (S. C.) 53; Coyle v. State (Tex. Cr. App.) 72 S. W. 847. And see State v. Harrell, 107 N. C. 944, 12 S. E. 439.

brought on the fight by insulting and abusive language or conduct,[24] or if he engaged in the fight willingly, and not merely on the defensive.[25]

(*e*) *Public Place.*—Both at common law and under the statutes, the fighting must be in a public place. If it is in private, the offense is merely assault and battery.[26] Thus, a fight in a field surrounded by woods, and situated at a distance from any highway or other public place, is not an affray, though there may be another person present besides the combatants.[27] Even a highway is not necessarily a public place, within the definition of an "affray."[28] The fight need not originate in a public place. It is an affray, though commenced in private, if it is carried by flight and pursuit to places where people are assembled.[29]

(*f*) *Terror of the People.*—The definitions of an "affray" make it essential that the fighting shall be, not only in a public place, but also to the terror of the people;[30] and a conviction

[24] State v. King, 86 N. C. 603; State v. Sumner, 5 Strob. (S. C.) 53; Pollock v. State, 32 Tex. Cr. R. 29, 22 S. W. 19.

[25] State v. Harrell, 107 N. C. 944, 12 S. E. 439. And see State v. Downing, 74 N. C. 184.

[26] 4 Bl. Comm. 145; Reg. v. Hunt, 1 Cox, C. C. 177; State v. Weekly, 29 Ind. 206; State v. Sumner, 5 Strob. (S. C.) 53; McClellan v. State, 53 Ala. 640; Thompson v. State, 70 Ala. 26; State v. Brewer, 33 Ark. 176; Childs v. State, 15 Ark. 204; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Heflin, 8 Humph. (Tenn.) 84.

[27] Taylor v. State, 22 Ala. 15. An inclosed lot, situated thirty yards distant from the street of a town, but visible from the street, has been held a public place. Carwile v. State, 35 Ala. 392.

[28] State v. Weekly, 29 Ind. 206. Contra, State v. Warren, 57 Mo. App. 502.

Thus, as was said in the case of State v. Weekly, supra, a fight would not be an affray if it should take place on a part of the highway concealed entirely from public view by a growth of timber.

[29] Wilson v. State, 3 Heisk. (Tenn.) 278; State v. Billings, 72 Mo. 662.

[30] 4 Bl. Comm. 145; State v. Warren, 57 Mo. App. 502; Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; State v. Sumner, 5 Strob. (S. C.) 53, 56.

has been set aside because of the court's failure to instruct the jury to this effect.[31] The existence of this element, however, as a matter of fact, need not be proved. If the fighting is shown to have been in a public place, "the inference of law will be strong enough to import whatever terror may be a necessary ingredient."[32]

420. Prize Fighting.—To engage in a prize fight is a misdemeanor at common law, if it takes place under such circumstances as to constitute, or tend to cause, a breach of the public peace.

Prize fighting—fighting for a prize or reward[33]—is expressly punished by statute in many jurisdictions. It is not a distinct offense, *eo nomine*, at common law, but it is a misdemeanor at common law if it takes place in public, so as to constitute an affray or riot, or to otherwise constitute or tend to cause a breach of the public peace. It is not a lawful game at common law, as is a friendly boxing or wrestling match.[34]

421. Dueling.—It is a misdemeanor at common law to fight a duel, or to send, or to knowingly bear, or to intentionally provoke, a challenge to fight a duel.

In a broad sense, any fighting of two persons, one against the other, by agreement, is a duel, but the term, as commonly used, implies such a fighting with deadly weapons.[34a] In some countries it is not unlawful, but it is a misdemeanor at common law

[31] State v. Warren, 57 Mo. App. 502.

[32] State v. Sumner, 5 Strob. (S. C.) 53, 56. And see Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517.

[33] See Sullivan v. State, 67 Misc. 352, 7 So. 275.

[34] 1 East, P. C. 270; Rex v. Billingham, 2 Car. & P. 234; Rex v. Perkins, 4 Car. & P. 537. State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328. And see Com. v. Wood, 11 Gray (Mass.) 85.

[34a] A challenge to fight a fair fight without weapons is not dueling. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

in England and in this country.[35] It is also a misdemeanor at common law to give a challenge to fight a duel, either by words or by letter, or to knowingly be the bearer of such a challenge,[36] or to designedly provoke such a challenge.[37] To constitute the offense of dueling, it is not necessary that any injury shall be done.[38] These acts are now punished in most jurisdictions by statute.[39]

422. Carrying Weapons.—There is a conflict of authority as to whether it was a misdemeanor at common law to go about armed with dangerous and unusual weapons, to the terror and alarm of the people, but carrying weapons or concealed weapons is very generally prohibited and punished by statute.

At Common Law.—In a well-considered Tennessee case it was held that it was no offense at all at common law for a man to go about in public places armed with dangerous and unusual weapons, where there was no fighting, or attempt to use the weapons, though it was alleged to have been done to the terror of the people.[40] In North Carolina the contrary was held,[41] and this decision seems to be supported both by general principles and by authority.[42]

Statutory Offense.—Carrying of weapons, except by certain

[35] 4 Bl. Comm. 145, 199; Com. v. Lambert, 9 Leigh (Va.) 603.

[36] 4 Bl. Comm. 150; 1 Hawk. P. C. c. 63, § 19; Com. v. Taylor, 5 Bin. (Pa.) 277; Rex v. Philipps, 6 East, 464. See Brown v. Com., 2 Va. Cas. 516.

[37] 2 Whart. Crim. Law, § 177.

[38] See Com. v. Lambert, 9 Leigh (Va.) 603.

[39] See Am. & Eng. Enc. Law (2d Ed.) tit. "Dueling."

[40] Simpson v. State, 5 Yerg. (Tenn.) 356. As to whether it is an affray, see ante, § 419.

[41] State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416. And see State v. Lanier, 71 N. C. 288.

[42] The statute of Northampton (2 Edw. III. c. 3), punishing such acts, has been said to have been merely declaratory of the common law. Knight's Case, 3 Mod. 117; State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416. And Hawkins says that this was an offense at common law. 1 Hawk. P. C. c. 28, § 4.

privileged classes, was prohibited and punished by early English statutes. And in this country there are statutes in most states making it a misdemeanor to carry concealed weapons, except in certain cases.[43]

423. Unlawful Assembly.—An unlawful assembly, which is a misdemeanor at common law, is an assembly of three or more persons, either—

1. **With intent to commit a crime by open force.**
2. **Or with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of it.[44]**

To constitute an unlawful assembly, there must be a meeting of three or more persons—not less than three[45]—for such a purpose as is stated above. If persons who have assembled for a lawful purpose afterwards associate together to do an unlawful act, such association is equivalent to an assembling for that purpose.[46] The purpose of the assembly may be to commit some crime, but this is not necessary. It may be to do any act, lawful or unlawful, provided the purpose is to be carried out in such a manner as to give firm and courageous persons in the neighborhood reasonable grounds to apprehend a breach of the peace.[47]

[43] See Am. & Eng. Enc. Law (2d Ed.) tit. "Carrying Weapons."

[44] Steph. Dig. Crim. Law, art. 70. And see 3 Inst. 176; 1 Hawk. P. C. c. 65, § 9; 4 Bl. Comm. 146; Beatty v. Gillbanks, 9 Q. B. Div. 308, 15 Cox, C. C. 138, Beale's Cas. 105; Reg. v. McNaughten, 14 Cox, C. C. 576; State v. Cole, 2 McCord (S. C.) 117; People v. Judson, 11 Daly (N. Y.) 1, 83; Reg. v. Vincent, 9 Car. & P. 91, Mikell's Cas. 43, n.

[45] Post, § 425e.

[46] State v. Cole, 2 McCord (S. C.) 117.

[47] Steph. Dig. Crim. Law, art. 70; Reg. v. Neale, 9 Car. & P. 431; Rex v. Brodribb, 6 Car. & P. 571; Reg. v. Vincent, 9 Car. & P. 91.

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighborhood, is an unlawful assembly;

It is essential that the assembly shall either be for an unlawful object, or shall be tumultuous, and against the peace. For this reason, persons—as members of the Salvation Army, for example—who assemble for a lawful purpose, and without any intention of carrying it out unlawfully, are not guilty of an unlawful assembly merely because they have good reason to believe that their assembly will be opposed, and that those who will oppose it will commit a breach of the peace.[48] There must be no carrying out of the unlawful purpose, nor any movement towards carrying it out, for in such a case the offense becomes a rout or a riot.[49] Both a rout and a riot, however, include unlawful assembly, and a man may be convicted of the latter on proof of the former.[50]

Statutes.—In some jurisdictions, the statutory offense of unlawful assembly differs from the offense at common law. In New York, to sustain an indictment for unlawful assembly, it must be proved that three or more persons, being assembled, united in attempting or threatening an act "tending towards a breach of the peace, or an injury to person or property, or any unlawful act."[51] A threat made by one or two persons only,

and, in viewing this question, the jury should take into their consideration the hour at which the parties meet, and the language used by the persons assembled, and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. Reg. v. Vincent, 9 Car. & P. 91.

[48] Beatty v. Gillbanks, 9 Q. B. Div. 308, 15 Cox, C. C. 138, Beale's Cas. 105.

[49] Post, §§ 424, 425. "The difference between a riot and an unlawful assembly is this: If the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose, which, if executed, would make them rioters, and, having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly." Per Mr. Justice Patterson in Rex v. Birt, 5 Car. & P. 154.

[50] See State v. Stalcup, 1 Ired. (N. C.) 30.

[51] Pen. Code N. Y. § 451, subd. 3; People v. Most, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458 (anarchist case).

although in an assembly of many persons, is not within the statute.[52] It need not affirmatively appear, however, that other persons present when the threat was made uttered or repeated the same words. Participation in the threat may be shown by the adoption by others of the language used, exhibited by their conduct.[53] Threats of personal violence made in New York against persons in another state, and threats relating to acts not presently to be done, but to be performed at some future time, are within the statute.[54]

424. Rout.—A rout is where three or more persons, who have assembled in such a way as to constitute an unlawful assembly, make some advance towards doing an unlawful act. It is a misdemeanor at common law.[55]

As in unlawful assembly, so in a rout, there must be at least three persons.[56] "Rout" differs from "unlawful assembly" in that there is something more than the mere assembling. Where three or more persons, who have assembled for the purpose of doing any unlawful act, make any movement or advance towards doing it, the offense is no longer a mere unlawful assembly, but becomes a rout. Thus, if three or more persons come together for the purpose of lynching or tarring and feathering a man, or of committing a trespass on land, and start out towards the place where the unlawful act is to be done, they are guilty of a rout.[57]

425. Riot—(a) In General.—A riot is where three or more persons, who have assembled under such circumstances as to

[52] People v. Most, supra.

[53] People v. Most, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458.

[54] Id.

[55] Steph. Dig. Crim. Law, art. 71; 4 Bl. Comm. 146; 1 Hawk. P. C. c. 65, § 14; State v. Sumner, 2 Speer (S. C.) 599; People v. Judson, 11 Daly (N. Y.) 1, 83.

[56] See post, § 425e.

[57] See authorities above cited.

constitute an unlawful assembly, actually engage in carrying out their unlawful purpose, or where three or more persons, who have assembled without any unlawful purpose, form and proceed to carry out such a purpose in a violent or tumultuous manner. It is a misdemeanor at common law.[58]

Riot includes unlawful assembly and rout.[59] There must be at least three persons.[60] When three or more persons, who have assembled for the purpose of doing any unlawful act, whether it be a crime or a mere civil trespass, actually engage in the execution of their unlawful purpose in a violent or tumultuous manner, they are guilty of riot.[61] It is also a riot for three or more persons, who have assembled for a lawful purpose, or who happen to be together without any previous understanding, to determine upon doing an unlawful act in concert, and then engage in the execution of their unlawful purpose in a violent or tumultuous manner.[62] Even a lawful act may be done in such a manner as to render the doers guilty of riot. If three or more persons, acting in concert, engage in doing an act in a violent or tumultuous manner, thereby committing a breach of

[58] Steph. Dig. Crim. Law, art. 72; 3 Inst. 176; 4 Bl. Comm. 146; 1 Hawk. P. C. c. 65, § 1; Reg. v. Cunningham, 16 Cox, C. C. 420, Mikell's Cas. 43, n.

[59] State v. Stalcup, 1 Ired. (N. C.) 30; Dougherty v. People, 5 Ill. 179; Com. v. Gidney, 2 Allen (Mass.) 150.

[60] See post, this section.

[61] State v. Cole, 2 McCord (S. C.) 117; State v. Connolly, 3 Rich. (S. C.) 337; State v. Jackson, 1 Speer (S. C.) 13; People v. Judson, 11 Daly (N. Y.) 1, 83.

In Bell v. Mallory, 61 Ill. 167, a man claiming to have purchased a colt procured the assistance of two other persons to drive it from the range into an inclosure of the owner, and then, against the remonstrance of the owner, attempted to secure it and take it away, one of the other men being armed with a pistol, and threatening the owner on his interfering to prevent the taking. This was held to be a riot.

When a number of persons tumultuously endeavor to rescue a prisoner from an officer, there is an act of violence, though no blow is struck. Fisher v. State, 78 Ga. 258.

[62] State v. Cole, 2 McCord (S. C.) 117; State v. Snow, 18 Me. 346.

the peace, they are guilty of riot, whether their object be otherwise lawful or unlawful.[63] That the parties intended merely a frolic or joke is no defense.[64]

(*b*) *Concert of Action.*—To render persons guilty of riot, they must act in concert.[65] But the concert of action may exist in the execution of the act itself. It is not necessary that the

[63] 4 Bl. Comm. 146; 10 Mod. 116; State v. Connolly, 3 Rich. (S. C.) 337; State v. Brazil, Rice (S. C.) 257; Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148; Green v. State, 109 Ga. 536, 35 S. E. 97. And see Kiphart v. State, 42 Ind. 273; Bankus v. State, 4 Ind. 114.

In State v. Brazil, supra, a band of eight or ten disguised and armed men had paraded the streets of a town at night, marching backward and forward, shooting guns and blowing horns, to the terror and alarm of the people. It was held that they were guilty of riot. It was said by the court in this case: "Even admitting the acts the defendants performed were not in themselves unlawful, yet they were calculated to excite terror and alarm, and in two of the cases were actually proved to have produced that effect."

In Indiana the statute makes it a riot for three or more persons to actually do an unlawful act of violence, either with or without a common cause of quarrel, or even to do a lawful act in a violent and tumultuous manner. See State v. Scaggs, 6 Blackf. (Ind.) 37. To violently and unlawfully burst open the door of another's dwelling house is within the statute. Id.

Pennsylvania v. Morrison, Add. (Pa.) 274, Mikell's Cas. 22. Several were indicted for riotously assembling and raising a liberty pole as an insult and indignity to certain federal and state commissioners.

[64] State v. Alexander, 7 Rich. (S. C.) 5; State v. Brazil, Rice (S. C.) 257 (as to which case see the note preceding); State v. Brown, 69 Ind. 95; Backus v. State, 4 Ind. 114.

In State v. Alexander, supra, four persons went at midnight, upon concert, to the prosecutor's stable, for the purpose of shaving his horse's tail, and did so, making such a noise and disturbance as to arouse the prosecutor, and alarm the members of his family. It was held that they were guilty of riot.

[65] Sloan v. State, 9 Ind. 565; Coney v. State, 113 Ga. 1060, 39 S. E. 425; Dixon v. State, 105 Ga. 787, 31 S. E. 750.

If a person, who is at a distance of thirty rods when a riot is committed by others, comes up immediately afterwards, and does violence upon the same person, but not acting in concert with the others, he is not guilty of riot, but of assault and battery. Sloan v. State, supra. It is otherwise if he is acting in concert with the others. Hibbs v. State, 24 Ind. 140.

parties shall have deliberated or exchanged views with each other before entering upon the execution of their common purpose.[66]

(*c*) *Distinguished from Treason.*—The parties must be engaged in a private purpose, as distinguished from an attempt to overthrow or subvert the government, which is treason.[67]

(*d*) *Breach of Peace and Terror to the People.*—To constitute a riot, the acts done must be against the public peace, or to the terror and alarm of the people.[68] Many of the definitions of a riot expressly require that the acts shall be done to the terror or alarm of the people,—*in terrorem populi.* But if persons assemble to do an unlawful act, the apparent tendency of which is to inspire terror or alarm, and execute their purpose, it is not necessary to show affirmatively that people were in fact terrorized or alarmed.[69] The terror or alarm need not be to more than one person or one household.[70]

(*e*) *Number of Persons.*—Unless the rule is changed by statute, less than three persons cannot be guilty of an unlawful assembly, a rout, or a riot. There may be any number over two, but there must be at least three.[71] It is not necessary, however, that three persons be indicted or be known. An indictment will lie against one or two persons for either of these offenses, if it be alleged and proved that there were three or more persons, and that the others are dead, or that their names are

[66] People v. Judson, 11 Daly (N. Y.) 1, 84.

[67] State v. Cole, 2 McCord (S. C.) 117; People v. Judson, 11 Daly (N. Y.) 1, 83.

[68] State v. Cole, 2 McCord (S. C.) 117; Rex v. Cox, 4 Car. & P. 538.

[69] State v. Alexander, 7 Rich. (S. C.) 5. See Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148.

[70] State v. Alexander, supra.

[71] 4 Bl. Comm. 146; Rex v. Scott, 3 Burrows, 1262; State v. O'Donald, 1 McCord (S. C.) 532. And see Turpin v. State, 4 Blackf. (Ind.) 72; Com. v. Berry, 5 Gray (Mass.) 93.

Under the Illinois statute, two persons may commit these offenses. See Logg v. People, 92 Ill. 598. The same is true under the Georgia statute. Prince v. State, 30 Ga. 27; Green v. State, 109 Ga. 536, 35 S. E. 97.

not known.[72] Where three persons are together for a common unlawful purpose, it is not necessary, in order to make them all guilty of riot, that all should do some physical act. It is enough if two or even one of them does the unlawful act, if the others are present, abetting it.[73]

(*f*) *Justification or Excuse.*—Persons acting under lawful authority, as peace officers and soldiers, so long as they do not exceed their authority, either as to the thing done, or the manner of doing it, are not guilty of riot. But peace officers and soldiers may be guilty of riot if they act without authority, or in excess of their authority.[74] Custom is no justification or excuse.[75]

(*g*) *Acts of One the Acts of All.*—When three or more persons enter in concert upon the execution of an unlawful purpose, and the combination or concert is shown, the acts of one are the acts of all.[76] To constitute a person a rioter, it is not necessary that he shall be actively engaged, or that he shall do any physical act of violence himself. It was said in substance in a New York case: The law does not distinguish between the relative degrees of violence on the part of individuals in a riot, but all who aid and assist in it are equally guilty. Any act in

[72] Rex v. Scott, 3 Burrow, 1262; State v. Calder, 2 McCord (S. C.) 462; State v. Brazil, Rice (S. C.) 257.

[73] State v. Straw, 33 Me. 554. See, also, Williams v. State, 9 Mo. 270; People v. Judson, 11 Daly (N. Y.) 1, 85.

[74] State v. Cole, 2 McCord (S. C.) 117; Darst v. People, 51 Ill. 286; Douglass v. State, 6 Yerg. (Tenn.) 525.

In Darst v. People, supra, police officers and town trustees who proceeded to a man's house, broke down the door, and seized and carried away intoxicating liquors, without previous judicial determination that the man was guilty of maintaining a nuisance in violation of a statute, were convicted of riot, though the statute in terms authorized this mode of proceeding. It was held that the statute was unconstitutional in so far as it allowed such seizure without previous judicial proceedings, and, in effect, that it was no justification.

[75] Bankus v. State, 4 Ind. 114; ante, § 84.

[76] Bell v. Mallory, 61 Ill. 167; People v. O'Loughlin, 3 Utah, 133, 1 Pac. 653.

aid or furtherance of the common design is sufficient. It is not necessary that a party shall do any physical act, such as throwing a stone, or commit personal violence, or be armed with a weapon, or make use of threatening speeches. If, by any act of his, done with intent to create a riot, he assists to bring it about, or if, by signs, words, gestures, cries, shouting, or any other thing, he aids to promote or augment it, he is guilty.[77]

426. Disturbance of Public Assembly.—Disturbance of any public assembly, whether the assembly be for the purpose of religious worship, or for some other lawful purpose, is a misdemeanor at common law.[78]

The reason why the disturbance of a public assembly is punished as a misdemeanor at common law is because it either amounts to a breach of the peace in itself, or because it has a direct tendency to cause a breach of the peace. The assembly need not be for the purpose of religious worship. It is a misdemeanor to disturb any public assembly.[79] In most states, perhaps in all, such offenses are now expressly punished by statute.[80]

427. Disorderly Houses.—A house which is kept in such a way as to disturb the public peace, or to encourage or promote breaches of the public peace, is a disorderly house, and the keeping of the same is a misdemeanor at common law.

Some disorderly houses are of such a nature that they tend to corrupt the morals of the community, and the keeping of them

[77] People v. Judson, 11 Daly (N. Y.) 1, 85. And see State v. Straw, 33 Me. 554; Williams v. State, 9 Mo. 270.

[78] Com. v. Hoxey, 16 Mass. 385; State v. Jasper, 4 Dev. (N. C.) 323; State v. Linkhaw, 69 N. C. 214, 12 Am. Rep. 645; Bell v. Graham, 1 Nott & McC. (S. C.) 278, 9 Am. Dec. 687; Hunt v. State, 3 Tex. App. 116, 30 Am. Rep. 126. See, also, State v. Wright, 41 Ark. 410, 48 Am. Rep. 43; Lancaster v. State, 53 Ala. 398, 25 Am. Rep. 625.

[79] See the cases above cited.

[80] See Am. & Eng. Enc. Law (2d Ed.) tit. "Disturbing Meetings."

is punished as a misdemeanor for this reason.[81] Others are of such a nature that they tend to encourage or promote breaches of the peace, and the keeping of them is punished on this ground. There are others, the keeping of which is punished for both reasons. Of the first kind are bawdy houses. Of the second kind are saloons and other places in which disorderly persons are allowed to congregate, and by quarreling, swearing, or other disorder, disturb the public peace, and annoy the neighborhood. The keeping of such a place is a misdemeanor at common law.[82] Common gambling houses, and places where cock fighting and other unlawful games and sports are permitted, tend, not only to corrupt the public morals, but also to encourage or promote breaches of the peace, and the keeping of such places is a misdemeanor for both reasons.[83]

To render a house disorderly, the disorder need not be inside the house. If a place is so conducted as to attract disorderly persons, the keeping of it is a misdemeanor, although the persons go or remain outside to be disorderly.[84] If a man is guilty of keeping a disorderly house, it is no defense for him to show that he has endeavored to prevent breaches of the peace and other disorder.[85]

[81] Post, §§ 465, 466.

[82] 1 Hawk. P. C. c. 75, § 6; Rex v. Moore, 3 Barn. & Adol. 184; U. S. v. Dixon, 4 Cranch, C. C. 107, Fed. Cas. No. 14,970; State v. Buckley, 5 Harr. (Del.) 508; State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; State v. Haines, 30 Me. 65; Beard v. State, 71 Md. 275, 17 Atl. 1044, 17 Am. St. Rep. 536.

[83] 1 Hawk. P. C. c. 75, § 6; Rex v. Higginson, 2 Burrow, 1232; Rex v. Dixon, 10 Mod. 335; U. S. v. Dixon, 4 Cranch, C. C. 107, Fed. Cas. No. 14,970; State v. Haines, 30 Me. 65; Vanderworker v. State, 13 Ark. 700; King v. People, 83 N. Y. 587; Beard v. State, 71 Md. 275, 17 Atl. 1044, 17 Am. St. Rep. 536; Cahn v. State, 110 Ala. 56, 20 So. 380; Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; post, § 466.

[84] State v. Buckley, 5 Harr. (Del.) 508; State v. Webb, 25 Iowa, 235; State v. Thornton, Busb. (N. C.) 252.

[85] Cable v. State, 8 Blackf. (Ind.) 531; Price v. State, 96 Ala. 1, 11 So. 128.

428. Libel—(a) In General.—It is a misdemeanor at common law to maliciously publish any writing, picture, sign, or other representation which tends to defame a living person, and expose him to ridicule, hatred, or contempt, or, under some circumstances, to defame the memory of a deceased person. Slander, or verbal defamation, is not punished at common law, but is punished in some jurisdictions by statute.

(*b*) *Against a Living Person.*—Libels against individuals have a direct tendency to provoke violent retaliation, and thereby cause breaches of the public peace, and, because of this tendency, they are regarded and punished as a misdemeanor at common law.[86] In most states, libel is now punished by statute. Any publication by writing, etc., which is calculated to defame a person, and to expose him to ridicule, hatred, or contempt, is a libel.[87] To maliciously publish, either by direct statement, or by innuendo, insinuation, irony, or otherwise,[88] that a person is guilty of a crime, is clearly a libel.[89] It has also been held a libel to publish of a person that he has, as a juror, been guilty of misconduct in staking a verdict upon chance,[90] or that he is a rascal, scoundrel, cheat, etc.[91] A malicious publication which imputes dishonesty or incapacity to a man in his trade or profession is indictable as a libel.[92] The same is true of a publica-

[86] Gregory v. Reg., 15 Q. B. 957, 5 Cox, C. C. 247; Rex v. Critchley, 4 Term R. 129, note; Rex v. Summers, 3 Salk. 194, Mikell's Cas. 41; The Case De Libellis Famosis, 5 Rep. 125, Mikell's Cas. 951; Com. v. Chapman, 13 Metc. (Mass.) 68; State v. Burnham, 9 N. H. 34; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

[87] Steph. Dig. Crim. Law, art. 269; Gregory v. Reg., 15 Q. B. 957, 5 Cox, C. C. 247; Barthelemy v. People, 2 Hill (N. Y.) 248; State v. Henderson, 1 Rich. (S. C.) 180; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; State v. Mason, 26 Or. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779.

[88] Steph. Dig. Crim. Law, art. 269.

[89] 2 Whart. Crim. Law, § 1596; Smith v. State, 32 Tex. 594.

[90] Com. v. Wright, 1 Cush. (Mass.) 46.

[91] See Williams v. Karnes, 4 Humph. (Tenn.) 9.

[92] 2 Whart. Crim. Law, § 1597; Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145.

tion imputing to a man or woman the commission of adultery or other immoral conduct.[93] In an English case, the words published were: "Why should T. be surprised at anything Mrs. W. does? If she chooses to entertain B., she does what very few will do; and she is, of course, at liberty to follow the bent of her own inclining, by inviting all expatriated foreigners, who crowd our streets, to her table, if she thinks fit,"—and an indictment was sustained.[94]

To be indictable, a defamatory libel need not necessarily refer to any one particular person. It may refer to a body of persons, if definite and small enough for its individual members to be recognized as such.[95] Thus, a religious society of nuns may be libeled by suggesting immorality and the birth of illegitimate children in their nunnery.[96]

(*c*) *Against a Dead Person.*—The publication of a libel on the character of a dead person is a misdemeanor if it is calculated to throw discredit on living persons, and so provoke them to a breach of the peace, but not otherwise except by statute.[97]

(*d*) *Things Capable of Being Libels.*—Any words or signs conveying defamatory matter marked upon any substance, and anything which, by its own nature, conveys defamatory matter, may be a libel, as a letter, or a passage in a newspaper or book, words written on a wall, a picture, a gallows set up before a man's door, etc.[98] Words spoken, or mere verbal slander, con-

[93] Reg. v. Gathercole, 2 Lewin, C. C. 237; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; Mankins v. State, 41 Tex. Cr. R. 662, 57 S. W. 950.

[94] Gregory v. Reg., 15 Q. B. 957, 5 Cox, C. C. 247.

[95] Steph. Dig. Crim. Law, art. 267.

[96] Reg. v. Gathercole, 2 Lewin, C. C. 237.

A libel may be published against "certain persons lately arrived from Portugal, and living near Brood street," though no particular person is mentioned or referred to. Rex v. Osborne, 2 Keb. 230.

[97] Steph. Dig. Crim. Law, art. 267; Rex v. Topham, 4 Term R. 126; Rex v. Critchley, 4 Term R. 129, note; Com. v. Taylor, 5 Binn. (Pa.) 277; The Case De Libellis Famosis, 5 Rep. 125, Mikell's Cas. 951.

[98] Steph. Dig. Crim. Law, art. 268. The case De Libellis Famosis, 5 Rep. 124, Mikell's Cas. 951.

cerning a private individual only, are not indictable at common law, though they are punished in some jurisdictions by statute.[99]

(*e*) *Publication.*—To publish a libel is to deliver it, read it, or communicate its purport in any other manner, or to exhibit it to any person other than the person libeled, provided the person making the publication knows, or has an opportunity of knowing, the contents of the libel.[100] Publication is necessary.[101] If the libel is placed where others may see it, there is a publication, whether others do in fact see it or not.[102] It has been held in several cases that a libel is sufficiently published to support an indictment if it is sent to the person libeled,[103] but it is doubtful whether this is the law, unless it is sent with the intention of provoking a breach of the peace, for a libel exhibited only to the person libeled cannot expose him to hatred, ridicule, or contempt.[104]

(*f*) *Malice.*—The publication of a libel, to be indictable as a misdemeanor, must be malicious, but this does not mean that there must be ill will or actual malice towards the person libeled, or even that there shall be any general bad design or intent. If a libel is published willfully, and without sufficient cause or excuse, as explained in the following paragraphs, it is published

[99] Steph. Dig. Crim. Law, art. 268; State v. Wakefield, 8 Mo. App. 11; State v. Hewlin, 128 N. C. 571, 37 S. E. 952.

[100] Steph. Dig. Crim. Law, art. 270; Rex v. Burdett, 4 Barn. & Ald. 95; The Case De Libellis Famosis, 5 Rep. 124, Mikell's Cas. 951.

[101] See the cases above cited. And see State v. Barnes, 32 Me. 530. To dictate to a newspaper reporter for publication is sufficient. State v. Osborn, 54 Kan. 473, 38 Pac. 572.

[102] Rex v. Burdett, 4 Barn. & Ald. 95; Giles v. State, 6 Ga. 276, Mikell's Cas. 952.

[103] Phillips v. Jansen, 2 Esp. 624; Reg. v. Brooke, 7 Cox, C. C. 251; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105. Compare Rex v. Wegener, 2 Stark. 245.
Depositing a letter in the mail addressed to the person libelled is sufficient. Mankins v. State, 41 Tex. Cr. R. 662, 57 S. W. 950.

[104] 2 Whart. Crim. Law, § 1619; Rex v. Wegener, 2 Stark. 245.

maliciously.[105] "Malice," in the law of libel, means a publication "intentionally and without just cause or excuse."[106] Malice is inferred as a presumption of fact from the publication, unless justification or excuse is shown.[107]

(*g*) *Truth of Publication.*—At common law, the fact that the publication is true is no justification, but by statutes in England and in this country, the common-law rule has been so far modified that the truth of the publication may be shown, and will constitute a defense, if it is made to appear that the publication was made with good motives, and for justifiable ends, or that it was for the public benefit.[108] Unless this is made to appear, the truth of the publication is no justification or excuse, even under the statutes.[109]

(*h*) *Privileged Communications*—(*1*) *In General.*—The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing it is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, provided the publication does not exceed, either in extent or in manner, what is reasonably sufficient for the occasion.[110] This rule does

[105] Steph. Dig. Crim. Law, art. 271; Bromage v. Prosser, 4 Barn. & C. 247; Rex v. Harvey, 2 Barn. & C. 257; State v. Mason, 26 Or. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779; Com. v. Snelling, 15 Pick. (Mass.) 337; Com. v. Bonner, 9 Metc. (Mass.) 410; Haley v. State, 63 Ala. 83; Benton v. State, 59 N. J. Law, 551, 36 Atl. 1041.

[106] Bromage v. Prosser, supra; Com. v. Snelling, supra.

[107] Barthelemy v. People, 2 Hill (N. Y.) 248.

[108] See 6 & 7 Vict. c. 96, § 8; Steph. Dig. Crim. Law, art. 272. The Case De Libellis Famosis, 5 Rep. 124, Mikell's Cas. 951; Rex v. Burdett, 4 Barn. & Ald. 95; Reg. v. Newman, 1 El. & Bl. 268, Dears. C. C. 85; Com. v. Snelling, 15 Pick. (Mass.) 337; Com. v. Damon, 136 Mass. 441; State v. Lehre, 2 Brev. (S. C.) 446.

[109] Com. v. Snelling, supra.

[110] Steph. Dig. Crim. Law, art. 273. See Beatson v. Skene, 5 Hurl.

not protect communications containing false defamatory matter made maliciously, and to injure the person to whom they relate.[111]

(*2*) *Fair Criticism.*—The publication of a libel is not a misdemeanor if the defamatory matter consists of comments upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided such comments are fair.[112] Every person who takes a public part in public affairs, either by becoming a candidate for office, or by holding public office, or otherwise, submits his conduct therein to criticism.[113] And every person who publishes any book or other literary production, or any work of art, or any advertisement of goods, submits the book, or literary production, or work of art, or advertisement, to public criticism.[114] In like manner, any person who takes part in any dramatic performance, or other public exhibition or entertainment, submits himself or herself to public criticism to the extent to which he or she takes part in it.[115] A fair comment within the rule above stated is a comment which is either true, or which, if false, expresses the

& N. 838; Todd v. Hawkins, 8 Car. & P. 88; Com. v. Blanding, 3 Pick. (Mass.) 304, Mikell's Cas. 954; Lewis v. Chapman, 16 N. Y. 369; Byam v. Collins, 111 N. Y. 143, 19 N. E. 75; Fowles v. Bowen, 30 N. Y. 20; State v. Lonsdale, 48 Wis. 348, 4 N. W. 390.

[111] Com. v. Blanding, 3 Pick. (Mass.) 304, Mikell's Cas. 954; Byam v. Collins, 111 N. Y. 143, 19 N. E. 75; Browning v. Com., 25 Ky. L. R. 482, 76 S. W. 19.

[112] Steph. Dig. Crim. Law, art. 274.

[113] Steph. Dig. Crim. Law, art. 274; Henwood v. Harrison, L. R. 7 C. P. 606; Harrison v. Bush, 5 El. & Bl. 344; State v. Burnham, 9 N. H. 34; Vanderzee v. McGregor, 12 Wend. (N. Y.) 545, 27 Am. Dec. 156; Bodwell v. Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228; Com. v. Clap, 4 Mass. 163; State v. Balch, 31 Kan. 465, 2 Pac. 609; Negley v. Farrow, 60 Md. 158.

[114] Steph. Dig. Crim. Law, art. 274; Carr v. Hood, 1 Camp. 355; Thompson v. Shackell, 1 Mood. & M. 187; Jenner v. A'Beckett, L. R. 7 Q. B. 11.

[115] Steph. Dig. Crim. Law, art. 274; Dibdin v. Swan, 1 Esp. 28.

real opinion of its author, such opinion having been formed with a reasonable degree of care, and on reasonable grounds.[116]

(*3*) *Legislative Proceedings, Public Meetings, and Comments Thereon.*—It is not a misdemeanor to publish such of the reports, papers, votes, or proceedings of a legislative assembly as such assembly may deem fit or necessary to be published, or any extract from, or abstract of, such reports, papers, votes, or proceedings, if the publication is in good faith, and without malice, or to publish a fair report of any debate in a legislative assembly, even though such publication may contain matter defamatory of the character of individuals.[117] It is a libel, however, to publish a report of a *public meeting* if it contains such matter, although the report may be fair, and may be published in order to give the public information, and not in order to injure the person to whom the defamatory matter relates.[118] A member of the legislature is not indictable for defamatory matter published by him in the due course of legislative proceedings.[119]

(*4*) *Proceedings in Courts of Justice.*—It is not a misdemeanor to publish anything whatever in a judicial proceeding before a court of competent jurisdiction, civil or military, even though the person publishing knows that the matter is false, and publishes it in order to injure the person to whom it relates.[120]

(*5*) *Report of Judicial Proceedings.*—Nor is it a misdemeanor to publish a fair report of the proceedings in a court of justice, or *ex parte* proceedings of a judicial nature, though it may defame the character of an individual, provided the publi-

[116] Steph. Dig. Crim. Law, art. 274; Hunter v. Sharpe, 4 Fost. & F. 983.

[117] Steph. Dig. Crim. Law, art. 275; Mason v. Walter, L. R. 4 Q. B. 73.

[118] Steph. Dig. Crim. Law, art. 275; Davison v. Duncan, 7 El. & Bl. 231.

[119] See Coffin v. Coffin, 4 Mass. 1.

[120] Steph. Dig. Crim. Law, art. 276; Cutler v. Dixon, 4 Coke, 14b; Henderson v. Broomhead, 4 Hurl. & N. 569, 576; Dawkins v. Lord Paulet, L. R. 5 Q. B. 94; Com. v. Blanding, 3 Pick. (Mass.) 304, Mikell's Cas. 954.

cation does not amount to a seditious, blasphemous, or obscene libel.[121] Such a report is not fair when partial, but it is fair when it is substantially accurate, and when it is either complete, or condensed in such a manner as to give a just impression of what took place.[122] This rule does not protect comments made by the reporter, or reports of observations made by persons not entitled to take part in the proceedings.[123]

429. Malicious Mischief.—Malicious injury to the property of another is a misdemeanor at common law. In most jurisdictions it is now expressly punished by statute.

The offense of malicious mischief, which consists in maliciously destroying or injuring the property of another, has already been considered at some length in treating of offenses against the property of individuals. When such an act is done under such circumstances as to constitute an actual breach of the public peace, it is clearly punishable at common law; and, by the weight of authority, such an act is punishable, even when there is no actual breach of the peace, because it has a direct tendency to provoke violent retaliation, and thereby cause a breach of the peace. The subject is now covered in most jurisdictions, if not in all, by statute, so that resort to common-law authority is not necessary.[124]

II. Offenses Affecting the Administration of Justice or of Government.

430. In General.—Any act which injuriously affects, obstructs, or corrupts the administration of public justice, or the

[121] Steph. Dig. Crim. Law, art. 277; Curry v. Walter, 1 Bos. & P. 525; Ryalls v. Leader, L. R. 1 Exch. 296, 300; Lewis v. Levy, El., Bl. & El. 537; Com. v. Blanding, 3 Pick. (Mass.) 304, Mikell's Cas. 954; Thompson v. Powning, 15 Nev. 195.

[122] Steph. Dig. Crim. Law, art. 277; Lewis v. Levy, El., Bl. & El. 537, 551.

[123] Steph. Dig. Crim. Law, art. 277; Lewis v. Levy, El., Bl. & El. 537, 539; Delegal v. Highley, 3 Bing. N. C. 960, 961.

[124] Ante, § 388.

administration of the government, or which has a direct tendency to do so, is a misdemeanor at common law.

It is obvious that public policy requires the punishment of acts which corrupt or obstruct, or which have a direct tendency to corrupt or obstruct, the administration of justice and of the government, and it is safe to say that any such act is punishable as a misdemeanor at common law.[125] For this reason, the common law punishes bribery and other misconduct of judicial and other officers, bribery of jurors, or otherwise tampering with jurors, champerty and maintenance, compounding felonies, obstructing officers in the service of process, etc., perjury and subornation of perjury, bribery and fraud in connection with public elections, and many other offenses. These specific offenses will be considered in the following sections.

431. Perjury and Subornation of Perjury—(a) Definitions.—Perjury, at common law, is the willful and corrupt taking of a false oath in a judicial proceeding, in regard to a matter material to the issue.[126] It is extended by statute, in most jurisdictions, to false swearing not in a judicial proceeding. It is a misdemeanor at common law.

To constitute the offense,

[125] 4 Bl. Comm. 127 et seq.; Reg. v. Burgess, 16 Q. B. Div. 141; Com. v. Callaghan, 2 Va. Cas. 460, Beale's Cas. 116; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; State v. McNally, 34 Me. 210, 56 Am. Dec. 651; State v. DeWitt, 2 Hill (S. C.) 282, 27 Am. Dec. 371; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; Com. v. Silsbee, 9 Mass. 417.

It is a misdemeanor at common law to hinder or dissuade a witness from attending before a court in obedience to a summons, Com. v. Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665; or to even attempt to deter a witness from attending a trial, although the attempt is made before the service of a subpœna, and although it is unsuccessful. State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

[126] 3 Inst. 164, Mikell's Cas. 959; 1 Hawk. P. C. c. 69, § 1; 4 Bl. Comm. 153; Coyne v. People, 124 Ill. 17, 14 N. E. 668, 7 Am. St. Rep. 324; People v. Fox, 25 Mich. 492.

See Laws of Cnut, II. 36, reprinted in Mikell's Cas. 959.

1. The testimony must be false, or believed to be false, or the witness must not know whether it is true or false.
2. The taking of the false oath must be both willful and corrupt.
3. The matter sworn to must be material to the issue or question in controversy.
4. Some form of oath, or its equivalent, is essential, and it must be duly administered by an officer authorized to administer it.
5. The oath itself, as well as the facts sworn to, must be material.
6. To constitute perjury in a judicial proceeding the court or tribunal must have jurisdiction.

Subornation of perjury is the procuring another to commit perjury. To constitute this offense,

1. The testimony of the witness suborned must be false.
2. It must be given willfully and corruptly by the witness.
3. The suborner must know that the testimony to be given by the witness will be false.
4. And he must know or believe that the witness will willfully and corruptly testify falsely.

Taking a false oath willfully and corruptly, though it may not amount technically to perjury, is a misdemeanor at common law.[127]

(*b*) *The Proceedings in Which Perjury may be Committed.* —At common law, false swearing, to constitute perjury, must be in a judicial proceeding,[128] but in most states, if not in all, the offense has been extended by statute to include false swearing in many other cases.[129] Either at common law, or under

[127] Ex parte Overton, 2 Rose, 257; Reg. v. Hodgkiss, L. R. 1 C. C. 212, 11 Cox, C. C. 365; Reg. v. Chapman, 1 Den. C. C. 423, 2 Car. & K. 846, 3 Cox, C. C. 467.

[128] 3 Inst. 164; 1 Hawk. P. C. c. 69, § 1; Rex v. Aylett, 1 Term R. 63, 69, per Lord Mansfield; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; Arden v. State, 11 Conn. 408, Mikell's Cas. 962.

[129] Thus, in New Jersey, a statute designates the officers before whom

particular statutes, it has been held that a charge of perjury may be predicated upon a false oath to procure a marriage license,[130] and other extrajudicial oaths;[131] upon a false affidavit made for the purpose of instituting a criminal prosecution, or of procuring a warrant of arrest,[132] or a search warrant;[133] upon a false poor debtor's or insolvent debtor's oath;[134] a false oath in naturalization proceedings;[135] a false oath to an answer in chancery,[136] or on a motion for a continuance,[137] or for a new

"all oaths, affirmations, and affidavits required to be made or taken by any statute of this state, or necessary or proper to be made, taken, or used in any court of this state, or for any lawful purpose whatever, excepting official oaths, oaths required to be taken in open court, or upon notice," and declares it to be perjury to willfully and corruptly swear or affirm falsely in or by any such oath, affirmation, or affidavit. See State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270. See, also, State v. Estabrooks, 70 Vt. 412, 41 Atl. 499.

[130] Call v. State, 20 Ohio St. 330; Warwick v. State, 25 Ohio St. 21; Harkreader v. State, 35 Tex. Cr. R. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

[131] As a false oath on an inquiry before the legislature, Ex parte McCarthy, 29 Cal. 395, 401; or on a hearing before referees, State v. Keene, 26 Me. 33; or arbitrators, State v. Stephenson, 4 McCord (S. C.) 165; Reg. v. Hallett, 2 Den. C. C. 237, 5 Cox, C. C. 238; State v. Keene, 26 Me. 33; a false affidavit by a drafted man, claiming exemption from military service, U. S. v. Sonachall, 4 Biss. 425, Fed. Cas. No. 16,352; a false affidavit as to the capital stock of a bank, required by statute, State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; a false affidavit of verification required by law to chattel mortgages, State v. Estabrooks, 70 Vt. 412, 41 Atl. 499.

[132] State v. Cockran, 1 Bailey (S. C.) 50; Pennaman v. State, 58 Ga. 336; Shell v. State, 148 Ind. 50, 47 N. E. 144.

[133] Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116.

[134] Arden v. State, 11 Conn. 408, Mikell's Cas. 962; Com. v. Calvert, 1 Va. Cas. 181.

[135] U. S. v. Jones, 14 Blatchf. 90, Fed. Cas. No. 15,491; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Rump v. Com., 30 Pa. 475; Pankey v. People, 2 Ill. 80.

[136] Reg. v. Yates, Car. & M. 132.

[137] State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; State v. Johnson, 7 Blackf. (Ind.) 49; State v. Winstandley, 151 Ind. 316, 51 N. E. 92; State v. Matlock, 48 La. Ann. 663, 19 So. 669.

trial;[138] a false oath in justification of the sureties on a bail bond or appeal bond;[139] a false affidavit for a writ of *habeas corpus*;[140] a false oath in an affidavit permitted or required by the laws of another state;[140a] a false oath by a juror when examined on his *voir dire*;[141] and false testimony before a grand jury.[142]

(*c*) *Falsity of Testimony.*—To constitute perjury, the testimony or statement must be false, or the party must believe it to be false.[143] One who believes that he is testifying falsely, or who does not know whether his testimony is true or false, may be guilty of perjury, though he may in fact speak the truth.[144] A person may commit perjury either by swearing to a fact which he knows is not true, or by swearing to his knowledge or belief as to a fact, when he has no such knowledge or belief.[145]

(*d*) *Knowledge and Intent.*—It is essential, at common law, that the taking of the false oath shall be both willful and cor-

[138] State v. Chandler, 42 Vt. 446.

[139] Com. v. Hatfield, 107 Mass. 227; Com. v. Butland, 119 Mass. 317; Territory v. Weller, 2 N. M. 470.

[140] White v. State, 1 Smedes & M. (Miss.) 149.

[140a] People v. Martin, 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628.

[141] State v. Howard, 63 Ind. 502; State v. Wall, 9 Yerg. (Tenn.) 347; Com. v. Stockley, 10 Leigh (Va.) 678.

[142] Reg. v. Hughes, 1 Car. & K. 519; State v. Offutt, 4 Blackf. (Ind.) 355; State v. McCormick, 52 Ind. 169; State v. Terry, 30 Mo. 368; State v. Schill, 27 Iowa, 263; State v. Green, 24 Ark. 591.

[143] State v. Trask, 42 Vt. 152.

[144] Gurneis' Case, 3 Inst. 166, Mikell's Cas. 960; 1 Hawk. P. C. c. 69, § 6; Rex v. Edwards, Russ. Crimes, 294; State v. Gates, 17 N. H. 373; State v. Cruikshank, 6 Blackf. (Ind.) 62; People v. McKinney, 3 Park. Cr. R. (N. Y.) 510.

[145] Rex v. Pedley, 1 Leach, C. C. 325; Reg. v. Schlesinger, 10 Q. B. 670, 2 Cox, C. C. 200; U. S. v. Atkins, 1 Sprague, 558, Fed. Cas. No. 14,474.

But perjury cannot be predicated upon the testimony of a witness in giving his estimate of value, or otherwise stating his opinion, unless it appears that he made misstatements of fact, or did not answer according to his belief. In re Howell, 114 Cal. 250, 46 Pac. 159.

rupt. Testifying falsely by mistake, however negligently or inconsiderately, is not perjury.[146] For this reason, the fact that a person has given contradictory testimony on different occasions does not show that he has committed perjury, for he may, on each occasion, have believed his testimony to be true.[147] It has been held that it is perjury for a witness to swear willfully and deliberately to what is false, when he has no probable cause to believe it to be true, though he may believe it to be true,[148] but this view cannot be sustained. A witness who states what he believes to be true cannot be guilty of *willful* and *corrupt* false

[146] Rex v. Smith, 2 Show. 165; U. S. v. Shellmire, Bald. 370, 378, Fed. Cas. No. 16,271; U. S. v. Moore, 2 Lowell, 232, Fed. Cas. No. 15,803, Mikell's Cas. 234; Lyle v. State, 31 Tex. Cr. R. 103, 19 S. W. 903; Cothran v. State, 39 Miss. 541; Miller v. State, 15 Fla. 577, 585; State v. Cockran, 1 Bailey (S. C.) 50; Lambert v. People, 76 N. Y. 220; Green v. State, 41 Ala. 419; Nelson v. State, 32 Ark. 192; Thomas v. State, 71 Ga. 252; Rowe v. State, 99 Ga. 706, 27 S. E. 710.

Not only must the false swearing be willful, but it must be corrupt, or intentionally false, and it is error, therefore, at common law, to instruct the jury to convict if the false swearing was willful, without also stating substantially that it must have been corrupt. Cothran v. State, 39 Miss. 541. Compare Brown v. State, 57 Miss. 424.

"Whatever evil intent may be alleged in the indictment as moving the defendant to take the false oath, the very taking of it must be stated to have been done deliberately, and with a wicked purpose, at that moment existing. This has been expressed by applying the terms 'willful' and 'corrupt' to the act of swearing." State v. Carland, 3 Dev. (N. C.) 114. To allege that the oath was taken "falsely and maliciously" is not enough. Id.

An honest oath under advice of counsel is not perjury. U. S. v. Stanley, 6 McLean, 409, Fed. Cas. No. 16,376; U. S. v. Conner, 3 McLean, 573, Fed. Cas. No. 14,847; Com. v. Clark, 157 Pa. 257, 27 Atl. 723. But it is otherwise if the accused acted in bad faith, knowing the testimony or statement was false, and sought the advice as a mere cover to secure immunity from the penalty of the crime. Tuttle v. People, 36 N. Y. 431.

[147] Jackson's Case, 1 Lewin, C. C. 270. And see Schwartz v. Com., 27 Grat. (Va.) 1025, 21 Am. Rep. 365.

[148] Com. v. Cornish, 6 Binn. (Pa.) 249; State v. Knox, Phil. (N. C.) 312. And see Johnson v. People, 94 Ill. 505.

swearing, however negligent or careless he may be in his belief.[149]

(*e*) *Materiality of Testimony, etc.*—(*1*) *In General.*—In order that perjury may be predicated upon false testimony, or upon a false affidavit, the matter sworn to must have been material to the issue or question in controversy.[150] And the materiality must be shown. It will not be presumed.[151] Whether it was material or not depends, of course, upon the circumstances of the particular case. "Testimony," said the New Hampshire court, "tending to affect the verdict of the jury, or extenuating or increasing the damage, and thus influencing the judgment of the court, is material."[152]

[149] U. S. v. Shellmire, Baldw. 370, 378, Fed. Cas. No. 16,271. And see Thomas v. State, 71 Ga. 252. A witness is not guilty of perjury in falsely swearing to a fact, to the best of his opinion, if he believes it to be true, though without any reasonable cause. Com. v. Brady, 5 Gray (Mass.) 78.

[150] Rex v. Aylett, 1 Term R. 63, 69, per Lord Mansfield; Reg. v. Tate, 12 Cox, C. C. 7; State v. Hattaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580, Mikell's Cas. 961; Gibson v. State, 44 Ala. 17; Wood v. People, 59 N. Y. 117; Pollard v. People, 69 Ill. 148; People v. McDermott, 8 Cal. 288; Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72; People v. Collier, 1 Mich. 137, 48 Am. Dec. 699; Martin v. Miller, 4 Mo. 47, 28 Am. Dec. 342; Rahm v. State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; Crump v. Com., 75 Va. 922; Rhodes v. Com., 78 Va. 692; State v. Meader, 54 Vt. 126; State v. Trask, 42 Vt. 152; State v. Brown, 68 N. H. 200, 38 Atl. 731; People v. Jones, 123 Cal. 299, 55 Pac. 992.

Thus, where a witness swore to a particular fact, which was material, and that he was present when it occurred, and afterwards, when asked where he lived at the time, testified that he lived near the parties, which was false, it was held that this was too remote from the issue to constitute perjury. State v. Hattaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580, Mikell's Cas. 961.

Under the present statute in South Carolina it has been held that materiality is not necessary. State v. Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660. Neither is it necessary in Rhode Island. State v. Miller (R. I.) 58 Atl. 882.

[151] Wood v. People, 59 N. Y. 117; State v. Aikens, 32 Iowa, 403; Nelson v. State, 32 Ark. 192; Com. v. Pollard, 12 Metc. (Mass.) 225.

[152] Per Upham, J., in State v. Norris, 9 N. H. 96. And see State v. Meader, 54 Vt. 126. See, also, infra, this section.

(*2*) *Collateral Matters.*—The rule that the false swearing must be as to a matter material to the issue or question in controversy does not mean that it must be material directly to the main issue or question. It may be as to a collateral matter, if it affects the issue.[153] It is perjury to swear falsely as to any material circumstance which has a legitimate tendency to prove or disprove the fact in issue.[154] And it is perjury to swear falsely as to any collateral issue arising in the course of an action or proceeding.[155] A charge of perjury may be predicated upon false testimony tending to increase or mitigate the damages;[156] false testimony for the purpose of procuring the admission in evidence of a document that is material to the issue;[157] false testimony affecting the credibility of the defendant as a witness, or of any other material witness.[158] And such a charge may be

[153] 1 Hawk. P. C. c. 69, § 3; Rex v. Griepe, 12 Mod. 139, Holt, 535, 1 Ld. Raym. 256; State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; Jacobs v. State, 61 Ala. 448; State v. Lavalley, 9 Mo. 834; Wood v. People, 59 N. Y. 117; State v. Brown, 79 N. C. 642; Com. v. Pollard, 12 Metc. (Mass.) 225.

[154] Com. v. Grant, 116 Mass. 17; Williams v. State, 68 Ala. 551; Robinson v. State, 18 Fla. 898; Com. v. Pollard, 12 Metc. (Mass.) 225; State v. Wakefield, 73 Mo. 549; Dilcher v. State, 39 Ohio St. 130; Bradberry v. State, 7 Tex. App. 375; Lawrence v. State, 2 Tex. App. 479; State v. Hunt, 137 Ind. 537, 37 N. E. 409.

Testimony tending to corroborate evidence concerning a material matter is material. Com. v. Parker, 2 Cush. (Mass.) 212; Wood v. People, 59 N. Y. 117.

[155] Jacobs v. State, 61 Ala. 448; State v. Johnson, 7 Blackf. (Ind.) 49; State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485.

[156] State v. Keenan, 8 Rich. (S. C.) 456; Stephens v. State, 1 Swan (Tenn.) 157; State v. Swafford, 98 Iowa, 362, 67 N. W. 284.

[157] Reg. v. Phillpotts, 3 Car. & K. 135, 2 Den. C. C. 302, 5 Cox, C. C. 363.

[158] Rex v. Griepe, 12 Mod. 139, Holt, 535, 1 Ld. Raym. 256; Reg. v. Overton, Car. & M. 655; Reg. v. Tyson, L. R. 1 C. C. 107, 11 Cox, C. C. 1, Mikell's Cas. 964; Wood v. People, 59 N. Y. 117; People v. Courtney, 94 N. Y. 490; People v. Barry, 63 Cal. 62; U. S. v. Landsberg, 21 Blatchf. 169, 23 Fed. 585; State v. Mooney, 65 Mo. 494; State v. Brown,

based upon a false affidavit on a motion for a continuance,[159] or for a new trial.[160]

(3) *Incompetent Evidence.*—If the evidence was material, the false swearing is none the less perjury because it was incompetent, and would have been excluded if objected to,[161] or because it was afterwards withdrawn.[162] Thus, a charge of perjury may be based upon false oral testimony as to a promise within the statute of frauds.[163]

(4) *Affidavit or Deposition not used or Informal.*—Nor is a false affidavit or deposition, which was material when made, any the less perjury because it was not used,[164] or because it was excluded, or would have been excluded, for some informality.[165] This does not apply, however, to an affidavit, such as an affidavit for an attachment or a continuance, which fails to state the facts necessary to entitle the party to the relief sought.[166]

79 N. C. 642; People v. Macard, 109 Mich. 623, 67 N. W. 968; State v. Park, 57 Kan. 431, 46 Pac. 713.

In Leak v. State, 61 Ark. 599, 33 S. W. 1067, it was held that where, on a criminal prosecution, there is total failure of proof warranting a conviction of the accused, a witness falsely denying having testified to certain facts before the grand jury, when questioned for the purpose of impeaching his testimony, cannot be convicted of perjury, as his denial is immaterial.

Where the evidence of a witness in chief is immaterial, false testimony on cross-examination as to matters affecting his credibility only is not perjury. Stanley v. U. S., 1 Okl. 336, 33 Pac. 1025.

[159] State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; State v. Johnson, 7 Blackf. (Ind.) 49.

[160] State v. Chandler, 42 Vt. 446.

[161] Reg. v. Gibbon, Leigh & C. 109, 9 Cox, C. C. 105; Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255; Howard v. Sexton, 4 N. Y. 157.

[162] Reg. v. Phillpotts, 3 Car. & K. 135, 2 Den. C. C. 302, 5 Cox, C. C. 363.

[163] Howard v. Sexton, 4 N. Y. 157.

[164] Rex v. Crossley, 7 Term R. 315; Rex v. White, Mood. & M. 271; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; State v. Cockran, 1 Bailey (S. C.) 50. Compare Morrell v. People, 32 Ill. 499.

[165] Rex v. Hailey, 1 Car. & P. 258, Ryan & M. 94 (informality as to jurat); Reg. v. Christian, Car. & M. 388 (informality in title); State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270.

[166] Hood v. State, 44 Ala. 81; State v. Hobbs, 40 N. H. 229.

(5) *Evidence not Affecting Verdict or Decision.*—In no case is it any defense to say that the court or jury did not give credit to the testimony, or that, for any other reason, the verdict or judgment was not influenced thereby.[167] "It is the act of false swearing in respect to a matter material to the point of inquiry which constitutes the crime, and not the injury which it might have done to individuals, or the degree of credit which was given to the testimony."[168] The fact that the issue concerning which a witness testifies falsely is afterwards admitted does not render the testimony immaterial.[169]

(6) *Incompetency of Witness.*—A person who has been sworn as a witness, and who has testified falsely as to a matter material to the issue, is none the less guilty of perjury because he was not competent as a witness in the case, or competent to testify as to the particular facts.[170]

(7) *Privileged Testimony.*—And when a witness voluntarily testifies as to matters concerning which he might refuse to answer on the ground that his answer might tend to criminate him, he is guilty of perjury if his testimony is willfully and corruptly false.[171]

(8) *Voluntary Attendance.*—It can make no difference that

[167] Hamper's Case, 2 Leon, 230; Pollard v. People, 69 Ill. 148; Wood v. People, 59 N. Y. 117.

[168] Per McAllister, J., in Pollard v. People, 69 Ill. 148.

[169] People v. Hitchcock, 104 Cal. 482, 38 Pac. 198.

[170] It was so held in Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255, where, in a suit for divorce on the ground of adultery, the husband, his wife having borne a child, testified falsely that he had had no intercourse with her during their marriage. See, also, Montgomery v. State, 10 Ohio, 220; State v. Molier, 1 Dev. (N. C.) 263; Sharp v. Wilhite, 2 Humph. (Tenn.) 434. Contra, Reg. v. Clegg, 19 Law Times (N. S.) 47.

[171] Mackin v. People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167; State v. Maxwell, 28 La. Ann. 361; Mattingly v. State, 8 Tex. App. 345. In Kentucky it has been held that this is true, though the accused may have been required to testify, against his objection. Com. v. Turner, 98 Ky. 526, 33 S. W. 88.

the accused attended as a witness voluntarily, and without the service of a subpœna.[172]

(*f*) *The Oath*—(*1*) *In General.*—Some form of oath, or its equivalent, is absolutely essential.[173] And it must have been duly administered by an officer authorized to administer it,[174]

[172] Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72.

[173] O'Reilly v. People, 86 N. Y. 154, 40 Am. Rep. 525. In this case, the accused had handed to an officer, authorized to take and certify affidavits, an affidavit previously signed by him, and reciting that he had been duly sworn, and the officer affixed his own signature to the jurat without any words or formalities. It was held that a charge of perjury could not be predicated of the transaction, because there was no oath. See, also, Case v. People, 76 N. Y. 242.

But it is immaterial whether the witness was sworn if he signs his testimony and states that he does swear to it [Markey v. State (Fla.) 37 So. 53], and where one is sworn to a deposition it is not essential that he sign it. State v. Woolridge (Or.) 78 Pac. 333.

"The word 'oath' includes every affirmation which any class of persons are by law permitted to make in the place of an oath." Steph. Dig. Crim. Law, art. 135; State v. Whisenhurst, 2 Hawks (N. C.) 458.

[174] 1 Hawk. P. C. c. 69, § 4; Custodes v. Gwinn, Style, 336, Mikell's Cas. 959; Rex v. Verelst, 3 Camp. 432; Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293; Morrell v. People, 32 Ill. 499; Van Dusen v. People, 78 Ill. 645; Muir v. State, 8 Blackf. (Ind.) 154; State v. Phippen, 62 Iowa, 54, 17 N. W. 146; Biggerstaff v. Com., 11 Bush (Ky.) 169; State v. Cannon, 79 Mo. 343; State v. Jackson, 36 Ohio St. 281; Straight v. State, 39 Ohio St. 496; U. S. v. Garcelon, 82 Fed. 611; U. S. v. Curtis, 107 U. S. 671.

Perjury cannot be predicated upon an affidavit sworn before a notary public professing to act in a state of which he is a nonresident, and of which he was a nonresident at the time of his appointment. Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293.

"The expression 'duly administered' means administered in a form binding on his conscience, to a witness legally called before them, by any court, judge, justice, officer, commissioner, arbitrator, or other person, who, by the law for the time being in force, or by consent of the parties, has authority to hear, receive, and examine evidence." Steph. Dig. Crim. Law, art. 135.

"The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience." Steph. Dig. Crim. Law, art. 135; Sells v. Hoare, 3 Brod. & B. 232; State v. Whisenhurst, 2 Hawks (N. C.) 458.

or before a court having jurisdiction to administer it.[175] As was said in a New York case: "To make a valid oath, for the falsity of which perjury will lie, there must be, in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant takes upon himself the obligation of an oath."[176]

If the oath is legally administered by an authorized officer, mere informalities will not invalidate it.[177] And if a particular form of oath or affidavit is prescribed by statute, a substantial compliance with the statute is sufficient.[178] The authorities are not in unison on whether an oath administered by an officer *de facto* is sufficient. If a particular officer was authorized to administer the oath, and it is shown that the person who administered it was acting as such officer, this is *prima facie* sufficient to show that it was lawfully administered;[179] but it has been held that the prosecution may be defeated by showing that the person was not an officer *de jure*.[180] On principle it would seem that a false oath taken in a proceeding in which the judgment would bind the parties ought to be perjury, and there are many cases in which this view is supported.[181] An oath may be ad-

[175] Reg. v. Pearce, 3 Best & S. 531, 9 Cox, C. C. 258; Com. v. White, 8 Pick. (Mass.) 458. And see infra, this section.

[176] O'Reilly v. People, 86 N. Y. 154, 40 Am. Rep. 525.

[177] State v. Keene, 26 Me. 33. And see Walker v. State, 107 Ala. 5, 18 So. 393.

[178] State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; State v. Gates, 17 N. H. 373. See State v. Whisenhurst, 2 Hawks (N. C.) 458.

[179] State v. Hascall, 6 N. H. 352; Keator v. People, 32 Mich. 484; Reg. v. Roberts, 38 Law Times (N. S.) 690, 14 Cox, C. C. 101.

[180] Rex v. Verelst, 3 Camp. 432; Straight v. State, 39 Ohio St. 496; State v. Hayward, 1 Nott & McC. (S. C.) 546; Biggerstaff v. Com., 11 Bush (Ky.) 169; Walker v. State, 107 Ala. 5, 18 So. 393.

[181] 1 Bishop, New Cr. Law, § 464 (6); People v. Cook, 8 N. Y. 67, 89; Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293; Keator v. People, 32 Mich. 484; State v. Williams, 61 Kan. 739, 60 Pac. 1050; Izer v. State, 77 Md. 110, 26 Atl. 282; Greene v. People, 182 Ill. 278, 55 N. E. 341.

ministered by any person in the presence and by direction of the court.[182]

(*e*) *Materiality of Oath.*—The oath itself, as well as the facts sworn to, must be material. A charge of perjury cannot be based upon a voluntary extrajudicial oath.[183] As was said by Judge Cooley in a Michigan case: "The facts sworn to may be material, and yet the false swearing be no perjury, because the oath performed no office in the case, and was wholly unimportant and immaterial."[184] For this reason, it has been held that perjury cannot be assigned upon a false oath to an answer in chancery, where the bill or the law did not call for an answer under oath.[185] The same is true of an affidavit to be used in a proceeding in a court having no jurisdiction.[186]

(*g*) *Jurisdiction of the Court or Tribunal.*—In order that a false oath in a judicial proceeding may constitute perjury, the court or tribunal must have jurisdiction of the cause or proceeding.[187] And, on a prosecution for perjury, such jurisdiction

[182] State v. Knight, 84 N. C. 789; Stephens v. State, 1 Swan (Tenn.) 157. And an oath administered by a third person in the presence of and by direction of an officer duly authorized, and whose name is used on the jurat, will be considered as administered by him. Walker v. State, 107 Ala. 5, 18 So. 393.

[183] Reg. v. Bishop, Car. & M. 302; Silver v. State, 17 Ohio, 365; Linn v. Com., 96 Pa. 285; People v. Fox, 25 Mich. 492; Lamden v. State, 5 Humph. (Tenn.) 83; People v. Travis, 4 Park. Cr. R. (N. Y.) 213; U. S. v. Nickerson, 1 Sprague, 232; Fed. Cas. No. 15,878; Collins v. State, 33 Fla. 446, 15 So. 220.

[184] Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539.

[185] Silver v. State, 17 Ohio, 365; People v. Gaige, 26 Mich. 30; Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539.

[186] State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196.

[187] Rex v. Aylett, 1 Term R. 63, 69, per Lord Mansfield; Rex v Cohen, 1 Starkie, 511; Reg. v. Pearce, 3 Best & S. 531, 9 Cox, C. C. 258; Reg. v. Bacon, 11 Cox, C. C. 540; Com. v. Pickering, 8 Grat. (Va.) 628, 56 Am. Dec. 153; State v. Hall, 49 Me. 412; Com. v. White, 8 Pick. (Mass.) 453; Wilson v. State, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; Pankey v. People, 2 Ill. 80.

An indictment for perjury will not lie for false swearing before a committee illegally constituted. Com. v. Hillenbrand, 96 Ky. 407, 29 S. W. 287.

must be alleged and proved. It will not be presumed.[188] If the court had jurisdiction, mere errors or irregularities in the cause or proceeding are immaterial.[189]

(*h*) *Subornation of Perjury.*—Subornation of perjury is a misdemeanor at common law. It consists in procuring another to commit perjury by inciting, instigating, or persuading him to do so.[190]

To constitute this offense, the accused must have known that the witness intended to commit perjury. It is not enough to show that he knew the testimony would be false.[191] And the solicited perjury must have been committed.[192] If a witness is not guilty of perjury, either because he does not know that his testimony is false, or for any other reason, one who has induced him to testify cannot be guilty of subornation of perjury.[193] What has been said, therefore, in the preceding sections, as to the oath, the falsity and materiality of the testimony, the intent, etc., is equally applicable in a prosecution for subornation of perjury.

[188] Com. v. Pickering, 8 Grat. (Va.) 628, 56 Am. Dec. 158.

[189] State v. Lavalley, 9 Mo. 834; State v. Molier, 1 Dev. (N. C.) 263; Morford v. Ter., 10 Okl. 741, 63 Pac. 958, 54 L. R. A. 513.

[190] 1 Hawk. P. C. c. 69, § 10; Com. v. Douglass, 5 Metc. (Mass.) 241.

[191] Com. v. Douglass, 5 Metc. (Mass.) 241; U. S. v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947; Stewart v. State, 22 Ohio St. 477; Coyne v. People, 124 Ill. 17, 14 N. E. 668, 7 Am. St. Rep. 324.

[192] Rex v. Johnson, 2 Show. 1.

[193] Coyne v. People, 124 Ill. 17, 14 N. E. 668, 7 Am. St. Rep. 324; Maybush v. Com., 29 Grat. (Va.) 857. In U. S. v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947, it is said: "The crime of subornation of perjury has several indispensable ingredients, which must be charged in the indictment, or it will be fatally defective. 1. The testimony of the witness suborned must be false. 2. It must be given willfully and corruptly by the witness, knowing it to be false. 3. The suborner must know or believe that the testimony of the witness given, or about to be given, will be false. 4. He must know or believe that the witness will willfully and corruptly testify to facts which he knows to be false." And see Watson v. State, 5 Tex. App. 11.

432. Bribery—(a) Definition.—Bribery, at common law, and under the statutes, may be defined as the giving of anything of value to any person holding a public office, or to any person performing a public duty, or the acceptance thereof by any such person, with the intention that he shall be influenced thereby in the discharge of his legal duty.[194] The offense is a misdemeanor at common law, but in some states it has been made a felony by statute.

To offer a bribe, or to solicit a bribe, is also a misdemeanor at common law.

(*b*) *Persons Who are the Subject of Bribery.*—Coke, Blackstone, and some of the other early writers, limit bribery at common law to judicial officers or other persons concerned in the administration of justice,[195] but, according to the weight of authority, the offense is not so narrow as this. It is defined by Bishop as "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done," and in a note he says the offense is not confined to persons "in judicial place," as was stated by Coke, nor to persons "concerned in the administration of justice," as stated by Blackstone, but that it extends to "all officers connected with the administration of the government, executive, legislative, and judicial."[196] This view is amply supported by authority.[197] It is not even necessary

[194] See 2 Bish. New Crim. Law, § 85; Rex v. Vaughan, 4 Burrow, 2494; Curran v. Taylor, 92 Ky. 537, 541, 18 S. W. 232; Dishon v. Smith, 10 Iowa, 212, 221; State v. Pritchard, 107 N. C. 921, 12 S. E. 50; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128.

[195] 3 Inst. 145; 4 Bl. Comm. 139, 157; Steph. Dig. Crim. Law, art. 126; 1 Hawk. P. C. c. 67, § 1.

Blackstone says: "Bribery is when a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in his office." 4 Bl. Comm. 139. See, also, 1 Russ. Crimes, 154; Watson v. State, 29 Ark. 299.

[196] 2 Bish. New Crim. Law, § 85, and note 1.

[197] Curran v. Taylor, 92 Ky. 537, 541, 18 S. W. 232; State v. Ellis,

that the person bribed shall be a public officer. It is enough if the duty in the performance of which he is influenced is a public duty. Thus, it is a misdemeanor at common law to bribe a voter at an election of public officers, or on a public question.[198]

In most states, the offense is now defined by statute, so that there is little necessity to resort to the common law, except for general principles. Some of the statutes apply to particular officers only, as judicial officers,[199] state officers,[200] judicial, legislative, or executive officers.[201] *De facto* officers, as well as officers *de jure,* are persons with respect to whom bribery may be committed.[202]

(*c*) *The Bribe.*—The thing offered or accepted may be money, property, services, or anything else of value.[203] It must

33 N. J. Law, 102, 97 Am. Dec. 707; State v. Miles, 89 Me. 142, 36 Atl. 70; State v. Davis, 2 Penn. (Del.) 139, 45 Atl. 394.

[198] In the late case of Curran v. Taylor, 92 Ky. 537, 18 S. W. 232, it was said that the common-law offense of bribery is committed by offering any undue reward or remuneration to any public officer or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duty. And it was held that the buying of votes at an election to take the sense of the voters of a county as to making a county subscription in aid of a railroad, while not within the Kentucky statute against bribery, was bribery and a misdemeanor at common law. See, also, Rex v. Pitt, 3 Burrow, 1335, 1338; Rex v. Plympton, 2 Ld. Raym. 1377; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; Com. v. Bell, 145 Pa. 374, 22 Atl. 641, 644.

[199] The expression "judicial officers" includes not only judges and justices, but also state, city, and county attorneys. State v. Currie, 35 Tex. 17; State v. Henning, 33 Ind. 189. And it includes arbitrators. State v. Lusk, 16 W. Va. 767.

[200] The words "officers of the state" include members of the legislature. State of Kansas v. Pomeroy, 1 Cent. Law. J. 411.

[201] Municipal officers, as well as state officers, are within such a statute. People v. Jaehne, 103 N. Y. 182, 8 N. E. 374; People v. Swift, 59 Mich. 529, 26 N. W. 694. A trustee of a township is an "executive officer." State v. McDonald, 106 Ind. 233, 6 N. E. 607.

A city attorney is, within a statute enumerating executive and judicial officers. People v. Salsbury, 134 Mich. 537.

[202] State v. Gardner, 54 Ohio St. 24, 42 N. E. 999; State v. Graham, 96 Mo. 120, 8 S. W. 911; Florez v. State, 11 Tex. App. 102; State v. Duncan, 153 Ind. 318, 54 N. E. 1066.

[203] Watson v. State, 39 Ohio St. 123. An agreement to reinstate a

be of some value, but any value is sufficient.[204] It need not be of value at the time it is offered or promised.[205] Merely to keep "open house," and entertain, though for the purpose of unduly influencing legislation, has been held not to constitute bribery.[206]

(*d*) *The Intent.*—To constitute bribery, both at common law and under the statutes, there must be a corrupt intent to influence the officer or other person, or, on his part, to be influenced, in the discharge of his duties.[207] But it is not necessary, unless expressly required by a statute, that the act induced, or sought to be induced, shall favor, aid, or benefit the briber himself.[208] A person who gives money to an officer with corrupt intent to influence his official conduct is guilty of bribery, though the officer may receive the same without knowing what it is, and may keep it solely for the purposes of public justice.[209]

(*e*) *The Act Induced or Sought to be Induced.*—In accordance with the definition of bribery given above, the act which is induced or sought to be induced by the bribe must be an act in discharge of the legal duty of the person bribed. It is not

dismissed employe may be a bribe. People v. Van De Carr, 87 App. Div. 386, 84 N. Y. Supp. 461.

[204] State v. McDonald, 106 Ind. 233, 6 N. E. 607. And see Caruthers v. State, 74 Ala. 406; Com. v. Chapman, 1 Va. Cas. 138; State v. Biebusch, 32 Mo. 276.

In Indiana, under a statute punishing as bribery the actual giving or receiving of anything of value, it was held that an officer who received a note could not be convicted, because the note, being unenforceable, was of no value. State v. Walls, 54 Ind. 561. See, also, U. S. v. Driggs, 125 Fed. 520.

Where the note is in form negotiable and not absolutely void it will sustain the indictment. Com. v. Donovan, 170 Mass. 228, 49 N. E. 104.

[205] Watson v. State, 39 Ohio St. 123.

[206] Randall v. Evening News Ass'n, 97 Mich. 136, 56 N. W. 361.

[207] State v. Pritchard, 107 N. C. 921, 12 S. E. 50; Hutchinson v. State, 36 Tex. 293; State v. Graham, 96 Mo. 120, 8 S. W. 911; White v. State, 103 Ala. 72, 16 So. 63; Johnson v. Com., 90 Ky. 53, 13 S. W. 520.

[208] Glover v. State, 109 Ind. 391, 10 N. E. 282.

[209] Com. v. Murray, 135 Mass. 530.

bribery if the act is in discharge of a mere moral duty.[210] If an official act is induced, or sought to be induced, by a bribe, the fact that it is illegal, or in excess of the officer's power, jurisdiction, or authority is no defense.[211] But if the act sought to be induced is so foreign to the duties of the office as to lack even color of authority, there is no bribery.[211a] It is bribery for an officer to accept money, for the doing of an official act, though the act may be one which it is his duty to do,[212] as where money is paid an officer to induce him to release a person from an illegal arrest.[213] But it is not bribery for one under illegal arrest to offer the officer something to release him.[213a] If the object sought is the omission to act, it is immaterial whether the occasion to act ever arose,[213b] provided there is a legal duty to act if occasion arises.[213c]

[210] See Dishon v. Smith, 10 Iowa, 212, 221.

[211] Glover v. State, 109 Ind. 391, 10 N. E. 282; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707; State v. Potts, 78 Iowa, 656, 43 N. W. 534; People v. McGarry (Mich.) 99 N. W. 147; State v. Lehman, 182 Mo. 424, 81 S. W. 1118.

Thus, an offer of money to a member of a city council to vote in favor of an application for leave to lay a railroad track along one of the streets of the city is a misdemeanor,—an attempt to bribe,—even though the city council may not have authority to make the grant, or the railroad company the power to avail itself of the benefits thereof, if made. State v. Ellis, supra.

[211a] Gunning v. People, 189 Ill. 165, 59 N. E. 494, 82 Am. St. Rep. 433; Collins v. State, 25 Tex. Supp. 204; Com. v. Reese, 16 Ky. L. R. 493, 29 S. W. 352; State v. Butler, 178 Mo. 272, 77 S. W. 560. As where a bribe was offered a revenue officer to enter and burn a distillery. U. S. v. Gibson, 47 Fed. 833.

[212] People v. O'Neil, 48 Hun, 36, 109 N. Y. 251, 16 N. E. 68.

[213] Moseley v. State, 25 Tex. App. 515, 8 S. W. 652.

[213a] Moore v. State, 44 Tex. Cr. R. 159, 69 S. W. 521.

[213b] Where the agreement was not to arrest persons violating certain laws it is immaterial whether there were any violators to arrest. People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700; Com. v. Donovan, 170 Mass. 228, 49 N. E. 104.

[213c] If the statute, commanding the act which the officer agreed not to perform, is unconstitutional, there is no duty to act and no bribery. U. S. v. Boyer, 85 Fed. 425.

(*f*) *The Offering, Giving, or Receiving of the Bribe.*—At common law, both the giver and the taker of a bribe are guilty of a misdemeanor.[214] And it is a misdemeanor to offer a bribe, though this is an attempt to bribe, rather than bribery.[215] It is also a misdemeanor at common law, in the nature of an attempt, to solicit a bribe, though it may not be given.[216] Some statutes require actual giving and receipt of the money or other thing, and an offer merely is not enough. But, under such a statute, it is sufficient if there is a corrupt agreement for payment of money for an act, and the money is paid in pursuance thereof after the act is done.[217] The money or other thing need not be paid or given to the person bribed. It is enough if it be given to another at his instance.[218]

433. Embracery.—It is a misdemeanor, known as "embracery," for any person to attempt, by any means whatever, except by the production of evidence and argument in open court, to influence and instruct any juryman, or to incline him to be more favorable to the one side than to the other, in any judicial proceeding, whether any verdict is given or not, and whether a verdict, if given, is true or false.[219]

Embracery is a misdemeanor at common law, being an offense against public justice, and in most jurisdictions it is expressly punished by statute.[220] It is defined by Blackstone

[214] Per Lord Mansfield in Rex v. Vaughan, 4 Burrow, 2494, 2500; State v. Miles, 89 Me. 142, 36 Atl. 70.

[215] Rex v. Vaughan, 4 Burrow, 2494; U. S. v. Worrall, 2 Dall. (Pa.) 384; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707.

[216] Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; People v. Hammond, 132 Mich. 422, 93 N. W. 1084.

[217] Glover v. State, 109 Ind. 391, 10 N. E. 282. Contra, under the Texas statute requiring the gift to precede the act. Hutchinson v. State, 36 Tex. 293.

[218] Com. v. Root, 96 Ky. 533, 29 S. W. 351.

[219] Steph. Dig. Crim. Law, art. 128.

[220] 1 Hawk. P. C. c. 85, § 7; 4 Bl. Comm. 140; Gibbs v. Dewey, 5

as "an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like."[221] No actual tender which the juror may accept or reject is necessary, it being sufficient that a willingness to bribe was disclosed by accused to the juror.[221a]

434. Misconduct in Office—(a) In General.—A public officer is guilty of a misdemeanor at common law if, from an improper motive, and in the exercise of the duties of his office, or under color of exercising such duties, he does an illegal act, or abuses his discretionary power, or if he commits any fraud or breach of trust affecting the public, or if he willfully neglects to perform his duty without sufficient excuse.

And a person is guilty of a misdemeanor if he unlawfully refuses or omits to take upon himself and serve any public office which he is by law required to accept if duly appointed, unless some other penalty is provided, or there is some custom to the contrary.

(*b*) *Unlawful Acts and Abuse of Power.*—"Every public officer," says Stephen, "commits a misdemeanor who, in the exercise or under color of exercising the duties of his office, does an illegal act, or abuses any discretionary power with which he is invested by law, from an improper motive, the existence of which motive may be inferred either from the nature of the act or from the circumstances of the case. But an illegal exercise of authority, caused by a mistake as to the law, made in good faith, is not a misdemeanor."[222] Thus, it is a misdemeanor for a justice of the peace to refuse licenses to keepers

Cow. (N. Y.) 503; State v. Williams, 136 Mo. 293, 38 S. W. 75; State v. Woodward, 182 Mo. 391, 81 S. W. 857; State v. Brown, 95 N. C. 685; Caruthers v. State, 74 Ala. 406.

[221] 4 Bl. Comm. 140.

[221a] State v. Woodward, 182 Mo. 391, 81 S. W. 857; State v. Miller, 182 Mo. 370, 81 S. W. 867.

[222] Steph. Dig. Crim. Law, art. 119; Reg. v. Wyat, 1 Salk. 380; Rex v. Bembridge, 3 Doug. 327; Rex v. Borron, 3 Barn. & Ald. 434.

of a public house because of their refusal to vote as directed or desired by him,[223] or to send his servant to the house of correction for being saucy, and giving too much corn to his horses,[224] or for justices of the peace to enter into a corrupt agreement to vote for a certain person as clerk of the court.[225]

(*c*) *Extortion.*—If the illegal act consists in the officer's taking, under color of his office, from any person, any money or valuable thing which is not due from him, or which is not due at the time it is taken, the offense is called "*extortion.*"[226] Thus, a constable is guilty of extortion if he obtains money from a person who is in his custody under a warrant for an assault, upon color and pretense that he will procure the warrant to be discharged.[227] In most jurisdictions, perhaps in all, the offense is now punished by statute.[228] To constitute extortion at common law, and very generally under the statutes, there must be a corrupt intent. For example, it is not enough to show that unlawful fees were demanded and received, but it must appear that they were demanded and received corruptly, and, according to the better opinion, not under any mistake, either of law or fact.[229] It is also necessary that the money or other thing shall be demanded and received by the officer under

[223] Rex v. Williams, 3 Burrow, 1317.

[224] Rex v. Okey, 8 Mod. 46.

[225] Com. v. Callaghan, 2 Va. Cas. 460, Beale's Cas. 116.

[226] Steph. Dig. Crim. Law, art. 119. And see 1 Hawk. P. C. c. 68, § 1; Williams v. U. S., 168 U. S. 382; State v. Pritchard, 107 N. C. 921, 12 S. E. 50; Com. v. Bagley, 7 Pick. (Mass.) 279; Williams v. State, 2 Sneed (Tenn.) 160; People v. Whaley, 6 Cow. (N. Y.) 661.

Distinction between extortion and bribery. People v. McLaughlin, 2 App. Div. 419, 37 N. Y. Supp. 1005.

[227] Steph. Dig. Crim. Law, art. 119, illustration 6; 2 Chit. Crim. Law, 282.

[228] See 12 Am. & Eng. Enc. Law (2d Ed.) 576.

[229] State v. Pritchard, 107 N. C. 921, 12 S. E. 50; Collier v. State, 55 Ala. 125. Some courts have held that mistake of law is no defense. State v. Dickens, 1 Hayw. (N. C.) 407; Shepard, J., in State v. Pritchard, supra; Levar v. State, 103 Ga. 42, 29 S. E. 467.

color of his office.[230] The offense may be committed by a *de facto* officer, as well as by an officer *de jure*.[231]

(*d*) *Oppression.*—If the illegal act of the officer consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not being extortion, the offense is called "*oppression.*"[232] Thus, as before stated, it is oppression for justices of the peace to refuse licenses to the keepers of public houses because of their refusal to vote a certain way,[233] or for a justice of the peace to send his servant to the house of correction for being saucy, and giving too much corn to his horses,[234] etc. To constitute oppression, there must be an improper motive, and not a *bona fide* mistake as to the law.[235] Oppression by public officers is punished in most states by statute.

(*e*) *Fraud and Breach of Trust.*—It is a misdemeanor for a public officer, in the discharge of the duties of his office, to commit any fraud or breach of trust affecting the public, whether such fraud or breach of trust would be criminal or not if committed against a private individual.[236] Thus, it is a misdemeanor for an accountant in a public office to fraudulently omit to make certain entries in his accounts, whereby he enables the cashier to retain large sums of money in his own possession, and to appropriate the interest on such sums,[237] or for a public officer to make a contract on behalf of the public, on the condition that he shall have part of the profits.[238]

(*f*) *Neglect of Official Duty.*—It is a misdemeanor for a public officer to willfully neglect to perform any duty which

[230] Reg. v. Baines, 6 Mod. 192; State v. Pritchard, 107 N. C. 921, 12 S. E. 50; Collier v. State, 55 Ala. 125.
[231] Com. v. Saulsbury, 152 Pa. 554, 25 Atl. 610.
[232] Steph. Dig. Crim. Law, art. 119.
[233] Rex v. Williams, 3 Burrow, 1317.
[234] Rex v. Okey, 8 Mod. 46.
[235] Rex v. Jackson, 1 Term R. 653; Reg. v. Badger, 4 Q. B. 475.
[236] Steph. Dig. Crim. Law, art. 121.
[237] Rex v. Bembridge, 3 Doug. 332; Steph. Dig. p. 80, illustration 1.
[238] Rex v. Jones, 31 St. Tr. 251; Steph. Dig. p. 80, illustration 2.

he is bound, either by common law or by statute, to perform, unless the discharge of such duty is attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.[239] Thus, it has been held a misdemeanor for the mayor of a city to refuse or willfully neglect to do the various acts which it is in his power to do, and which a man of ordinary firmness might be expected to do, in order to suppress a riot in the city;[240] for a constable to refuse to arrest a person who commits a felony in his presence,[241] or to raise a hue and cry when a felony has been committed, and he is informed thereof;[242] for a sheriff to refuse to execute a criminal condemned to death;[243] or for a coroner to neglect to take an inquest on a body after notice that it is lying dead in his jurisdiction.[244] Neglect of duty by public officers is now covered and punished in most jurisdictions by statute.

(*g*) *Refusal to Serve an Office.*—"Every one commits a misdemeanor who unlawfully refuses or omits to take upon himself and serve any public office which he is by law required to accept if duly appointed, but this article does not extend to cases in which any other penalty is imposed by law for such refusal or neglect, or to any case in which by law or by custom, any person is permitted to make any composition in place of serving any office."[245]

[239] Steph. Dig. Crim. Law, art. 122; Crouther's Case, 2 Cro. Eliz. 654, Beale's Cas. 95; People v. Bedell, 2 Hill (N. Y.) 196; State v. Kern, 51 N. J. Law, 259, 17 Atl. 114; Robinson v. State, 2 Cold. (Tenn.) 181.

The neglect must be willful or corrupt to be criminal. State v. Bair (Ohio) 73 N. E. 514.

[240] Rex v. Pinney, 5 Car. & P. 254, 3 Barn. & Adol. 947. And see Rex v. Kennett, 5 Car. & P. 282, note.

[241] 2 Hawk. P. C. 129.

[242] Crouther's Case, 2 Cro. Eliz. 654, Beale's Cas. 95.

[243] Rex v. Antrobus, 2 Adol. & E. 798.

[244] 2 Hale, P. C. 58.

[245] Steph. Dig. Crim. Law, art. 123; Rex v. Bower, 1 Barn. & C. 585; Guardians of Poor v. Greene, 5 Bin. (Pa.) 554, Mikell's Cas. 5.

435. Escape—(a) In General.—An "escape" is where a person who is in lawful custody for any criminal offense, whether it be treason, felony, or misdemeanor, regains his liberty before he is delivered in due course of law. It is an offense on the part of the person in custody, and of the officer in whose custody he is, as stated in the following paragraphs.

(*b*) *Voluntary Permission of Escape by Officer, etc.*—Any person who has a prisoner in his lawful custody, and who knowingly, and with intent to save him from trial or punishment, permits him to regain his liberty otherwise than in due course of law, commits the offense of voluntary escape, and is guilty of treason, felony, or misdemeanor, according to the circumstances. He is guilty of treason if the prisoner was in his custody for, and was guilty of, treason. He becomes an accessary after the fact to the felony if the prisoner was in custody for, and was guilty of, a felony. And he is guilty of a misdemeanor if the prisoner was in custody for, and was guilty of, a misdemeanor.[246] This was the common-law rule, but in many jurisdictions it has been more or less changed by statute. It makes no difference whether the prisoner was in jail or prison, or under a bare arrest in the street, or elsewhere.[247]

(*c*) *Negligent Permission of Escape.*—One who negligently permits the escape of a prisoner is not guilty of so serious an offense as one who knowingly and voluntarily does so. He is guilty of a misdemeanor only, whatever may have been the offense for which the prisoner was in custody. The rule is that every one is guilty of a misdemeanor, known as "negligent escape," who, by neglect of any duty, or by ignorance of the law, permits a person in his lawful custody to regain his liberty otherwise than in due course of law.[248] This offense is very

[246] Steph. Crim. Law, art. 143; 1 Russ. Crimes, 583; 4 Bl. Comm. 129, 130; 2 Hawk. P. C. c. 17, § 5; State v. Doud, 7 Conn. 387.

[247] 4 Bl. Comm. 130.

[248] Steph. Dig. Crim. Law, art. 144; 1 Hale, P. C. 600; 2 Hawk. P. C. c. 19, § 31 et seq.; 4 Bl. Comm. 130; Martin v. State, 32 Ark. 126.

generally punished by statute, but it is also an offense at common law.

(*d*) *Liability of Person Escaping.*—Not only are officers and others guilty of an offense in permitting an escape, but the prisoner also commits an offense in escaping. It is a misdemeanor at common law, and very generally under statutes in the different jurisdictions, for any person who is lawfully in custody for a criminal offense to escape from such custody before he is delivered in due course of law.[249] In order that a person may be guilty of an escape, he must have been arrested, and he must be lawfully in custody.[250]

436. Breaking Prison.—It is a felony or misdemeanor, according to the circumstances, for a person, who is lawfully detained on a criminal charge, or under sentence for a crime, to break out of the place in which he is detained, against the will of the person by whom he is detained.[251]

This offense is commonly known as "breach of prison," or "prison breach." It is something more than an escape, because there is a breaking out of custody, and the offense is more serious, and was more severely punished at common law. If the offender was detained on a charge of, or under sentence for, treason or felony, he was guilty of felony. If he was detained under a charge of misdemeanor, he was guilty of a misdemeanor only.[252] To constitute this offense, the prisoner

[249] Steph. Dig. Crim. Law, art. 152; 1 Hale, P. C. 611; 2 Hawk. P. C. c. 17, § 5; Id., c. 18, §§ 9, 10; 4 Bl. Comm. 129; Com. v. Farrell, 5 Allen (Mass.) 131; State v. Brown, 82 N. C. 586; Riley v. State, 16 Conn. 50; State v. Davis, 14 Nev. 439, 33 Am. Rep. 563; State v. Doud, 7 Conn. 385, Mikell's Cas. 32.

[250] See Whitehead v. Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672; People v. Ah Teung, 92 Cal. 425. If an arrest is prevented by a party's resistance or avoidance of the officer, there is no escape. Whitehead v. Keyes, supra.

[251] Steph. Dig. Crim. Law, art. 153.

[252] Steph. Dig. Crim. Law, art. 153; 4 Bl. Comm. 130; 1 Hale, P. C.

must break out;[252a] but the expression "break out" means any actual breaking of the place in which he is confined, whether intentional or not.[253] If a person detained in prison for felony merely climbs over the prison wall and escapes, he is guilty of escape, but not of prison breach. But if loose bricks are arranged on top of the wall, so as to fall if disturbed, and, in climbing over the wall, he accidentally disturbs and throws one of them down, he is guilty of prison breach.[254] To unlock a door or open a window is a breaking.[255] Breach of prison to escape is punished by statute in most states, and is generally, if not always, made a misdemeanor in all cases.[256] As in the case of escape, the imprisonment must be lawful.[257] And it is also necessary that the prisoner shall escape, and not merely break with intent to escape.[258]

437. Rescue.—It is treason, felony, or misdemeanor, according to the circumstances, to rescue a prisoner from one who lawfully has him in custody.

By "rescue" is meant the act of forcibly freeing a person from lawful custody, against the will of those who have him in custody.[259] At common law a person who is guilty of rescue

607; 2 Hawk. P. C. c. 18, § 1; Com. v. Miller, 2 Ashm. (Pa.) 61; People v. Duell, 3 Johns. (N. Y.) 449.

All prison breach was felony at common law, but it was changed, as stated in the text, by an early English statute,—1 Edw. II. See 4 Bl. Comm. 130.

[252a] To escape by stratagem rather than force is not a breach. State v. King, 114 Iowa, 413, 87 N. W. 282, 89 Am. St. Rep. 371.

[253] Steph. Dig. Crim. Law, art. 153.

[254] Rex v. Haswell, Russ. & R. 458.

[255] Randall v. State, 53 N. J. Law, 488, 22 Atl. 46.

[256] See State v. Brown, 82 N. C. 586.

[257] 2 Hawk. P. C. c. 18, §§ 7, 8; State v. Leach, 7 Conn. 452, 18 Am. Dec. 118. Illegality of imprisonment is no defense in California to a charge of breaking and injuring the public jail. People v. Boren, 139 Cal. 210, 72 Pac. 899.

[258] 2 Hawk. P. C. c. 18, § 12.

[259] Steph. Dig. Crim. Law, art. 145; 1 Russ. Crimes, 597; 4 Bl. Comm. 131; 2 Hawk. P. C. c. 21, § 6.

is guilty of a like offense, as is an officer who voluntarily permits a prisoner to escape.[260] He is guilty of treason, felony, or misdemeanor, according to the offense for which the person rescued was in custody.[261] The offense of rescue is now very generally defined and punished by statutes varying more or less from the common law.[262] To constitute a rescue, the prisoner must be in lawful custody, either of an officer, or of a private person,[263] and he must escape.[264] And where the prisoner is in the custody of a private person, the rescuer must have notice of the fact that he is in custody.[265]

438. Compounding Offenses.—It is a misdemeanor for a person, for any valuable consideration, to enter into an agreement not to prosecute any person for a felony, or to show favor to any person in any such prosecution.[266]

This offense, called the "compounding of a felony," is very generally punished by statute. It is also indictable as a misdemeanor at common law, because it is an offense against public justice.[267] "To compound a crime," it has been said, "is to take any valuable consideration, or any engagement or promise thereof, upon any agreement or understanding, express or implied, to conceal such an offense, or to abstain from any prose-

[260] Ante, § 435(b).

[261] Steph. Dig. Crim. Law, art. 146; 1 Hale, P. C. 606, 607; 1 Russ. Crimes, 597; 4 Bl. Comm. 131; 2 Hawk. P. C. c. 21, § 7.

[262] See Robinson v. State, 82 Ga. 544, 9 S. E. 528; Hillian v. State, 50 Ark. 523, 9 S. E. 528.

[263] 1 Hale, P. C. 606. Since there must have been an arrest before there can be a rescue, a person who, by interference, prevents an officer from making an arrest, is not guilty of a rescue, but of obstructing an officer. Whitehead v. Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672.

[264] 2 Hawk. P. C. c. 21, § 3.

[265] Steph. Dig. Crim. Law, art. 145; 1 Hale, P. C. 606.

[266] Steph. Dig. Crim. Law, art. 158.

[267] 1 Hawk. P. C. 125; 4 Bl. Comm. 133; Com. v. Pease, 16 Mass. 91; People v. Buckland, 13 Wend. (N. Y.) 592.

cution therefor, or to withhold any evidence thereof."[268] It was originally called *"theft bote,"* and was committed where a person robbed took his goods again, or other amends, upon agreement not to prosecute.[269] It extends now to all felonies and to misdemeanors against public justice and dangerous to society, but not to those of low grade or of private injury.[269a]

To constitute this offense there must be some agreement or understanding either express or implied, and not merely a concealment of the felony, or a failure to prosecute without any agreement.[270] Where there is no agreement, the offense is misprision of felony.[271] Thus, it is not compounding the felony for the owner of stolen goods to take them back, or to take payment or security therefor, without any agreement not to prosecute, though he may not prosecute.[272] It is also necessary that there shall be some valuable consideration for the promise not to prosecute, but the consideration may be a note or other promise, or any other advantage, as well as the payment of money or delivery of property.[273] Conviction of the felon is not a condition precedent to a prosecution for compounding the felony.[274]

439. Misprision of Felony.—One who sees another commit a felony, or knows of its commission, and uses no means to apprehend him, or bring him to justice, or to prevent the felony, is guilty of a misdemeanor known as "misprision of felony."

As was shown in a previous chapter, one who sees another

[268] Allen P. Hallett, in 6 Am. & Eng. Enc. Law (2d Ed.) 399. See, also, State v. Carver, 69 N. H. 216, 39 Atl. 973.

[269] 4 Bl. Comm. 133.

[269a] State v. Carver, 69 N. H. 216, 39 Atl. 973.

[270] 1 Hawk. P. C. c. 59, § 7; Brittin v. Chegary, 20 N. J. Law, 625.

[271] Post, § 439.

[272] 1 Hawk. P. C. c. 59, § 7. See Flower v. Sadler, 10 Q. B. Div. 572; Rex v. Stone, 4 Car. & P. 379.

[273] Com. v. Pease, 16 Mass. 91.

[274] People v. Buckland, 13 Wend. (N. Y.) 592. And it is immaterial whether any offense was in fact committed. State v. Carver, 69 N. H. 216, 39 Atl. 973.

commit a murder or other felony is not guilty of the felony as a principal in the second degree, merely because he takes no steps to prevent the felony, or to apprehend him or bring him to justice.[275] Nor is he guilty as an accessary after the fact to the felony because of his mere neglect to make known the commission of the crime.[276] He is guilty, however, of a misdemeanor, —misprision of felony.[277] To be guilty of misprision only, he must not aid or abet the felony, or receive, relieve, or assist the felon, for in such cases he is himself guilty of the felony, as a principal in the second degree, or accessary before or after the fact.[278]

440. Barratry.—It is a misdemeanor, called "common barratry," or "barretry," to frequently excite and stir up suits and quarrels between individuals, either at law or otherwise.[279]

This is a common-law offense against public justice. It is defined in some states by statute as "the practice of exciting groundless judicial proceedings."[280] At common law, there must be at least two of such acts, and perhaps three, to make one a *common* barrator.[281] Some statutes expressly require at least three.[282] The acts must be committed with a mean and selfish intent, and not for the *bona fide* purpose of promoting public justice, or enforcing private rights.[283]

[275] Ante, § 174.

[276] Ante, § 184.

[277] Steph. Dig. Crim. Law, art. 157; 1 Hale, P. C. 439; 2 Hawk. P. C. c. 29, § 10; 4 Bl. Comm. 121.

[278] Ante, §§ 170 et seq., 181 et seq.

[279] 4 Bl. Comm. 134; Steph. Dig. Crim. Law, art. 141; Com. v. Davis, 11 Pick. (Mass.) 432; State v. Chitty, 1 Bailey (S. C.) 379; Com. v. McCulloch, 15 Mass. 227, Mikell's Cas. 33, n.

[280] Pen. Code N. Y. § 132.

[281] Reg. v. Hannon, 6 Mod. 311; Com. v. Davis, 11 Pick. (Mass.) 432; Com. v. Tubbs, 1 Cush. (Mass.) 3.

[282] See Lucas v. Pico, 55 Cal. 126; Pen. Code N. Y. 134.

[283] 8 Coke, 36b; Com. v. McCulloch, 15 Mass. 227; State v. Chitty, 1 Bailey (S. C.) 379.

441. Maintenance and Champerty.—Maintenance and champerty are misdemeanors at common law:

1. **Maintenance being the act of assisting the plaintiff in any legal proceeding in which the person giving assistance has no valuable interest, or in which he acts from any improper motive.**
2. **And champerty being maintenance in which the motive of the maintainor is an agreement that, if the proceeding succeeds, the subject-matter shall be divided between the plaintiff and the maintainor.**[284]

These offenses—maintenance and champerty—are both, like barratry, offenses against public justice, and misdemeanors at common law, and are expressly prohibited and punished by statute in many jurisdictions.[285] Both at common law and under the statutes, the party interfering in a suit by another, to be guilty of maintenance or champerty, must have no valuable interest therein, and must act from an improper motive. He is not guilty if he has a real interest, or if he believes in good faith that he has.[286] Relatives, or husband and wife, or perhaps master and servant, may assist each other, if they act from no improper motive, without being guilty of maintenance.[287] And a person may assist another from charitable motives.[288] In some states, the common-law doctrine as to these offenses has been greatly modified, or is not recognized at all.

[284] Steph. Dig. Crim. Law, art. 141; Key v. Vattier, 1 Ohio, 132, Mikell's Cas. 33, n.; Thompson v. Reynolds, 73 Ill. 11, Mikell's Cas. 33, n.

[285] Steph. Dig. Crim. Law, art. 141; 4 Bl. Comm. 135; Martin v. Clarke, 8 R. I. 389, 401, 5 Am. Rep. 586; Thompson v. Reynolds, 73 Ill. 11.

[286] 1 Hawk. P. C. c. 83, § 18; Findon v. Parker, 11 Mees. & W. 675; Gilman v. Jones, 87 Ala. 698, 5 So. 785, 7 So. 48; Davies v. Stowell, 78 Wis. 336, 47 N. W. 370.

[287] 1 Hawk. P. C. c. 83, §§ 20-24; 4 Bl. Comm. 135; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 309; Beard v. Puett, 105 Ind. 68, 4 N. E. 671; Ex parte Hiers, 67 S. C. 108, 45 S. E. 146, 100 Am. St. Rep. 713.

[288] 4 Bl. Comm. 135; State v. Chitty, 1 Bailey (S. C.) 379, 401;

442. Disobedience to Lawful Orders—(a) Disobedience to a Statute.—It is a misdemeanor to willfully do or omit to do an act concerning the public which is forbidden or commanded by a statute, unless some other exclusive penalty is provided.

"Every one commits a misdemeanor who willfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public, or any part of the public, unless it appears from the statute that it was the intention of the legislature to provide some other penalty for such disobedience."[289] This principle would apply to a willful omission to repair a public highway, in obedience to a statute.[290]

(b) Disobedience to Lawful Orders of Court, etc.—It is a misdemeanor to willfully disobey any order, warrant, or command duly made, issued, or given by any court, officer, or person acting in any public capacity and duly authorized in that behalf, unless some other exclusive penalty or mode of proceeding is provided.[291]

Thus, if no other penalty or mode of proceeding is prescribed, it is a misdemeanor, and indictable at common law, for a man to refuse to pay over money for the support of his bastard child, in obedience to a lawful order of a competent court,[292] or for a person to refuse to assist a peace officer to make an arrest,

Quigley v. Thompson, 53 Ind. 317; Graham v. McReynolds, 90 Tenn. 703, 18 S. W. 272.

[289] Steph. Dig. Crim. Law, art. 124; State v. Parker, 91 N. C. 650, Mikell's Cas. 15; Rex v. Wright, 1 Burrow, 543; Rex v. Harris, 4 Term R. 205; People v. Stevens, 13 Wend. (N. Y.) 341; Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267.

[290] See Reg. v. Bamber, 5 Q. B. 279, Beale's Cas. 356; Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267.

[291] Steph. Dig. Crim. Law, art. 125; Jones' Case, 2 Mood. C. C. 171; Rex v. Dale, Dears. C. C. 37; Reg. v. Sherlock, L. R. 1 C. C. 20, 10 Cox, C. C. 170; Reg. v. Ferrall, 2 Den. C. C. 51.

[292] Reg. v. Ferrall, 2 Den. C. C. 51.

suppress a riot or affray, or execute any other duty, when lawfully called upon by the officer for assistance.[293]

443. Libel and Slander of Judicial Officers.—To libel or slander a judicial officer in his office is a misdemeanor at common law.

As was shown in another section, to merely speak defamatory words of a private individual is not an indictable offense at common law, though it is otherwise if a libel is maliciously published by writing, etc.[294] It is a misdemeanor at common law, however, to even speak defamatory words of a judge or justice of the peace in the execution of his office.[295] "All actions for slandering a justice in his office may be turned into indictments."[296]

444. Offenses in Connection with Elections.—Frauds and obstruction in connection with public elections are misdemeanors at common law.

In most jurisdictions, if not in all, statutes have been enacted punishing various acts in connection with public elections, as fraudulent registration, fraudulent and illegal voting, misconduct of election officers, bribery of voters, intimidation of voters, etc.,[297] and, as the statutes cover almost every wrong in connection with elections, few cases have arisen of prosecutions at common law. There are some such cases, however, and it cannot be doubted that frauds, bribery, intimidation of voters, wrongful interference, and other acts in connection with public elections which directly tend to prevent a pure and prop-

[293] Reg. v. Sherlock, L. R. 1 C. C. 20, 10 Cox, C. C. 170.

[294] Ante, § 428.

[295] Anon., Comb. 46, Beale's Cas. 96; Rex v. Darby, 3 Mod. 139, Mikell's Cas. 21; where an indictment was sustained for speaking of a justice of the peace as a "buffle-headed fellow." See, also, Anon., 3 Mod. 52, Mikell's Cas. 21, where one was indicted for drinking an health to the pious memory of one who had been executed for high treason.

[296] Wright, C. J., in Anon., Comb. 46, Beale's Cas. 96.

[297] See the various state statutes governing elections.

er election, are indictable at common law, if not covered by statute.[298] It has been held a misdemeanor at common law to fraudulently and illegally vote twice at an election,[299] or to disturb a town meeting to elect officers, in order to prevent a legal election.[300] And, in a comparatively late Pennsylvania case, a fraudulent deposit of illegal ballots, and a false and fraudulent count and return of votes, were held indictable as a misdemeanor at common law. The court said: "We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public police and economy."[301] Bribery of voters is elsewhere considered.[302]

III. Offenses Affecting the Public Safety, Health, Comfort, etc.

445. In General.—Any act injuriously affecting or endangering the safety, health, or comfort of the community at large is a public nuisance, and a misdemeanor at common law.

446. Public and Private Nuisances.

As was explained shortly in another place, a nuisance which affects an individual only, or a few individuals, is a mere private wrong, and not a crime. It is a private nuisance, as distinguished from a public nuisance, and is no ground for indictment.[303] On the other hand, a nuisance which, by being maintained in or near a public highway, or in a thickly-settled community, injuriously affects the whole community, is a

[298] Com. v. McHale, 97 Pa. 397, 39 Am. Rep. 808, Mikell's Cas. 27; Com. v. Silsbee, 9 Mass. 417, Beale's Cas. 111.

[299] Com. v. Silsbee, 9 Mass. 417, Beale's Cas. 111.

[300] Com. v. Hoxey, 16 Mass. 385.

[301] Com. v. McHale, 97 Pa. 397, 39 Am. Rep. 808, Mikell's Cas. 27.

[302] Ante, § 432b.

[303] Rex v. Lloyd, 4 Esp. 200; Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, Beale's Cas. 119; Com. v. Webb, 6 Rand. (Va.) 726; Com. v. Faris, 5 Rand. (Va.) 691; People v. Jackson, 7 Mich. 432.

common or public nuisance, and is a misdemeanor at common law.[304] For example, it is not a public nuisance, subject to indictment, for a man to fire his gun near a house in which there is a sick person, to the detriment of such person's health,[305] but to do such acts in the streets of a city would be a public nuisance. It would not be a public nuisance to expose a single person to a contagious disease, but it is a public nuisance to expose a person having a contagious disease in the public streets, and so endanger the health of the whole community.[306]

447. Nuisances Affecting the Public Health and Safety.

It may undoubtedly be laid down as a general proposition that all unjustifiable acts[307] which endanger the safety or health of the community at large are public nuisances and misdemeanors at common law.[308] Individuals who suffer a special damage therefrom may maintain an action for redress, but the state may also proceed against the wrongdoer by indictment. Thus, it is a public nuisance, and therefore a misdemeanor, to expose persons or animals infected with the smallpox, or any other contagious disease, in the public streets, and thus endanger the public health;[309] to deposit or keep powder, naphtha, or other explosives in such a place as to endanger the life and safety of the public;[310] to shoot off fire arms, or do blasting,

[304] Rex v. White, 1 Burrows, 333; Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104; Reg. v. Henson, Dears. C. C. 24; Reg. v. Lister, Dears. & B. C. C. 209; Com. v. Webb, 6 Rand. (Va.) 726; and other cases more specifically cited in the notes following.

[305] Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, Beale's Cas. 119. It may be punishable as an act of wanton and malicious mischief. Ante, § 388.

[306] Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104.

[307] As to justification, see ante, § 77; post, § 456.

[308] Anon., 12 Mod. 342, Beale's Cas. 843; Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104; and cases cited in the notes following.

[309] Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104; Rex v. Vantandillo, 4 Maule & S. 73; Reg. v. Henson, Dears. C. C. 24.

[310] Anon., 12 Mod. 342, Beale's Cas. 843; Reg. v. Lister, Dears. & B. C. C. 209; Bradley v. People, 56 Barb. (N. Y.) 72; Myers v. Malcolm,

in such a way as to endanger the lives of persons living or passing in the neighborhood;[311] to set spring guns in such a way as to endanger persons passing in the street;[312] to sell or expose for sale unwholesome provisions, or water, etc.;[313] to pollute a well,[313a] or to race horses without necessity on a public highway, to the danger of the public.[314] To disobey the orders of the public authorities with respect to the performance of quarantine regulations is an indictable offense at common law.[315]

Statutes.—In all of the states statutes have been enacted by the legislatures punishing as nuisances various acts which are deemed to be detrimental to the public health and safety. Among these may be mentioned statutes regulating the sale and keeping of poisons, explosives, etc., statutes containing quarantine regulations, and providing for the care and isolation of persons suffering from contagious diseases, statutes punishing the sale or importation of diseased cattle, etc., and statutes regulating the keeping and care of dairies, and the sale of dairy products, and the like. The enactment of such statutes is undoubtedly within the power of the legislatures, and they have repeatedly been upheld as constitutional.[316] The necessity for a criminal intent to sustain a prosecution under these statutes is elsewhere considered.[317] Whenever the legislature

6 Hill (N. Y.) 292, 41 Am. Dec. 744; Rex v. Taylor, 2 Strange, 1167, Mikell's Cas. 52.

[311] Rex v. Moore, 3 Barn. & Adol. 184; Reg. v. Mutters, Leigh & C. 491, 10 Cox, C. C. 6; Hunter v. Farren, 127 Mass. 481, 34 Am. Rep. 423. And see State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[312] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[313] State v. Smith, 3 Hawks (N. C.) 378; State v. Lafferty, Tappan (Ohio) 113; State v. Snyder, 44 Mo. App. 429; Stein v. State, 37 Ala. 123; Rex v. Dixon, 3 Maule & S. 11.

[313a] State v. Buckman, 8 N. H. 203.

[314] State v. Battery, 6 Baxt. (Tenn.) 545.

[315] Rex v. Harris, 2 Leach, C. C. 549, 4 Term R. 202.

[316] Ante, §§ 33, 37, et seq.

[317] Ante, §§ 56, 70, et seq.

declares an act to be a public nuisance, a person doing the act is liable to indictment.[318]

448. Nuisances Affecting the Public Comfort—In General.

Acts may also amount to indictable public nuisances because they affect the comfort of the community at large by reason of noise, dust, smoke, noisome smells, etc. Thus, it has been held a public nuisance to erect buildings near the highway and dwellings, and make acid spirit of sulphur, so that the air is impregnated with noisome and offensive stinks, to the common nuisance of all persons passing and dwelling in the neighborhood.[319] The same is true of other offensive trades and occupations in thickly settled communities, as slaughter-houses, pig pens, breweries, soap factories, boiler factories, tallow factories, brick kilns, and the like.[320] To support an indictment for a nuisance it is not necessary that the smells produced by it shall be injurious to the health. It is sufficient if they are offensive to the senses.[321] And, as we have seen, a thing may be a nuisance because of smoke, dust, and noise, as well as because of noisome smells.[322]

[318] Reg. v. Crawshaw, Bell, C. C. 302.

[319] Rex v. White, 1 Burrow, 333.

[320] Rex v. Watts, 2 Car. & P. 486; Rex v. Cross, 2 Car. & P. 483, Beale's Cas. 844; Rex v. Neil, 2 Car. & P. 485; Rex v. Watts, Moody & M. 281; Reg. v. Wigg, 2 Ld. Raym. 1163; Rex v. Medley, 6 Car. & P. 292; Com. v. Mann, 4 Gray (Mass.) 213; Ellis v. State, 7 Blackf. (Ind.) 534; Dennis v. State, 91 Ind. 291; Com. v. Miller, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170, Beale's Cas. 849; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, Beale's Cas. 851; Seacord v. People, 121 Ill. 623, 13 N. E. 194; State v. Kaster, 35 Iowa, 221; Faucher v. Grass, 60 Iowa, 505, 15 N. W. 302; Ray v. Lynes, 10 Ala. 63; Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; Com. v. Perry, 139 Mass. 198, 29 N. E. 656; Allen v. State, 34 Tex. 230; Howard v. Lee, 3 Sandf. (N. Y.) 281; Coe v. Schultz, 47 Barb. (N. Y.) 64; Com. v. Upton, 6 Gray (Mass.) 473; State v. Wetherall, 5 Harr. (Del.) 487; State v. Payson, 37 Me. 361.

[321] Rex v. Neil, 2 Car. & P. 485; and other cases above cited.

[322] Com. v. Harris, 101 Mass. 29; Faucher v. Grass, 60 Iowa, 505, 15 N. W. 302; and other cases above cited.

In all cases, the thing complained of must injuriously affect the community at large, so as to constitute a public nuisance. If it affects a single individual only, or two or three particular individuals only, it is a private, as distinguished from a public nuisance, and is not an indictable offense.[323] It is also necessary, in determining whether a manufactory or other building is a common nuisance, to consider all the circumstances, including the character of the neighborhood in which it is situated, the presence of other manufactories, etc. In other words, "the character of the business complained of must be determined in view of its own peculiar location and surroundings, and not by the application of any abstract principle."[324]

449. Disorderly Conduct.

(*a*) *In General.*—Conduct of an individual may amount to a public nuisance if it is of such a disorderly character, and in such a place, that it annoys and disturbs the peace and quiet of the community, though, except for such effect, there would be nothing criminal, or even wrong, in the conduct. Such is the case where the whole community is disturbed and annoyed by loud crying out or singing, or other noisy conduct in the public streets, or other public places,[325] or by blasphemy,[326] or public profane cursing or swearing,[327] public

[323] Rex v. Lloyd, 4 Esp. 200, per Lord Ellenborough. See Ray v. Lynes, 10 Ala. 63; Faucher v. Grass, 60 Iowa, 505, 15 N. W. 302; State v. Board of Health, 16 Mo. App. 8.

[324] Com. v. Miller, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170, Beale's Cas. 849.

[325] Rex v. Smith, 2 Strange, 704, Beale's Cas. 844; Rex v. Moore, 3 Barn. & Adol. 184; Hall's Case, Vent. 169; Beale's Cas. 842; Com. v. Harris, 101 Mass. 29; Com. v. Oaks, 113 Mass. 8; Com. v. Spratt, 14 Phila. (Pa.) 365.

[326] Post, § 471.

[327] Post, § 470; State v. Graham, 3 Sneed (Tenn.) 134; State v. Powell, 70 N. C. 67; State v. Archibald, 59 Vt. 548, 9 Atl. 362, 59 Am. Rep. 755.

drunkenness,[328] indecent exposure of the person,[329] night walking,[329a] and other acts of public indecency or immorality.[330]

(*b*) *A common scold*—i. e., a woman who by habitual scolding disturbs the peace and comfort of the neighborhood—is a public nuisance, and indictable at common law.[331]

(*c*) *Eavesdroppers,* defined by Blackstone to be persons who "listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales," are a public nuisance at common law.[332]

(*d*) *Exciting public alarm,* and disturbing the feeling of public security, by false rumors and the like, is also indictable as a nuisance at common law.[333]

450. Disorderly Houses.

A saloon or other place which is permitted to be the resort of idle and dissolute persons, and in which they are permitted to carouse and make loud noises, to the disturbance and annoyance of the community, is a disorderly house, and is therefore a public nuisance and misdemeanor at common law.[334] Bawdy houses and common gaming houses are disorderly houses and nuisances at common law.[335]

[328] Post, § 472.

[329] Post, § 469.

[329a] State v. Dowers, 45 N. H. 543.

[330] Post, § 462 et seq.

[331] 2 Hawk. P. C. c. 75, § 14; 4 Bl. Comm. 168; James v. Com., 12 Serg. & R. (Pa.) 236; Com. v. Mohn, 52 Pa. 243; State v. Pennington, 3 Head (40 Tenn.) 299.

[332] 4 Bl. Comm. 168; State v. Williams, 2 Overt. (Tenn.) 108; Com. v. Lovett, 4 Clark (Pa.) 5, 6 Pa. Law J. 226. See Pen. Code N. Y. § 436.

[333] Com. v. Cassidy, 6 Phila. (Pa.) 82, in which it was held a public nuisance to distribute handbills in a city, describing a black woman, and falsely declaring her to be a stealer of children, and to thereby alarm and disturb the community.

[334] State v. Bertheol, 6 Blackf. (Ind.) 474; State v. Buckley, 5 Harr. (Del.) 508; ante, § 427.

[335] Post, §§ 465, 466.

451. Sunday Work, Games, Sports, etc.—In many states, statutes have been enacted prohibiting and punishing work and business on Sunday, except in cases of necessity or charity, and public games, sports, exhibitions, etc.

It is certainly a nuisance at common law to disturb public rest and quiet on Sunday by unnecessary, conspicuous and noisy actions,[336] but work and games or sports which do not disturb the public rest and quiet, are not criminal offenses unless they are made so by some statute.[337] In England, Sabbath breaking has been punished by statute since an early day, and there are similar statutes in this country. The effect of most of these statutes is to prohibit and punish the exposing of any goods for sale on Sunday, with certain exceptions, or the doing of any work on that day, except works of necessity or charity. The English statute of 29 Car. II. c. 7, was to this effect, and has been very generally followed by us. In some jurisdictions, the statutes go further than this, and specifically prohibit (1) all labor except works of necessity or charity; (2) all shooting, hunting, fishing, playing, horse racing, gaming, or other public sports, exercises, or shows; (3) all noise disturbing the peace of the day; (4) all trades, manufactures, and mechanical employments, except when they are works of necessity; and (5) all manner of public selling or offering for sale of any property, with the exception of articles of food up to certain hours, the furnishing of meals under certain conditions, and the sale of prepared tobacco, fruits, confectionery, newspapers, drugs, medicines, etc.[338] In some states, by express provision of the statute, it is a defense to a prosecution for labor on Sunday that

[336] 2 Whart. Crim. Law, § 1431; Com. v. Jeandell, 2 Grant (Pa.) 506; Lindenmuller v. People, 33 Barb. (N. Y.) 548.

[337] Rex v. Brotherton, 2 Strange, 702; State v. Brooksbank, 6 Ired. (N. C.) 73; Eden v. People, 161 Ill. 296, 43 N. E. 1108; Sayles v. Smith, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117.

[338] See Pen. Code Minn. §§ 222-231.

the accused observes another day, and does not work on such day.[339]

Validity of Statutes.—These statutes have been upheld as constitutional against attacks on the ground that they were an unconstitutional interference with religious liberty. They are not based upon religious grounds, but on the ground that public policy requires at least one day of rest in each week to be set apart, and are clearly within the power of the legislatures.[340]

Exception of "Works of Necessity or Charity."—It has been said that the exception of "works of necessity or charity" comprehends "all acts which it is morally fit and proper should be done" on Sunday,[341] but this test is too indefinite for practical application. The question must be considered with reference to particular acts. The exception, it was said in a Massachusetts case, unquestionably includes acts necessary or proper to save life, or to prevent or relieve suffering, and this in the case of animals, as well as men; to prepare needful food for man or beast; or to save property in the case of fire, flood, tempest, or other *"unusual"* peril.[342] It is well settled, however, that it is no excuse for work on Sunday to show merely that it was more convenient or profitable to do it then than it would have been to defer or omit it.[343]

[339] Pen. Code Minn. § 226. In the absence of such a provision, it is no defense. Specht v. Com., 8 Pa. 312, 49 Am. Dec. 518; ante, § 65.

[340] Bloom v. Richards, 2 Ohio St. 391; Scales v. State, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768; Foltz v. State, 33 Ind. 215; Lindenmuller v. People, 33 Barb. (N. Y.) 548; Specht v. Com., 8 Pa. 312, 49 Am. Dec. 518; State v. Baltimore & O. R. Co., 24 W. Va. 783; State v. Court of Common Pleas, 36 N. J. Law, 72, 13 Am. Rep. 422.

[341] Flagg v. Inhabitants of Millbury, 4 Cush. (Mass.) 243. See, also, Johnston v. People, 31 Ill. 469; Morris v. State, 31 Ind. 189.

[342] Com. v. Sampson, 97 Mass. 407. And see Morris v. State, 31 Ind. 189.

[343] For this reason, in Com. v. Sampson, 97 Mass. 407, it was held that gathering seaweed on the beach on Sunday was not a work of necessity, though it would probably have floated away if not then gathered. "If," said Judge Hoar, "a vessel had been wrecked upon the

452. Obstructing Highways.

Any unlawful obstruction of a public street, road, or other highway, whether by the unauthorized erection of bridges, buildings, fences, railways, or other structures, or by turning water thereon, or by tearing up the same, or otherwise, is an interference with the right of the public to pass along the same, and is indictable as a common or public nuisance at common law.[344] An indictment will lie for setting a person in the footway of a public street to deliver hand-bills, if the footway is greatly obstructed,[345] or for keeping stage coaches and trucks standing in the street beyond such time as may be reasonably necessary,[346] or for causing a crowd to collect by acrobatic performances, exhibiting effigies in a window, or otherwise, if the street is

beach, it would have been lawful to work on Sunday for the preservation of property which might be lost by delay. But if the fish in the bay or the birds on the shore happened to be uncommonly abundant on the Lord's Day, it is equally clear that it would have furnished no excuse for fishing or shooting on that day." In another Massachusetts case it was held that the fact that crops in a field were suffering from want of hoeing did not make the hoeing of them on Sunday a work of necessity. Com. v. Josselyn, 97 Mass. 411. See, also, Johnston v. Com., 22 Pa. 102.

See, also, where a poor man worked for his neighbors through the week and being unable to borrow a cradle any other day, borrowed it on Sunday to harvest his wheat which was overripe and wasting. State v. Goff, 20 Ark. 289, Mikell's Cas. 132.

[344] Hall's Case, 1 Vent. 169, Beale's Cas. 842; Rex v. Sarmon, 1 Burrow, 516; Rex v. Cross, 3 Camp. 224; Rex v. Jones, 3 Camp. 230; Reg. v. Longton Gas Co., 2 El. & El. 651, 8 Cox, C. C. 317; Rex v. Carlisle, 6 Car. & P. 637; Rex v. West Riding of Yorkshire, 2 East, 342; Rex v. Morris, 1 Barn. & Adol. 441; Rex v. Gregory, 5 Barn. & Adol. 555, 2 Nev. & M. 478; Com. v. Reed, 34 Pa. 275, 75 Am. Dec. 661; Boyer v. State, 16 Ind. 451.

Unauthorized telegraph posts are an obstruction and nuisance. Reg. v. United Kingdom E. T. Co., 3 Fost. & F. 73, 9 Cox, C. C. 174; Com. v. Reed, 34 Pa. 275, 75 Am. Dec. 661. But see Com. v. City of Boston, 97 Mass. 555.

[345] Rex v. Sarmon, 1 Burrow, 516.

[346] Rex v. Cross, 3 Camp. 224; Rex v. Russell, 6 East, 427.

thereby obstructed.[347] Of course valid public authority to obstruct a highway is a defense.[348]

453. Failure to Repair Highways.

It is a misdemeanor for a corporation or individual to fail to repair a highway, or suffer it to be out of repair when required by law to keep it in repair, unless there is sufficient excuse for such neglect.[349]

454. Obstructing Navigable Waters.

It is also a public nuisance, and a misdemeanor at common law, to place an unauthorized obstruction, as a bridge, wharf, posts, and the like, in navigable rivers or other navigable waters, or to otherwise obstruct the same.[350]

455. Pollution of Waters and Watercourses.

It is a public nuisance and misdemeanor to pollute a spring or watercourse, as by urinating in a spring, throwing dead carcasses into a spring or stream, or putting other injurious or noxious substances therein, if the spring or watercourse is used by the public, so that the public health or comfort is thereby affected.[351]

456. Justification and Excuse.

(*a*) *Public Necessity and Authority.*—Public necessity and

[347] Rex v. Carlile, 6 Car. & P. 637; Hall's Case, Vent. 169, Beale's Cas. 842; Barker v. Com., 19 Pa. 412.

[348] Post, § 456.

[349] Rex v. Inhabitants of Stretford, 2 Ld. Raym. 1169; State v. Godwinsville, etc., Road Co., 49 N. J. Law, 266, 10 Atl. 666, 60 Am. Rep. 611; State v. King, 3 Ired. (N. C.) 411; Simpson v. State, 10 Yerg. (Tenn.) 525.

[350] Reg. v. Stephens, L. R. 1 Q. B. 702, Beale's Cas. 845; Rex v. Ward, 4 Adol. & El. 384; Respublica v. Caldwell, 1 Dall. (Pa.) 150, Beale's Cas. 177; State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411; People v. Vanderbilt, 28 N. Y. 396.

[351] State v. Taylor, 29 Ind. 517; Board of Health of New Brighton v. Casey, 3 N. Y. Supp. 399; State v. Buckman, 8 N. H. 203.

authority may justify an act, and render it lawful, when, but for such necessity and authority, it would amount to a public nuisance. Thus, as was shown in a previous section, if, in order to prevent the spread of a contagious disease, inconvenience is caused to persons by the smoke and noxious vapors arising from the burning of infected clothing and bedding, and if the burning is done by public authority or sanction, in good faith and for the public safety, and such means are employed as are usually resorted to and approved by medical science in such cases, and if done with reasonable care and regard for the safety of others, there is no indictable nuisance.[352]

(*b*) *Legislative Authority.*—An act done by a person, though it may affect the safety, health, or comfort of the community, does not render him liable to indictment, where there is a valid act of the legislature, or valid municipal ordinance, expressly authorizing him to do the act in the way in which it is done.[353] But legislative authority to do an act is not to be construed, where any other construction is reasonable, as permitting the doing of the act in such a way as to constitute a public nuisance. A license from the state or from a municipality may render lawful the keeping of a place which would be a nuisance at common law in the absence of a license;[354] but a license is no justification if a place is kept in a disorderly or noisome way, that is not clearly authorized.[355] Statutory authority to construct a railroad in or across a public street or highway, if valid, will prevent the obstruction from being a nuisance, if the provisions of the statute are complied with, but not other-

[352] State v. Mayor, etc., of Knoxville, 12 Lea (Tenn.) 146, Beale's Cas. 313.

[353] Berry v. People, 36 Ill. 425; Overby v. State, 18 Fla. 178.

[354] Berry v. People, supra; Overby v. State, supra.

[355] U. S. v. Coulter, 1 Cranch, C. C. 203, Fed. Cas. No. 14,875; State v. Mullikin, 8 Blackf. (Ind.) 260; Berry v. People, 1 N. Y. Cr. R. 43, 57, 77 N. Y. 588; State v. Foley, 45 N. H. 466. And see Rex v. Cross, 2 Car. & P. 483, Beale's Cas. 844.

wise.[356] When statutory powers are conferred under circumstances in which they may be exercised with a result not causing any nuisance, and new and unforeseen circumstances arise, which render the exercise of them impracticable without causing a nuisance, the persons so exercising them are liable to indictment.[357]

(*c*) *Benefit to the Community.*—If the act of a person, or his use of property, amounts to a public nuisance under the rules and principles explained in the preceding sections, it is no defense for him to say that the public may be or is in fact benefited thereby.[358] Thus, on an indictment for a nuisance in erecting a wharf on public property, it is no defense to show that such erection has been beneficial to the public.[359] And, on an indictment for maintaining an offensive business in a thickly-settled community, it is no defense to show that the business is useful or necessary, or that it contributes to the wealth or prosperity of the community.[360]

(*d*) *Acquiescence by the Public.*—According to the better opinion, long acquiescence by the public in conditions may prevent or bar an indictment for nuisance based upon such conditions. Thus, it was held in an English case, that an acquiescence for fifty years by the neighborhood prevented an indictment for continuing a noxious trade.[361] It was also held that an indictment would not lie for setting up a noxious manufac-

[356] Reg. v. Scott, 3 Q. B. 543, 2 Gale & D. 729; Rex v. Pease, 4 Barn. & Adol. 30.

[357] Reg. v. Bradford Nav. Co., 6 Best & S. 631, 11 Jur. (N. S.) 769.

[358] Anon., 12 Mod. 342, Beale's Cas. 843; Respublica v. Caldwell, 1 Dall. (Pa.) 150, Beale's Cas. 177; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, Beale's Cas. 851; State v. Kaster, 35 Iowa, 221; Seacord v. People, 121 Ill. 623, 13 N. E. 194; Rex v. Ward, 4 Adol. & El. 384 (overruling Rex v. Russell, 6 Barn. & C. 566).

[359] Respublica v. Caldwell, 1 Dall. (Pa.) 150, Beale's Cas. 177.

[360] People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, Beale's Cas. 851.

[361] Rex v. Neville, Peake, 93, per Lord Kenyon. But see Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; Anon., 12 Mod. 342, Beale's Cas. 843.

tory in a neighborhood in which other offensive trades had long been borne with and acquiesced in, where the inconvenience to the public was not greatly increased.[362] A man carrying on a noxious business in a place where it has been long established is indictable for a nuisance if the mischief is materially increased by a change in the manner or extent of carrying it on; but if the business is increased, with no additional mischief, by adoption of a better mode of carrying it on, an indictment will not lie.[363]

(e) *Things not Nuisances when Erected.*—Whether an indictment will lie where the thing complained of was not a nuisance when first erected, but became so afterwards, is not clearly settled. It has been held in some jurisdictions that if a person sets up a noxious trade remote from habitations and public roads, and, after that, new houses are built and new roads constructed near it, he may continue his trade, although it may be a nuisance to persons living in such houses, or passing along such roads.[364] Other courts have taken a contrary view, and have held that when a business becomes a nuisance by reason of residences being erected around it and roads or streets constructed, "it must give way to the rights of the public, and the owner thereof must either devise some means to avoid the nuisance, or must remove or cease the business."[365] He certainly cannot change the manner or extent of carrying on the business, so as to increase the mischief and injury.[366]

[362] Rex v. Neville, Peake, 91, per Lord Kenyon. See, also, Com. v. Miller, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170, Beale's Cas. 849.

[363] Rex v. Watts, Moody & M. 281, per Lord Tenderden.

[364] Anon., 12 Mod. 342, Beale's Cas. 843; Rex v. Cross, 2 Car. & P. 483; Ellis v. State, 7 Blackf. (Ind.) 534.

[365] People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, Beale's Cas. 851; Taylor v. People, 6 Park. Cr. R. (N. Y.) 347; Com. v. Upton, 6 Gray (Mass.) 473.

[366] Rex v. Watts, Moody & M. 281.

IV. Offenses Against God and Religion.

457. In General.—In this country, no act is a crime merely because it is contrary to the doctrines of the Christian religion, or any other religion.

In England, various acts were punished at first in the ecclesiastical courts, and later, by statutes, in the civil courts, as offenses against God, the Christian religion, and the established church, and some acts were punished at common law. Among these were apostacy, or a total renunciation of Christianity by embracing either a false religion, or no religion at all, after having once professed Christianity;[367] heresy, which consists, not in a total denial of Christianity, but in a denial of some of its essential doctrines, publicly and obstinately avowed;[368] offenses against the established church, by reviling its ordinances, or failure to conform to its worship;[369] blasphemy;[370] profane swearing and cursing;[371] witchcraft;[372] religious impostures, such as falsely pretending an extraordinary commission from heaven, and terrifying and abusing the people with false denunciations of judgments;[373] simony, or the corrupt presentation of any one to an ecclesiastical benifice for gift or reward;[374] Sabbath breaking;[375] drunkenness;[376] and open and notorious lewdness.[377]

[367] 9 & 10 Wm. III. c. 32; 4 Bl. Comm. 43.

[368] 1 Hale, P. C. 384; 2 Hen. IV. c. 15; 2 Hen. V. c. 7; 31 Hen. VIII. c. 14; 4 Bl. Comm. 44-49.

[369] 4 Bl. Comm. 50-59; 1 Edw. VI. c. 1; 1 Eliz. c. 1; and other statutes mentioned by Blackstone.

[370] 4 Bl. Comm. 59. See post, § 471.

[371] 4 Bl. Comm. 60. See post, § 470.

[372] 4 Bl. Comm. 60. This was at one time punished in New England with death, as it was in England.

[373] 4 Bl. Comm. 62.

[374] 4 Bl. Comm. 62.

[375] 4 Bl. Comm. 63. See ante, § 451.

[376] 4 Bl. Comm. 64. See post, § 472.

[377] 4 Bl. Comm. 65. See post, § 462 et seq.

In this country there is no established church, as in England, and no act is a crime *merely because* it offends against any church, or against God, or against the doctrines of any religion. Some of the acts above mentioned, if committed under such circumstances as to constitute a public nuisance, are indictable in this country as misdemeanors at common law, but this is because they annoy the community or shock its sense of morality and decency, or tend to corrupt the public morals, and not merely because the act is forbidden by God, or is contrary to the doctrines of Christianity, or of any church. Blasphemy, profane swearing and cursing, drunkenness, and lewdness are all misdemeanors at common law if committed openly and notoriously,[378] but, as a rule, it is otherwise if they are committed in private. To commit fornication in private, even when it is accompanied by seduction, or to get drunk in one's own house, is no offense at all at common law, though clearly an offense against God and religion.[379] To work on the Sabbath is a violation of God's command, but it is not a crime unless the work is done in such a way as to disturb the public rest, or unless it is expressly prohibited by statute.[380] It is almost needless to say that there are no such crimes in this country as apostacy, heresy, nonconformity to the worship of a church, etc. The constitution of the United States expressly declares that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[381] and the state constitutions contain similar limitations on the power of the state legislatures.

[378] Post, §§ 463-472.

Ecclesiastical offenses are said in Grisham v. State, 2 Yerg. (10 Tenn.) 595, Mikell's Cas. 191, n., to be punishable by our courts as the successors of both the temporal and ecclesiastical courts of England, but that view is not sound, and the remarks were obiter, the offense being open and notorious lewdness which without doubt the temporal courts can punish. Post, § 463.

[379] Post, §§ 462, 472.

[380] Ante, § 451.

[381] Const. U. S. Amend. art. 1.

Christianity as a Part of the Common Law.—It has been said in a number of cases that Christianity is a part of the common law,[382] but from what is said above it is clear that this is true only in a very limited sense. The fact that most people in this country, as in England, are Christians, makes certain acts, like blasphemy and open and notorious lewdness, offensive, so as to render them public nuisances, and for this reason indictable at common law; but, as stated above, no act is punished at common law in this country *merely* because it is contrary to the Christian religion. Nor, in view of our constitutions, could an act be punished for this reason alone.[383] It must be conceded, therefore, that Christianity is not, in any proper sense, a part of our common law.[383a]

V. Offenses Against Morality and Decency.

458. In General.—Any act which directly tends to corrupt the public morals, or which shocks the public sense of morality and decency, is a nuisance and misdemeanor at common law.

As was stated in a previous section,[384] "immorality" and "crime" are by no means convertible terms. The common law does not undertake to punish a man for his acts *merely* because they are immoral. There must be something more than this. There must be some injury or prejudice to the community at large. A man may be guilty of fornication or adultery in private, or be otherwise guilty of the grossest immorality in his private life, without being amenable to the criminal law, unless

[382] 4 Bl. Comm. 69; Taylor's Case, 1 Vent. 293, Beale's Cas. 96; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Lindenmuller v. People, 33 Barb. (N. Y.) 548; Shover v. State, 5 Eng. (10 Ark.) 259; Chapman v. Gillet, 2 Conn. 40; Updegraph v. Com., 11 Serg. & R. (Pa.) 394; Vidal v. Philadelphia, 2 How. (U. S.) 127.

[383] Const. U. S. Amend. 1. See Specht v. Com., 8 Pa. 312, 49 Am. Dec. 518. See ante, § 451, note 340, and cases there cited.

[383a] Bloom v. Richards, 2 Ohio St. 387; Board of Education of Cincinnati v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233.

[384] Ante, § 28.

his conduct is covered by some penal statute.[385] Public immorality or indecency, however, stands upon a different ground. Because of its manifest tendency to corrupt the morals of the community, or to shock the public sense of morality and decency, public immorality and indecency is a common nuisance and a misdemeanor at common law. It may therefore be laid down as a general rule, as stated above, that any act which has a direct tendency to corrupt the public morals, or which tends to shock the public sense of morality and decency, is a misdemeanor, whether covered by any statute or not.[386] For this reason it is a misdemeanor to keep a common bawdy house or a common gaming house, to be guilty of open and notorious lewdness, to indecently expose the person in public, to publish obscene literature or pictures, to be guilty of blasphemy, profanity, or drunkenness in public, to give an obscene or indecent exhibition, etc. In all jurisdictions, statutes have been enacted specifically punishing various acts of immorality and indecency.

459. Bigamy—(a) In General.—Bigamy is committed where a person who is already legally married marries another person during the life of his or her wife or husband.[387] It is punished in England and in this country by statute, except in certain cases.

Bigamy is not a common-law offense.[388] It was first made an offense cognizable by the civil courts, and punishable as a

[385] Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; State v. Brunson, 2 Bailey (S. C.) 149; Delany v. People, 10 Mich. 241; State v. Calley, 104 N. C. 858, 10 S. E. 455, 17 Am. St. Rep. 704; People v. Buchanan, 1 Idaho, 681; Bell v. State, 1 Swan (31 Tenn.) 42, Mikell's Cas. 59.

[386] Rex v. Delaval, 3 Burrow, 1434, Beale's Cas. 101; Rex v. Curl, 2 Strange, 788; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632, Beale's Cas. 113; Kanavan's Case, 1 Me. 226, Beale's Cas. 115; Britain v. State, 3 Humph. (Tenn.) 203; State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; Barker v. Com., 19 Pa. 412; and cases cited specifically in notes following.

[387] Steph. Dig. Crim. Law, art. 257.

[388] 4 Bl. Comm. 163; State v. Burns, 90 N. C. 707.

felony, by the statute of 1 James I. c. 2. Prior to this statute it was punished only as a canonical offense in the ecclesiastical courts. Statutes punishing the offense have also been enacted in this country. The present English statute declares that "whosoever, being married, shall marry any other person during the life of the former husband or wife, * * * shall be guilty of felony," but contains a proviso that nothing in the section shall apply "to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time," nor to "any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage," nor to "any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."[389] The statutes in this country are similar, and very generally contain similar provisos.

(*b*) *The Bigamous Marriage.*—Of course bigamy cannot be committed unless there is a marriage, or, rather, unless the parties go through the form or ceremony of a marriage.[390] The marriage need not be valid. It cannot be, for the prior marriage necessarily renders it void.[391] According to the better opinion, it need not even be such that it would be valid if there had not been any prior marriage.[392] Certainly that it is voidable merely is no defense,[393] and a common law marriage is sufficient in jurisdictions where such marriages are recognized.[393a]

[389] 24 & 25 Vict. c. 100, § 57. Similar to 9 Geo. IV. c. 31, § 22.

[390] Reg. v. Allen, L. R. 1 C. C. 367, 12 Cox, C. C. 193; Beggs v. State, 55 Ala. 108.

[391] See Com. v. McGrath, 140 Mass. 296, 6 N. E. 515; supra, note 395.

[392] Reg. v. Brawn, 1 Car. & K. 144, 1 Cox, C. C. 33; Reg. v. Allen, L. R. 1 C. C. 367, 12 Cox, C. C. 193; People v. Brown, 34 Mich. 339, 22 Am. Rep. 531; Hayes v. People, 25 N. Y. 390, 82 Am. Dec. 364. Contra, Reg. v. Fanning, 17 Ir. C. L. 289, 10 Cox, C. C. 411.

[393] See Reg. v. Asplin, 12 Cox, C. C. 391.

[393a] People v. Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408. And see People v. Beevers, 99 Cal. 286, 33 Pac. 844.

(*c*) *Cohabitation* after the bigamous marriage is not necessary.[394]

(*d*) *The Prior Marriage.*—By the very terms of the statute, the party marrying, to be guilty of bigamy, must be already married to another person. If the prior marriage was void, either because of want of mutual consent, or because the other party thereto was already married, or because of consanguinity between the parties within the prohibited degrees, or because of civil conditions, or for any other reason, the offense is not committed.[395] It is otherwise, however, if the prior marriage is merely voidable, and has not been annulled or avoided.[396] As

[394] State v. Patterson, 2 Ired. (N. C.) 346, 38 Am. Dec. 699; Com. v. Lucas, 158 Mass. 81, 32 N. E. 1033; Nelms v. State, 84 Ga. 466, 10 S. E. 1087, 20 Am. St. Rep. 377; U. S. v. West, 7 Utah, 437, 27 Pac. 84.

[395] Reg. v. Chadwick, 11 Q. B. 173, 205, 2 Cox, C. C. 381; Kopke v. People, 43 Mich. 41, 4 N. W. 551; Davis v. Com., 13 Bush (Ky.) 318; State v. Cone, 86 Wis. 498, 57 N. W. 50; Holbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; Com. v. McGrath, 140 Mass. 296, 6 N. E. 515; Lane v. State, 82 Miss. 555, 34 So. 353.

This applies where a man marries a third time after the death of the first wife. The second marriage is void because of the prior first marriage, and the third marriage, therefore, is legal, and not bigamous. Reg. v. Willshire, 6 Q. B. Div. 366, 14 Cox, C. C. 541; State v. Sherwood, 68 Vt. 414, 35 Atl. 352; People v. Corbett, 49 App. Div. 514, 63 N. Y. Supp. 460; Keneval v. State, 107 Tenn. 581, 64 S. W. 897; Holbrook v. State, supra.

Where the second marriage becomes valid, under the statute, by removal of the impediment during cohabitation, the third marriage is bigamous. Com. v. Josselyn, 186 Mass. 186, 71 N. E. 313.

[396] Rex v. Jacobs, 1 Mood. C. C. 140; Beggs v. State, 55 Ala. 108; State v. Cone, 86 Wis. 498, 57 N. W. 50; Walls v. State, 32 Ark. 565; People v. Beevers, 99 Cal. 286, 33 Pac. 844.

In some cases of voidable marriage, the marriage can only be avoided by a decree of nullity, and a second marriage, without first obtaining such a decree, is bigamous. See the cases above cited. But in other cases, as in some jurisdictions, where the party is under the age of consent, the marriage may be effectually avoided by the act of the party in disaffirming and repudiating it, without any decree of nullity, and, in such a case, a marriage by either party after such disaffirmance is not bigamous. Shafher v. State, 20 Ohio, 1; People v. Slack, 15 Mich. 193.

a general rule, for the purpose of a prosecution for bigamy, a prior marriage which was valid in the place where it was contracted is valid everywhere, and a marriage which was void in the place where it was contracted is void everywhere, for the validity of a marriage is governed by the *lex loci contractus*.[397]

(*e*) *Divorce or Annulment of Prior Marriage.*—By the express terms of most of the statutes, and even in the absence of an express proviso, a person who has been married does not commit bigamy in marrying again after a valid divorce from the bonds of the prior marriage, or after a decree of nullity,[398] unless, as is the case in some states, he is prohibited from marrying again, and the second marriage is in the same jurisdiction.[399] This does not apply to a divorce from bed and board only, or a mere separation, nor does it apply where the divorce is granted after the second marriage,[400] or where the decree of divorce is void for want of jurisdiction.[401]

(*f*) *The Criminal Intent.*—The statutes do not require any specific criminal intent in bigamy, but all that is necessary is that a party shall intentionally marry again when he knows that he is already legally married to another person.[402] Wheth-

[397] State v. Ross, 76 N. C. 242, 22 Am. Rep. 678; Bird v. Com., 21 Grat. (Va.) 800; State v. Clark, 54 N. H. 456; Weinberg v. State, 25 Wis. 370. There are some exceptions to this rule, as where parties leave a state to be married, in violation of its laws, etc. See State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683.

[398] State v. Norman, 2 Dev. (N. C.) 222; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

[399] Com. v. Richardson, 126 Mass. 34, 30 Am. Rep. 647; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

[400] Baker v. People, 2 Hill (N. Y.) 325.

[401] People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; State v. Armington, 25 Minn. 29.

[402] Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Com. v. Nash, 7 Metc. (Mass.) 472, Beale's Cas. 304; Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2.

er religious belief or mistake of fact or of law is a good defense is elsewhere considered.[403]

(*g*) *Death or Absence of Former Spouse.*—The death of the former husband or wife before the second marriage necessarily prevents the second marriage from being bigamous, and his or her absence for a long period may raise a presumption of death. In most jurisdictions, the statute expressly provides that it shall not apply to any person marrying again after his or her wife or husband has been continually absent for a specified period (the period varying in the different jurisdictions from two to seven years), without being known by such person to be living within such period.[404]

460. Incest.—Incest is marriage or cohabitation, or sexual intercourse without marriage, between a man and woman who are related to each other within the degrees within which marriage is prohibited by law.[405] In most states it is punished by statute.

It seems that incest was not a crime at all at common law, but was left entirely to the ecclesiastical courts.[406] In most states, however, if not in all, it is now punished by statute. These statutes are not precisely the same in all states, but they are substantially so. They punish any persons who, being within the degrees of consanguinity, or in some states of affinity also,[407] within which marriages are declared to be incestuous and void, intermarry or commit adultery or fornication with each other.[407a] To constitute the offense the parties must be related

[403] Ante, §§ 56, 64, 65, 70, 73.

[404] As to the effect of absence for less than the period specified, and bona fide belief in death, see ante, §§ 56, 70.

[405] See Cent. Dict. & Cyc. tit. "Incest;" 1 Bouv. Law Dict. tit. "Incest."

[406] State v. Keesler, 78 N. C. 469. See 4 Bl. Comm. 64.

[407] See Norton v. State, 106 Ind. 163, 6 N. E. 126; McGrew v. State, 13 Tex. App. 340; Stewart v. State, 39 Ohio St. 152.

[407a] State v. Herges, 55 Minn. 464, 57 N. W. 205; Nations v. State, 64 Ark. 467, 43 S. W. 396.

within the prohibited degrees, as in the case of parent and child, brother and sister, uncle or aunt and niece or nephew, etc.;[408] and the party or parties accused must have known of the relationship.[409] Relationship of the half blood is within the statutes;[410] and illegitimate consanguinity is of the same effect as legitimate.[411] Marriage is not necessary to constitute the offense, but sexual intercourse is necessary.[412] The intercourse, however, need not be proved by direct evidence, but may be inferred from marriage and cohabitation, or from cohabitation without marriage.[413] Cohabitation is not necessary unless required by the statute, but a single act of sexual intercourse is sufficient.[414] In most states the consent of both parties is not a necessary element of the offense,[414a] but some courts take

[408] Step-parent and step-child are within the statutes within the life of the child's parent, Baumer v. State, 49 Ind. 544; Norton v. State, 106 Ind. 163, 6 N. E. 126; Taylor v. State, 110 Ga. 150, 35 S. E. 161; but not after such parent's death or divorce, Johnson v. State, 20 Tex. App. 609, 54 Am. Rep. 535; Noble v. State, 22 Ohio St. 541.

[409] State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321; Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691.

If one of the parties know of the relationship, he or she is guilty, though the other may be innocent. State v. Ellis, supra.

[410] State v. Wyman, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753; Shelly v. State, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926; People v. Jenness, 5 Mich. 305; State v. Reedy, 44 Kan. 190, 24 Pac. 66; State v. Guiton, 51 La. Ann. 155, 24 So. 784.

[411] People v. Lake, 110 N. Y. 61, 77 N. E. 146, 6 Am. St. Rep. 344; State v. Laurence, 95 N. C. 659; Brown v. State, 42 Fla. 184, 27 So. 869.

[412] State v. Schaunhurst, 34 Iowa, 547; People v. Murray, 14 Cal. 160.

[413] State v. Schaunhurst, supra.

[414] State v. Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

[414a] State v. Nugent, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133; Smith v. State, 108 Ala. 1, 19 So. 306, 54 Am. St. Rep. 140; People v. Stratton, 141 Cal. 604, 75 Pac. 166; David v. People, 204 Ill. 479, 68 N. E. 540. Mere reluctance on the part of the female is no defense. Porath v. State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954; Taylor v. State, 110 Ga. 150, 35 S. E. 161.

the contrary view and refuse to sustain convictions for incest where the evidence shows rape.[414b]

461. Sodomy.—Sodomy or buggery, which is sexual connection by a man or woman with a brute animal, or connection per anum by a man with any other man, or with a woman, is a felony at common law.[415]

Sodomy or buggery is spoken of by the courts and in statutes as "the unnatural crime," or "the crime against nature." It is so disgusting a crime against morality and decency that it is punished by the common law, not as a misdemeanor merely, but as a felony. To constitute the offense, there must be some penetration, but the least penetration is sufficient.[416] Whether emission was necessary at common law is doubtful,[417] but the statutes very generally declare it unnecessary.[418] It is not neces-

[414b] State v. Jarvis, 20 Or. 437, 26 Pac. 302, 23 Am. St. Rep. 141; State v. Eding, 141 Mo. 281, 42 S. W. 935; People v. Burwell, 106 Mich. 27, 63 N. W. 986.

[415] Steph. Dig. Crim. Law, art. 168; 4 Bl. Comm. 215; 1 Whart. Crim. Law, § 579; Rex v. Jacobs, Russ. & R. 331; Reg. v. Allen, 1 Car. & K. 495; Reg. v. Allen, 1 Den. C. C. 364, 2 Car. & K. 869, 3 Cox, C. C. 270, 13 Jur. 108; Com. v. Thomas, 1 Va. Cas. 307; State v. La Forrest, 71 Vt. 311, 45 Atl. 225.

The act in a child's mouth is not sodomy. Rex v. Jacobs, supra; Com. v. Thomas, supra; People v. Boyle, 116 Cal. 658, 48 Pac. 800; Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833.

But where the statute denounces "sodomy, or other crime against nature," any copulation contrary to nature is included. Honselman v. People, 168 Ill. 172, 48 N. E. 304; Kelley v. People, 192 Ill. 119, 61 N. E. 425. And see State v. Vicknair, 52 La. Ann. 1921, 28 So. 273.

Woman is included in the term "mankind." Lewis v. State, 36 Tex. Cr. R. 37, 35 S. W. 372, 61 Am. St. Rep. 831.

[416] Rex v. Duffin, 1 East, P. C. 437, Russ. & R. 365.

[417] See Rex v. Duffin, supra; White v. Com., 23 Ky. L. R. 2349, 73 S. W. 1120.

[418] Rex v. Reekspear, 1 Mood. C. C. 342; Rex v. Cozins, 6 Car. & P 351.

sary that the act shall be done without the consent of the other party.[419]

462. Fornication and Adultery.—Fornication and adultery were not common-law crimes in England, nor, by the weight of authority, are they so in this country, unless committed openly and notoriously, so as to constitute a public nuisance. In many states, however, they are now punished by statute.

Definitions.—There is some difference of opinion as to the definitions of "fornication" and "adultery," so that what is fornication in one state may be adultery in another, and *vice versa*. As we shall see, these acts were not punished at common law, but were punished as ecclesiastical offenses in the ecclesiastical courts. They were known, however, to the common law for some purposes, but the common-law and canon-law definitions differed. The common law regarded adultery only as it tended to expose a husband to the maintenance of another man's children, and to having another man's children inherit his property, and it was therefore necessary that the woman should be married. Intercourse by a man, whether married or single, with another man's wife, was adultery in both, but intercourse by a man, whether married or single, with an unmarried woman, was not adultery in either, but fornication only.[420] The canon law, on the other hand, condemned and punished adultery because of the violation of the marriage vow, and did not necessarily require the woman to be married. For a married person, whether a man or a woman, and a single person to have sexual intercourse was adultery on the part of the married person, and fornication on the part of the single person.[421] Of course, two single persons

[419] Reg. v. Jellyman, 8 Car. & P. 604; Reg. v. Allen, 1 Den. C. C. 364, 2 Car. & K. 869, 3 Cox, C. C. 270, 13 Jur. 108.

[420] 3 Bl. Comm. 139; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284.

[421] Com. v. Kilwell, 1 Pittsb. (Pa.) 255; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

cannot be guilty of adultery under either definition.[422] In construing statutes punishing fornication and adultery without defining the offense, some courts have adopted the common-law definition,[423] while others have adopted the definition of the canon or ecclesiastical law.[424]

As a Common-Law or Statutory Offense.—In England, fornication and adultery were punished in the ecclesiastical courts, but they were not regarded as crimes at common law, unless committed openly.[425] Nor, according to the weight of authority, are they punishable at common law in this country.[426] It is otherwise, however, if they are committed openly and notoriously, so as to set a pernicious example, create public scandal, and thus constitute a public nuisance.[427] In most states, these offenses against public morals and decency are now expressly punished by statute.[428] The necessity for a criminal

[422] Com. v. Kilwell, supra; Smitherman v. State, 27 Ala. 23; State v. Thurstin, 35 Me. 205, 58 Am. Dec. 695.

[423] State v. Wallace, 9 N. H. 515; State v. Taylor, 58 N. H. 331; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Pearce, 2 Blackf. (Ind.) 318; State v. Lash, 16 N. J. Law, 380, 32 Am. Dec. 397; State v. Armstrong, 4 Minn. 335.

[424] Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; Helfrich v. Com., 33 Pa. 68, 75 Am. Dec. 579; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; State v. Hutchinson, 36 Me. 261; Territory v. Whitcomb, 1 Mont. 359; Miver v. People, 53 Ill. 59; Com. v. Lafferty, 6 Grat. (Va.) 672; State v. Hasty, 121 Iowa, 507, 96 N. W. 1115.

[425] 3 Bl. Comm. 139; 4 Bl. Comm. 65.

[426] Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776, Mikell's Cas. 64; State v. Brunson, 2 Bailey (S. C.) 149; Delaney v. People, 10 Mich. 241; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; State v. Cooper, 16 Vt. 551; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Brooks v. State, 2 Yerg. (Tenn.) 482; State v. Cagle, 2 Humph. (Tenn.) 414; State v. Moore, 1 Swan (Tenn.) 136; Ex parte Thomas, 103 Cal. 497, 37 Pac. 514.

[427] State v. Moore, 1 Swan (Tenn.) 136.

In the case of open adultery, it is the nuisance, not the mere adultery, that is punishable. See State v. Brunson, 2 Bailey (S. C.) 149.

[428] See Am. & Eng. Enc. Law (2d Ed.) tits. "Adultery"; "Fornication."

intent in these offenses, and the effect of ignorance of fact and of law, are elsewhere considered.[429]

463. Illicit Cohabitation.—Illicit cohabitation of a man and woman is a misdemeanor at common law if open and notorious, but not otherwise. In many jurisdictions, however, it is punished by statute, though not open and notorious.

Illicit cohabitation includes fornication or adultery, according to the circumstances, but it is something more. It is a living together in fornication or adultery. It is not a crime at all at common law unless the cohabitation is open and notorious, so as to amount to public immorality and a public scandal.[430] In many jurisdictions, statutes have been enacted expressly punishing such acts, in some states, though not in all, whether committed openly and notoriously, or secretly. These statutes vary in the different states. Some in terms punish illicit cohabitation, while others punish lewd and lascivious cohabitation, and others punish living in adultery or fornication, but the meaning is substantially the same in all. To bring a case within the statutes, it must appear that there was something more than a single act of intercourse. There must be, in the language of the statutes, cohabitation or a living together, and this implies some continuance.[431] It is not necessary, however, that the illicit relation shall continue for more than one day.[432] In some states the statutes expressly require that the cohabitation or living together shall be "open and notorious."[433]

[429] Ante, §§ 56, 70, 73.

[430] State v. Brunson, 2 Bailey (S. C.) 149; Delaney v. People, 10 Mich. 241; State v. Cooper, 16 Vt. 551; State v. Moore, 1 Swan (Tenn.) 136; Grisham v. State, 2 Yerg. (10 Tenn.) 595, Mikell's Cas. 19, n.

[431] Hall v. State, 53 Ala. 463; Com. v. Calef, 10 Mass. 153; Com. v. Catlin, 1 Mass. 8; Searls v. People, 13 Ill. 597; Miner v. People, 58 Ill. 59; State v. Cassida, 67 Kan. 171, 72 Pac. 522; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; McLeland v. State, 25 Ga. 477; State v. Crowner, 56 Mo. 147; Penton v. State, 42 Fla. 560, 28 So. 774; Thomas v. State, 39 Fla. 437, 22 So. 725.

[432] Hall v. State, 53 Ala. 463.

464. Seduction.—Seduction of a woman is made a crime in most states by statute. It consists in the act of seducing an unmarried female of previous chaste character, and having sexual intercourse with her, under promise of marriage, or, in some states, by other seductive means.

Seduction of a female, and having sexual intercourse with her under a promise of marriage, is not a crime at common law,[434] but in this country it is very generally made so by statute. Most of the statutes in terms punish any man who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character. Under such a statute, a promise of marriage is essential, but it may be a conditional promise,[435] or a promise that is not binding.[436] The woman must be induced to submit by means of the promise, otherwise there is no seduction.[437] The man need not be of age.[438] Nor need he be an unmarried man. It is sufficient if the woman thinks he is unmarried.[439] If she knows he is

[433] State v. Crowner, 56 Mo. 147; Wright v. State, 5 Blackf. (Ind.) 358.

[434] Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

[435] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Boyce v. People, 55 N. Y. 644. And see Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211.

A promise conditioned on pregnancy is not sufficient. State v. Adams, 25 Or. 172, 35 Pac. 36, 42 Am. St. Rep. 790, 22 L. R. A. 840; People v. Van Alstyne, 144 N. Y. 361, 39 N. E. 343; People v. Smith, 132 Mich. 58, 92 N. W. 776.

[436] Crozier v. People, 1 Park. Cr. R. (N. Y.) 453; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; People v. Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; State v. Brock (Mo.) 85 S. W. 595.

[437] Phillips v. State, 108 Ind. 406, 9 N. E. 345; Carney v. State, 79 Ala. 14; People v. De Fore, 64 Mich. 693, 31 N. W. 585; State v. Fitzgerald, 63 Iowa, 268, 19 N. W. 202.

[438] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Polk v. State, 40 Ark. 482, 48 Am. Rep. 17; People v. Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; State v. Brock (Mo.) 85 S. W. 595.

[439] State v. Primm, 98 Mo. 368, 11 S. W. 732.

married, there is no seduction.[440] The promise need not be made with intention not to perform it.[441]

Some of the statutes do not require the seduction to be under promise of marriage, but apply where a female is seduced and debauched, either by such a promise, or by any other art, influence, promise, or deception calculated to accomplish the purpose.[442] "The exact amount, or what kind of seductive art, is necessary to establish the offense, cannot be defined. Every case must depend upon its own peculiar circumstances, together with the condition in life, advantages, age, and intelligence of the parties."[443] In all cases, the woman must be *"seduced."* This term implies that the intercourse shall be accomplished by artifice and deception, and that there shall be something more than a yielding by the woman to mere lust or passion.[444] Under such statutes it is immaterial that the woman knew the man was married.[444a]

Some statutes require some other artifice or persuasion in addition to a promise of marriage. But, as was said in a Georgia case: "To make love to a woman, woo her, make honorable proposals of marriage, have them accepted, and afterwards undo her under a solemn repetition of the engagement vow, is to employ persuasion, as well as promises of marriage."[445]

[440] Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664.

[441] State v. Bierce, 27 Conn. 319; State v. Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

[442] State v. Patterson, 88 Mo. 88, 57 Am. Rep. 374; State v. Hughes, 106 Iowa, 125, 76 N. W. 520, 68 Am. St. Rep. 288; State v. Hayes, 105 Iowa, 82, 74 N. W. 757; Bracken v. State, 111 Ala. 68, 20 S. W. 636, 56 Am. St. Rep. 23.

[443] State v. Higdon, 32 Iowa, 262; State v. Hayes, supra; State v. Hughes, supra.

[444] Carney v. State, 79 Ala. 14; State v. Reeves, 97 Mo. 668, 10 S. W. 841; Phillips v. State, 108 Ind. 406, 9 N. E. 345; State v. Fitzgerald, 63 Iowa, 268, 19 N. W. 202; State v. Patterson, 88 Mo. 88, 57 Am. Rep. 374; People v. De Fore, 64 Mich. 693, 31 N. W. 585.

[444a] Artifices of flattery, love making and hypnotism. State v. Donovan (Iowa) 102 N. W. 791.

[445] Wilson v. State, 58 Ga. 328.

Who may be Seduced.—The statutes generally in terms apply only to the seduction of unmarried females, and the fact that the woman was unmarried must be shown.[446] They also very generally require in express terms that the female shall be of previous chaste character. And, even in the absence of an express requirement to this effect, it is to be implied.[447] This means actual personal virtue, and not merely reputation.[448] According to the better opinion, chastity of character will be presumed until the contrary is proven.[449] The expressions "chaste character," "virtuous female," etc., it has been held, do not necessarily mean that, to prevent a conviction, it must be shown that the female had previously been guilty of sexual intercourse. Though there are decisions to the contrary, it has been held that a female is unchaste, within the meaning of the statute, if her conversation and conduct is lascivious and indecent, though she may be a virgin.[450] The question is

[446] West v. State, 1 Wis. 209; Mesa v. State, 17 Tex. App. 395; State v. Carr, 60 Iowa, 453, 15 N. W. 271.

[447] Polk v. State, 40 Ark. 482, 48 Am. Rep. 17; People v. Clark, 33 Mich. 112; People v. Smith, 132 Mich. 58, 92 N. W. 776; People v. Roderigas, 49 Cal. 9; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664.

[448] Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; People v. Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

[449] Polk v. State, 40 Ark. 482, 48 Am. Rep. 17; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664; People v. Brewer, 27 Mich. 134; People v. Clark, 33 Mich. 112; People v. Squires, 49 Mich. 487, 13 N. W. 828; Wilson v. State, 73 Ala. 527; Suther v. State, 118 Ala. 88, 24 So. 43. Contra, Zabriskie v. State, 43 N. J. Law, 640, 39 Am. Rep. 610; Oliver v. Com., 101 Pa. 215, 47 Am. Rep. 704; Mills v. Com., 93 Va. 815, 22 S. E. 863.

[450] Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708. But see State v. Brinkhaus, 34 Minn. 285, 25 N. W. 642, where it was held that, although a female, from ignorance or other causes, may have so low a standard of propriety as to commit or permit indelicate acts or familiarities, yet if she has such a sense of virtue that she would not surrender her person unless seduced to do so under a promise of marriage, she cannot be said to be a woman of unchaste character, within

whether the female was of chaste character at the time she was seduced. One who, at some time in the past, has been guilty of sexual intercourse, but who has reformed, is within the statutes.[451] Her age is immaterial.[451a]

Subsequent Marriage.—By express provision of the statutes in most states, the subsequent intermarriage of the parties is a bar to a prosecution for seduction.[452] But this is not the case in the absence of such a provision, for, as was shown in another place, the person injured by a crime cannot prevent a prosecution by afterwards condoning the offense.[453]

465. Bawdy Houses.—A common bawdy house, or house to which persons may and do resort for the purpose of prostitution, is a disorderly house, and is a nuisance and misdemeanor at common law.

That a common bawdy house is a disorderly house and a public nuisance, and that the keeper thereof is guilty of a misdemeanor at common law, is beyond question.[454] Such a place

the meaning of the statute. See, also, Mills v. Com., 93 Va. 815, 22 S. E. 863, where it is said that it would be but a mockery to extend the protection of the law only to those who have no need of its assistance.

Chastity, in the case of an unmarried female, means simply that she is virgo intacta. People v. Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52.

[451] People v. Clark, 33 Mich. 112; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; State v. Carron, 18 Iowa, 372, 87 Am. Dec. 401; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664; State v. Brassfield, 81 Mo. 151, 51 Am. Rep. 234.

[451a] Prosecution may be for seduction, though the female was under the statutory age of consent. People v. Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

[452] See People v. Gould, 70 Mich. 240, 38 N. W. 232. But an offer of marriage by the man, refused by the girl, is no bar. State v. Thompson, 79 Iowa, 703, 45 N. W. 293. Contra, Com. v. Wright, 16 Ky. L. R. 251, 27 S. W. 815.

[453] Ante, § 156.

[454] 3 Inst. 204; 1 Hawk. P. C. c. 74, § 6; Reg. v. Williams, 10 Mod. 63, 1 Salk. 384; U. S. v. Gray, 2 Cranch, C. C. 675, Fed. Cas. No. 15,-

is injurious, both to the public morals and to the public health, and it also endangers the public peace, but it is regarded as a nuisance on the first ground chiefly.[455] In most jurisdictions, the offense is punished by statute. Some statutes use the expression, "house of ill fame," instead of "bawdy house," but they are practically synonymous.[456] To constitute a place a bawdy house or house of ill fame, it must be kept for the purpose of resort for prostitution. A single act of intercourse in a house is not enough to give it such a character.[457] Nor does the fact that the proprietor of a house practices lewdness with her visitors give the house such a character. The place must be a common resort for the purpose of prostitution.[458] The immoral purpose for which the house is kept is what makes it disorderly and a public nuisance, and it is not necessary that there shall be any noise or other disturbance, or that any indecency or disorderly conduct shall be visible from the outside.[459] The nature of the place which is kept is not generally

251; State v. Worth, R. M. Charlt. (Ga.) 5; State v. Porter, 38 Ark. 637; Smith v. State, 6 Gill (Md.) 425; Henson v. State, 62 Md. 231, 50 Am. Rep. 204; Com. v. Goodall, 165 Mass. 588, 43 N. E. 520; People v. King, 23 Hun, 148, 83 N. Y. 587, Beale's Cas. 847; State v. Evans, 5 Ired. (N. C.) 603.

[455] "It is clearly agreed that keeping a bawdy house is a common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons, and also has an apparent tendency to corrupt the manners of both sexes by such an open profession of lewdness." State v. Porter, 38 Ark. 638.

[456] State v. Plant, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821; Betts v. State, 93 Ind. 375; State v. Clark, 78 Iowa, 492, 43 N. W. 273.

[457] Com. v. Lambert, 12 Allen (Mass.) 177; State v. Lee, 80 Iowa, 75, 45 N. W. 545, 20 Am. St. Rep. 401; State v. Clark, 78 Iowa, 492, 43 N. W. 273; State v. Garing, 74 Me. 152.

[458] People v. Buchanan, 1 Idaho, 689; State v. Evans, 5 Ired. (N. C.) 607; State v. Calley, 104 N. C. 858, 10 S. E. 455, 17 Am. St. Rep. 704; State v. Lee, 80 Iowa, 75, 45 N. W. 545, 20 Am. St. Rep. 401. Contra, People v. Mallette, 79 Mich. 600, 44 N. W. 962.

[459] Reg. v. Rice, L. R. 1 C. C. 21; Com. v. Gannett, 1 Allen (Mass.) 7, 79 Am. Dec. 693; People v. King, 23 Hun, 148, 83 N. Y. 587, Beale's Cas. 847; Herzinger v. State, 70 Md. 278, 17 Atl. 81.

material, if it is kept as a resort for the purpose of prostitution. It may be a house in the ordinary sense, or it may be a room or rooms in a house,[460] or it may be a canvas tent, or a boat.[461]

Letting Premises for Immoral Purpose.—If the owner of a house leases it to another for the purpose of keeping a bawdy house, or afterwards encourages or participates in the keeping of the same, or, by the weight of authority, if he leases it with knowledge that it is to be so kept, he is guilty of a misdemeanor at common law.[462]

466. Gaming and Gaming Houses.—Gaming is not an offense at common law; but a common gaming house, to which the public may resort for the purpose of gaming, is a public nuisance, and keeping the same is a misdemeanor at common law.

The act of gaming or gambling is no offense at all unless, as is now the case in most states, it is expressly prohibited and punished by statute. It was not regarded as a misdemeanor at common law.[463] Nor is it an offense to permit persons to gamble in a private house, to which others do not resort for such purpose.[464] This is not true, however, of the keeping of a *common* gaming house. A common gaming house is a house, room, or place kept for the purpose of gaming, and to which persons may and do resort for such purpose, and is a disorderly

[460] 1 Russ. Crimes, 443; Rex v. Peirson, 2 Ld. Raym. 1197; State v. Garity, 46 N. H. 61.

[461] Killman v. State, 2 Tex. App. 222, 28 Am. Rep. 432; State v. Mullen, 35 Iowa, 199.

[462] Com. v. Harrington, 3 Pick. (Mass.) 26; Smith v. State, 6 Gill (Md.) 425; State v. Williams, 30 N. J. Law, 102; People v. Erwin, 4 Denio (N. Y.) 129; Campbell v. State, 55 Ala. 89; Ross v. Com., 2 B. Mon. (Ky.) 417; State v. Smith, 15 R. I. 24. Contra, in case of merely leasing with knowledge, State v. Wheatley, 4 Lea (Tenn.) 230.

[463] State v. Layman, 5 Harr. (Del.) 510; Com. v. Stahl, 7 Allen (Mass.) 304; State v. Mathews, 2 Dev. & B. (N. C.) 424.

[464] State v. Mathews, 2 Dev. & B. (N. C.) 424. See, also, Estes v. State, 2 Humph. (Tenn.) 496.

house. To keep such a place is a public nuisance and misdemeanor at common law, not only because of the tendency of such a place to lead to breaches of the peace, but also because of its tendency to encourage idleness and avariciousness, and to corrupt the public morals.[465] The purpose for which the house is kept renders it disorderly, and no noise or disturbance is necessary.[466] It has been held that keeping a place for the illegal sale of lottery tickets is not keeping a gaming house, nor a nuisance,[467] and that a telegraph company which furnishes racing news to a common gaming house, which is a nuisance, is not guilty of maintaining a nuisance.[467a]

Statutes have been enacted in many states for the purpose of suppressing gaming, and these statutes cover and punish many acts which were not punished at common law. The statutes vary very much in the different states. Generally they prohibit and punish gaming, either in particular places, or generally, and in any place.[468] And they punish, not only the keeping of a gaming house, but the permitting of gaming, and the exhibition, setting up, or keeping of gaming tables and devices, or particular kinds of tables or devices.[469]

[465] 1 Hawk. P. C. c. 75, § 6; Rex. v. Dixon, 10 Mod. 335; Rex v. Medlov, 2 Show. 30; Rex v. Rogier, 1 Barn. & C. 272; U. S. v. Dixon, 4 Cranch, C. C. 107, Fed. Cas. No. 14,970; People v. King, 23 Hun, 148, 83 N. Y. 587, Beale's Cas. 847; Vanderworker v. State, 13 Ark. 700; State v. Haines, 30 Me. 65; Lord v. State, 16 N. H. 330, 41 Am. Dec. 729; State v. Doon, R. M. Charlt. (Ga.) 1; People v. Jackson, 3 Denio (N. Y.) 101, 45 Am. Dec. 449, Beale's Cas. 121; Com. v. Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 99 Am. St. Rep. 299; Thrower v. State, 117 Ga. 753, 45 S. E. 126.

[466] State v. Doon, R. M. Charlt. (Ga.) 1.

[467] People v. Jackson, 3 Denio (N. Y.) 101, 45 Am. Dec. 449, Beale's Cas. 121.

[467a] Com. v. Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 99 Am. St. Rep. 299.

[468] See Am. & Eng. Enc. Law (2d Ed.) tit. "Gaming."

[469] See Id. tit. "Gaming Houses."

467. Obscene Libels.—An obscene libel is an obscene writing, book, or print. To publish such a libel, or otherwise expose the same to public view, is a public nuisance, and a misdemeanor at common law.

To publish any obscene writing or print, or any book containing obscene matter, by selling or exhibiting the same, or to otherwise expose it to the public view, is clearly a public nuisance, because of its tendency to corrupt public morals, and to shock the public sense of decency, and it is well settled that it is indictable as a misdemeanor at common law.[470] "The test of obscenity," said Chief Justice Cockburn in an English case, "is this: Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences."[471] Depositing obscene matter in the mails is expressly punished by an act of congress.[471a] On an indictment for publishing an obscene libel, or for depositing obscene matter in the mails, it is no defense for the accused to say that he was actuated by a good motive, as by the desire to correct evils and abuses in sexual intercourse.[472]

468. Obscene, Indecent, or Disgusting Exhibitions.—Any obscene or indecent exhibition in public, or any exhibition which, though not obscene or indecent, is so disgusting as to be offensive, is a misdemeanor at common law.

Obscene and indecent exhibitions, which tend to corrupt public morals, or to shock the public sense of decency, are clearly public nuisances, and indictable at common law. This

[470] Reg. v. Curl, 2 Strange, 788; Reg. v. Hicklin, L. R. 3 Q. B. 360, 11 Cox, C. C. 19; Reg. v. Carlile, 1 Cox, C. C. 229; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632, Beale's Cas. 113; Com. v. Holmes, 17 Mass. 336; McNair v. People, 89 Ill. 441; Bell v. State, 1 Swan (Tenn.) 42.

[471] Reg. v. Hicklin, L. R. 3 Q. B. 360, 11 Cox, C. C. 19.

[471a] Rev. St. § 3893; U. S. v. Wyatt, 122 Fed. 316.

[472] U. S. v. Harmon, 45 Fed. 414, Beale's Cas. 180.

is true, for example, of obscene and indecent tableaux and theatrical performances, obscene and indecent pictures, figures, and the like.[473] On the same principle, it is a misdemeanor to let a stallion to mares in a street or other public place.[474] An exhibition may also be a nuisance because of its disgusting nature, though it may not be obscene or indecent. Thus, where a herbalist publicly exposed in his shop on a highway a picture of a man naked to the waist, and covered with eruptive sores, it was held that an indictment for nuisance would lie because of the disgusting and offensive nature of the exhibition, although there was nothing immoral or indecent in the picture, and although the motive in exhibiting it was innocent.[475]

469. Indecent Exposure.—Indecent exposure of the person to public view, if intentional, or even when due to negligence, is a public nuisance and a misdemeanor at common law.[476]

To render indecent exposure a public nuisance, the exposure must be in a public place, or else it must be in such a place that a number of persons may be offended by it.[477] To indecently expose the person to one person only in private is not indictable unless made so by statute,[478] though if the exposure is made

[473] Reg. v. Saunders, 1 Q. B. Div. 15, 13 Cox, C. C. 116; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632, Beale's Cas. 113; Pike v. Com., 2 Duv. (Ky.) 89.

[474] Crane v. State, 3 Ind. 193.

[475] Reg. v. Grey, 4 Fost. & F. 73.

[476] Rex v. Sydlye, 1 Keb. 620, 10 St. Tr. Ap. 93; Reg. v. Thallman, Leigh & C. 326, 9 Cox, C. C. 388; Reg. v. Reed, 12 Cox, C. C. 1, Beale's Cas. 369; Reg. v. Harris, L. R. 1 C. C. 282, 11 Cox, C. C. 659; Com. v. Haynes, 2 Gray (Mass.) 72; State v. Roper, 1 Dev. & B. (N. C.) 208; State v. Rose, 32 Mo. 560; Ardery v. State, 56 Ind. 328; Britain v. State, 3 Humph. (22 Tenn.) 203; Com. v. Spratt, 14 Phila. (Pa.) 365. Cf. Reg. v. Watson, 2 Cox, C. C. 376.

[477] Reg. v. Thallman, Leigh & C. 326, 9 Cox, C. C. 388; Reg. v. Holmes, Dears. C. C. 207, 6 Cox, C. C. 216; Reg. v. Harris, L. R. 1 C. C. 282, 11 Cox, C. C. 659; Lockhart v. State, 116 Ga. 557, 42 S. E. 781; Morris v. State, 109 Ga. 351, 34 S. E. 577.

[478] Reg. v. Webb, 1 Den. C. C. 338, 3 Cox, C. C. 183; Reg. v. Farrell, 9 Cox, C. C. 446; State v. Millard, 18 Vt. 574.

publicly the fact that only one person saw it is immaterial.[478a] As was shown in a previous chapter, persons who bathe naked in the sea, near a public road, along which women pass, and in sight of women so passing, are guilty of a public nuisance, and, on an indictment therefor, it is no offense to show a custom to bathe there, though it may have existed for half a century without complaint..[479]

470. Obscene and Profane Language.—It is a public nuisance and a misdemeanor at common law to publicly utter obscene language, or to profanely curse or swear in public.

Both obscene language and profane cursing or swearing are punished at common law when the offense is committed in public, and in such a way as to constitute an annoyance to the public,[480] but not when the language is uttered in private, for in the latter case, though wrong, it is not a public nuisance.[481] It seems, also, that a single act of profane swearing or cursing is not indictable unless there are aggravating circumstances.[482]

471. Blasphemy.—Blasphemy is the malicious reviling of God or the Christian religion. It is a misdemeanor at common law.

[478a] State v. Martin (Iowa) 101 N. W. 637.

[479] Reg. v. Reed, 12 Cox, C. C. 1, Beale's Cas. 369; ante, § 84. And see Rex v. Crunden, 2 Camp. 89.

[480] State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; Barker v. Com., 19 Pa. 412; Bell v. State, 1 Swan (Tenn.) 42; State v. Graham, 3 Sneed (Tenn.) 134; Goree v. State, 71 Ala. 7; State v. Ellar, 1 Dev. (N. C.) 267; State v. Powell, 70 N. C. 67; State v. Brewington, 84 N. C. 783; State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713; Young v. State, 10 Lea (Tenn.) 165; State v. Archibald, 59 Vt. 548, 9 Atl. 362, 59 Am. Rep. 755.

[481] See State v. Brewington, 84 N. C. 783; Ex parte Delaney, 43 Cal. 478; Com. v. Linn, 158 Pa. 22, 27 Atl. 843; Young v. State, 10 Lea (Tenn.) 165; Gaines v. State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637.

Delivering a written communication to a female is not using obscene, vulgar or profane language in her presence. Williams v. State, 117 Ga. 13, 43 S. E. 436.

[482] See the cases cited in the note preceding.

If written or printed and published, the offense is called "blasphemous libel."

Strictly speaking, Christianity is not a part of our common law,[483] but, as we are a Christian people, the reviling of God and the Christian religion is offensive, and a public nuisance. To openly and maliciously blaspheme not only offends the public sense of religion, but it tends to provoke breaches of the public peace, and it is well settled that it is a misdemeanor at common law.[484] Malice is an essential element of the offense.[485]

Blasphemous Libel.—If blasphemous words or signs are written or printed and published, the offense is called "blasphemous libel." To publish a blasphemous libel is a misdemeanor at common law.[486]

472. Drunkenness.—Public drunkenness is a nuisance and misdemeanor at common law.

There is nothing in the law to prevent a man from becoming as drunk as he chooses, provided he does so in private, but he cannot do so in public, since his drunkenness then becomes a public nuisance. Statutes were enacted at an early day in England punishing drunkenness by a fine and by sitting in the stocks,[487] and there are statutes in this country making public drunkenness a misdemeanor; but, independently of any statute, it is a nuisance, and indictable as a misdemeanor at common law.[488]

[483] Ante, § 457.

[484] 4 Bl. Comm. 59; Taylor's Case, 1 Vent. 293, Beale's Cas. 96; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Updegraph v. Com., 11 Serg. & R. (Pa.) 394; Ex parte Delaney, 43 Cal. 478. And see People v. Porter, 2 Park. Cr. R. (N. Y.) 14.

[485] Reg. v. Ramsay, 15 Cox, C. C. 231. And see People v. Ruggles, supra; Updegraph v. Com., supra.

[486] Rex v. Carlile, 3 Barn. & Ald. 161; Rex v. Waddington, 1 Barn. & C. 26. See Com. v. Kneeland, 20 Pick. (Mass.) 211, distinguishing between "blasphemy" and "blasphemous libel."

[487] 4 Jac. I. c. 5; 4 Bl. Comm. 64.

[488] Tipton v. State, 2 Yerg. (Tenn.) 542. And see State v. Waller, 3 Murph. (N. C.) 229; Hutchison v. State, 5 Humph. (Tenn.) 142.

473. Offenses with Respect to Dead Bodies.—It is a misdemeanor at common law to so treat or deal with a dead body as to shock the public sense of decency.

Thus, it has been held a misdemeanor to indecently throw the dead body of a child into a river, instead of burying it, or causing it to be buried;[489] to inexcusably leave a dead body exposed, instead of causing it to be buried;[490] to unlawfully disinter a dead body for the purpose of dissection, or for any other unlawful purpose;[491] to sell it, without lawful authority, for the purpose of dissection, or to take it with intent to sell it.[492] It is not a misdemeanor to cremate a body instead of burying it, unless it is done for an unlawful purpose, or in such a way as to amount to a public nuisance.[493] To burn or otherwise dispose of a dead body to prevent the holding of a coroner's inquest thereon is a misdemeanor.[494] This subject is now very generally regulated by statute.

VI. Offenses Affecting the Public Trade.

474. In General.—Certain offenses were punished in England at common law or by statute because they injuriously affected the public trade, and various acts are punished by statute in this country on the same ground. Among the offenses which have been or are now thus punished are the following:

[489] Kanavan's Case, 1 Me. 226, Beale's Cas. 115.

[490] Reg. v. Clark, 15 Cox, C. C. 171. And see Reg. v. Vaun, 2 Den. C. C. 325.

[491] Reg. v. Sharpe, Dears. & B. C. C. 160, 7 Cox, C. C. 214, Beale's Cas. 175; Rex v. Lynn, 1 Leach, C. C. 497, 2 Term R. 733, Beale's Cas. 103; Com. v. Loring, 8 Pick. (Mass.) 370; Com. v. Cooley, 10 Pick. (Mass.) 37; Tate v. State, 6 Blackf. (Ind.) 110.

[492] Rex v. Cundick, Dowl. & R. N. P. 13; Rex v. Gilles, Russ. & R. 366, note; Thompson v. State, 105 Tenn. 177, 58 S. W. 213, 51 L. R. A. 883. This may, however, be authorized by law. See Reg. v. Feist, Dears. & B. C. C. 590, 8 Cox, C. C. 18.

[493] Reg. v. Price, 12 Q. B. Div. 247, 15 Cox, C. C. 389.

[494] Reg. v. Price, supra; Reg. v. Stephenson, 13 Q. B. Div. 331.

1. **Owling, or the transporting of wool or sheep out of the kingdom, to the detriment of its staple manufacture.**
2. **Smuggling, or the importing of goods without paying the duties imposed by law.**
3. **Fraudulent bankruptcy.**
4. **Usury, or the taking of excessive interest on a loan or forbearance of money.**
5. **Cheating.**
6. **Forestalling the market, regrating, and engrossing.**
7. **Monopolies.**

475. Owling.

The offense called "owling" consisted in the transporting of wool or sheep out of England, to the detriment of its staple manufacture. It was an offense at common law, and was also punished by the statute of 2 Edw. III. c. 1, and other early statutes. It was called "owling" because of its being usually carried out at night.[495]

476. Smuggling.

Smuggling is the offense of importing goods without paying the duties imposed by the laws of the customs and excise. This was made a felony by statutes in England when committed clandestinely.[496] It is also punished in this country by acts of congress.[497]

477. Fraudulent Bankruptcy.

Another offense against the public trade is fraudulent bankruptcy. It was punished by statute in England as a felony. It consisted in England in the bankrupt's neglect to surrender himself to his creditors, his nonconformity to the directions of

[495] 4 Bl. Comm. 154.

[496] 4 Bl. Comm. 154, 155.

[497] See Rev. St. U. S. § 3082; U. S. v. Thomas, 4 Ben. 370, Fed. Cas. No. 16,473; U. S. v. Claflin, 13 Blatchf. 184, Fed. Cas. No. 14,798; U. S. v. Fraser, 42 Fed. 140.

the bankruptcy laws, his concealing or embezzling his effects, and his withholding books or writings, with intent to defraud his creditors.[498] In this country, the bankruptcy law of 1898 contains provisions making it a criminal offense to commit certain acts of fraud therein specified.[498a]

478. Usury.

The offense of usury is the act of intentionally taking or reserving by contract a greater compensation or rate of interest for the loan of money than the highest rate of interest allowed by law. In England the rate of interest was first limited by the statute of 37 Hen. VIII. c. 9, to ten per cent., and it was made a misdemeanor to take more. This was followed by other statutes.[499] In this country, also, there are statutes in most states against usury, and some of them, like the English statute, make it a criminal offense. To constitute the offense, the taking of the unlawful interest must be intentional, and not due merely to a mistake.[500]

479. Cheating.

The common-law offense of cheating by the use of false weights and measures, and other deceitful practices affecting the public, was regarded as an offense affecting the public trade, and is so treated by Blackstone.[501] It has already been considered at length in this work in treating of offenses against the property of individuals.[502]

[498] 4 Bl. Comm. 156.

[498a] See post, § 513(1).

[499] 4 Bl. Comm. 156.

[500] See Crawford v. State, 2 Ind. 112; Block v. State, 14 Ind. 425. See, also, McAuly v. State, 7 Yerg. (Tenn.) 526.

[501] 4 Bl. Comm. 157. See Respublica v. Powell, 1 Dall. (Pa.) 47, Mikell's Cas. 56.

[502] Ante, § 350 et seq.

480. Forestalling, Regrating, and Engrossing.

Forestalling the market, regrating, and engrossing were punished in England, both at common law and by statute, as offenses against public trade. *"Forestalling"* the market was described by the statute of 5 & 6 Edw. VI. c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there. *"Regrating"* was described by the same statute to be the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles thereof. *"Engrossing"* was described to be the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. And the total engrossing of any other commodity, with an intent to sell it at an unreasonable price, was an indictable offense at common law.[503] These offenses are no longer punished in England, nor are they punished with us, unless there is a combination or conspiracy.[504]

481. Monopolies.

"Monopoly" has been defined in England as a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.[505] And in this country it has been defined as an institution or allowance by a grant from the sovereign power of the state, by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using of anything is given.[506] The granting of monopolies is now

[503] 4 Bl. Comm. 158.
[504] Ante, §§ 147-149.
[505] 4 Bl. Comm. 159; 1 Hawk. P. C. 231.
[506] Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 38.

very generally prohibited by statute. The term "monopoly" has also been used, somewhat in the sense of engrossing, to designate the act of a person or corporation in obtaining the control of a particular commodity, or of a particular industry, without any grant of exclusive rights or privileges by the state. In this sense, like engrossing, it is not now a crime unless there is a combination of several persons to accomplish such an end, in which case the combination may be punishable as a criminal conspiracy.[507]

VII. Offenses Against the Law of Nations.

482. In General.

Many acts are punished as offenses against the law of nations,—among others, piracy, violation of safe-conducts or passports, and infringement of the rights of ambassadors. The law of nations is that universal law of society which regulates the mutual intercourse between one state and another. Blackstone says: "The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle: That different nations ought, in time of peace, to do one another all the good they can, and, in time of war, as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective com-

[507] Ante, §§ 147-149.

munities, in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject. In arbitrary states, this law, wherever it contradicts, or is not provided for by, the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. * * * Offenses against this law are principally incident to whole states or nations, in which case recourse can only be had to war, which is an appeal to the God of hosts to punish such infractions of public faith as are committed by one independent people against another; neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live to animadvert upon them with becoming severity, that the peace of the world may be maintained."[508]

In this country, as we have seen, the federal courts have no common-law jurisdiction in criminal matters. They can punish no act until congress has made it a crime, affixed the punishment, and conferred upon them jurisdiction of the offense.[509] Without this, therefore, they could not punish offenses against the law of nations. The power of congress in the matter depends, of course, upon the constitution of the United States. That instrument expressly confers upon congress the power to define and punish piracies and felonies committed on the high seas, "and offenses against the law of nations."[510] This gives congress full power to provide for the punishment of any act

[508] 4 Bl. Comm. 66.

[509] Ante, § 12b.

[510] Const. U. S. art. 1, § 8

whatever which is an offense against the law of nations,[511] and it has exercised this power in a number of cases. In such of our states as administer the common law of crimes, offenses against the law of nations are doubtless punishable by the state courts.[511a]

483. Piracy.—Piracy is robbery and depredation upon the high seas. It is an offense against the law of nations, and a felony, punishable by death, except where a different punishment is prescribed by statute.

Piracy has, from the earliest times, been regarded as a crime against the law of nations. "A pirate is one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason, pirates, according to the law of nations, have always been compared to robbers, the only difference being that the sea is the theater of the operations of one, and the land of the other. And as general robbers and pirates upon the high seas are deemed enemies of the human race, making war upon all mankind indiscriminately, the vessels of every nation have a right to pursue, seize, and punish them."[512] The offense of piracy, by the common law, the law of nations being a part of the common law, "consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to a felony there."[513] Stephen says: "Piracy, by the law of nations, is taking a ship on the high seas, or within the jurisdiction of the Lord High Admiral, from the possession or control of those who are lawfully entitled to it, and

[511] See U. S. v. Arjona, 120 U. S. 479.

[511a] Respublica v. De Longchamps, 1 Dall. (Pa.) 111, Mikell's Cas. 33.

[512] Nelson, J., in Trial of Officers of The Savannah, p. 371. See, generally, 4 Bl. Comm. 71; Rex v. Dawson, 13 How. St. Tr. 454.

[513] 4 Bl. Comm. 72.

carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English county. Whoever commits piracy, by the law of nations, is liable (it seems) to the same punishment as if the act constituting piracy had been committed within the body of an English county."[514] In the United States, as we have seen, the federal constitution expressly authorizes congress to define and punish piracies and felonies on the high seas, and offenses against the law of nations; and, in pursuance of such authority, an act has been passed by congress punishing by death any person who shall commit the crime of piracy "as defined by the law of nations," and who shall be brought into or found in the United States.[515]

484. Violation of Safe-Conducts or Passports.

It is an offense against the law of nations to violate safe-conducts or passports expressly granted by the sovereign or chief executive of a nation or his ambassadors to the subjects of a foreign power in time of mutual war, or to commit acts of hostility against such as are in amity, league, or truce, and are in the country under a general implied safe-conduct, and one who committed such an offense was indictable at common law.[516] In this country, under the power to define and punish offenses against the law of nations, congress has passed an act expressly punishing, by imprisonment and fine, any person "who violates any safe-conduct or passport duly obtained or issued under authority of the United States."[517]

[514] Steph. Dig. Crim. Law, art. 104.

[515] Const. U. S. art. 1, § 8; Rev. St. U. S. § 5368 et seq. See U. S. v. Palmer, 3 Wheat. (U. S.) 610; U. S. v. Klintock, 5 Wheat. (U. S.) 144; U. S. v. Holmes, 5 Wheat. (U. S.) 412.

[516] 4 Bl. Comm. 68.

[517] Rev. St. U. S. § 4062.

485. Infringement of Rights of Ambassadors.

The common law of England recognized to the full extent the rights and privileges of ambassadors as established by the law of nations, and punished violations thereof.[518] In this country, congress has prescribed a punishment and fine for assaulting, wounding, imprisoning, or in any other manner offering violence to the person of a public minister, "in violation of the law of nations."[519] Such of our states as recognize the common law of crimes punish these offenses as at common law.[519a]

[518] 4 Bl. Comm. 70.

[519] Rev. St. U. S. § 4062. See 2 Whart. Crim. Law, § 1899; U. S. v. Jeffers, 4 Cranch, C. C. 704, Fed. Cas. No. 15,471; U. S. v. Liddle, 2 Wash. C. C. 205, Fed. Cas. No. 15,598; U. S. v. Ortega, 4 Wash. C. C. 531, 11 Wheat. 467, Fed. Cas. No. 15,971.

[519a] Respublica v. De Longchamps, 1 Dall. (Pa.) 111, Mikell's Cas. 33.

CHAPTER X.

JURISDICTION AND LOCALITY.

I. JURISDICTION IN GENERAL, §§ 486-492.
II. LOCALITY OF OFFENSES, §§ 493-511.
III. STATE AND FEDERAL JURISDICTION, §§ 512-514.

I. JURISDICTION IN GENERAL.

486. General Rule.—A country or state may punish any person, except foreign ambassadors or ministers and their servants, for offenses committed within its limits, but, as a general rule, the laws of a country or state have no operation beyond its territorial limits, and ordinarily, therefore, the courts of a country or state have no jurisdiction to punish for offenses committed beyond such limits.[1]

As we shall see in the course of this chapter, there are some real exceptions to this rule, and many apparent exceptions. In treating of the subject of jurisdiction, we shall first consider shortly the extent of the territorial limits of a country or state, and particularly of our own country and states, after which we shall consider the power of a nation or state to punish citizens or subjects of other nations or states, and the power to punish offenses by citizens or subjects abroad. We shall then treat

[1] Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897; State v. Barnett, 83 N. C. 615; People v. Merrill, 2 Park. Cr. R. (N. Y.) 590; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, Beale's Cas. 398; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407; State v. Wyckoff, 31 N. J. Law, 65, Beale's Cas. 399; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320; State v. Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822; Johns v. State, 19 Ind. 421, 81 Am. Dec. 408; Phillips v. People, 55 Ill. 429; Beattie v. State (Ark.) 84 S. W. 477.

of the locality of crimes, and finally of United States and state jurisdiction in criminal matters.

487. Territorial Limits in General.

Since jurisdiction depends to a great extent upon territorial limits, it is often necessary, in criminal prosecutions, to ascertain exactly what the territorial limits of a country, state, or county are. Where two countries or states adjoin on the land, the line between them is fixed by occupancy and treaties in the case of the United States and foreign countries. As between the different states, it is fixed by original colonial grants, by enabling acts of congress, by compacts between the states with the consent of congress, or by suits between states in the supreme court of the United States to ascertain and establish boundaries. The boundary lines between the different counties of a state are fixed by the statutes of the states.

488. Countries, States, or Counties Bounded by the Sea.

(*a*) *In General.*—It has repeatedly been said by writers on international law that the jurisdiction of a nation bordering on the sea extends not merely to low-water mark on the shore, but into the sea to the distance of a cannon shot, estimated at one marine league, or three miles, from low-water mark; and it has been very generally assumed from this that a nation has jurisdiction to punish offenses against its laws if committed at any place within such limits.[2] Whether this doctrine, however, gives jurisdiction to punish for acts committed at any place within the three-mile limit, in the absence of a statute, has been rendered very doubtful by a late decision in England, in which it was held by the court of criminal appeal, in the absence of any statute covering the case, that an indictment

[2] See 1 Kent, Comm. 29; 1 Hale, P. C. 154; Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, Beale's Cas. 930; Manchester v. Massachusetts, 139 U. S. 240. And see 11 Am. Law Rev. 625 et seq.

for manslaughter would not lie against the master of a German vessel, who was himself a German subject, for negligently running into and sinking an English ship, and causing the death of an English subject thereon, though the collision and death occurred within three miles of the shores of England. A majority of the court held that the *territorial limits* of a nation do not extend beyond low-water mark on the shore; that, though a nation has a *quasi* jurisdiction over the sea for a distance of three miles from the shore for the purpose of military and police regulations, this part of the sea is no part of its territory; and that, in the absence of legislation on the subject, its courts have no jurisdiction to take cognizance of and punish an act committed there by a foreigner on a foreign ship.[3] Since this decision, a statute has been enacted in England extending the admiralty jurisdiction in criminal matters, and the jurisdiction of the central criminal court, to which such jurisdiction has been transferred, to the distance of a marine league into the sea.[4]

In this country, also, statutes to this effect have been enacted and upheld. In Massachusetts it was held that the territorial jurisdiction of the state over the adjacent seas, subject to the common right of navigation, extends to the distance of at least a marine league from the shore, and over bays running into the state which do not exceed in width two marine leagues at the mouth, and a statute regulating fisheries in such waters, and punishing violations of its provisions, was upheld.[5] This decision was affirmed by the supreme court of the United States.[6]

[3] Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, 46 L. J. Mag. Cas. 17, Beale's Cas. 897. And see U. S. v. Kessler, Baldw. 15, Fed. Cas. No. 15,528.

[4] 41 & 42 Vict. c. 73.

[5] Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, Beale's Cas. 930. In this case, Buzzard's Bay was held to be within the territorial jurisdiction of Massachusetts.

[6] Manchester v. Massachusetts, 139 U. S. 240.

(*b*) *Bays and Other Arms of the Sea.*—When a river, haven, bay, or other arm of the sea, extends into a country or state, it is not only within the territorial limits of the country or state to an imaginary line drawn between the furthermost points of land, or *fauces terrae,* but it is also with the body of a county of the state, and subject to the common-law jurisdiction, if it is so narrow that a person standing on one shore can reasonably discern by the naked eye what is being done on the other shore.[7] According to this doctrine it has been held that the county of Suffolk, in Massachusetts, extends to all the waters of Boston harbor between the circumjacent islands down to Great Brewster Island and Point Allerton, and that the courts of such county have jurisdiction of offenses against the laws of the state committed on a vessel lying in such waters.[8]

(*c*) *Long Island Sound.*—The waters of Long Island sound are "high seas," within the meaning of the federal constitution and acts of congress, except such parts as are within the *fauces terrae.*[9] Within the *fauces terrae,* as in the Huntington and Northport bays, and in New Haven harbor, but not outside, such waters are within the territorial limits and jurisdiction of the states of New York and Connecticut, and within the body of the counties thereof.[10]

489. Rivers and Lakes.

(*a*) *In General.*—The jurisdiction of a state extends over all rivers and lakes lying within its territorial limits, unless there is some compact to the contrary.[11] Its jurisdiction over a river

[7] 1 Kent, Comm. 30; U. S. v. Bevans, 3 Wheat. (U. S.) 336; U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; Com. v. Peters, 12 Metc. (Mass.) 387; Manley v. People, 7 N. Y. 295.

[8] U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268, per Mr. Justice Story. See Direct U. S. Cable Co. v. Anglo-American Tel. Co., 2 App. Cas. 394.

[9] U. S. v. Jackalow, 1 Black (U. S.) 484; U. S. v. Peterson, 64 Fed. 145, 147.

[10] Manley v. People, 7 N. Y. 295.

[11] Biscoe v. State, 68 Md. 294; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

forming the boundary between it and another state depends, in the absence of any compact, upon whether its territorial limits extend to the middle of the stream, or to the one or the other of the banks. When a great river is the boundary between two states, if the original property was in neither state, and there is no convention respecting it, each holds to the middle of the stream. But when one state was the original proprietor, and has granted the territory on one side only, it retains the river within its own domain, and the newly-created state extends only to the low-water mark on the river.[12] There is a distinction, however, between ownership and jurisdiction, and there may be jurisdiction without ownership.[12a] Thus, it is the general, though perhaps not universal, rule, that jurisdiction of the surface of a river forming the boundary between the states has been made concurrent between the states throughout its whole width, though the actual state boundary may be at low water mark on one side of the river or may be at the thread of the stream.[13] And statutory provisions, giving adjoining counties concurrent jurisdiction over offenses committed within a certain distance of the county line, are common.[13a]

(*b*) *The Great Lakes.*—It has been held by the supreme court of the United States that the great lakes in this country are within the general designation of "high seas" in the federal constitution and acts of congress, and it was therefore held that the federal courts had jurisdiction of an offense committed on an American vessel in the Detroit river beyond the

[12] Chief Justice Marshall in Handly's Lessee v. Anthony, 5 Wheat. (U. S.) 374; Booth v. Shepherd, 8 Ohio St. 243; Com. v. Garner, 3 Grat. (Va.) 655; McFall v. Com., 2 Metc. (Ky.) 394.

[12a] Vattel, Law of Nations, Bk. I, § 295; Com. v. Garner, 3 Grat. (Va.) 655, 709.

[13] Wedding v. Meyler, 192 U. S. 573; Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953.

[13a] Hackney v. State (Tex. Cr. App.) 74 S. W. 554.

boundary line between the United States and Canada.[14] By an act of congress of 1890, the criminal jurisdiction of the federal courts was expressly extended over the Great Lakes and connecting waters.[14a] The limits of the states on the Great Lakes extend to the center of the lakes,[15] and the rivers connecting them, that line being the boundary between the United States and the British possessions.[15a]

(*c*) *Hudson River.*—Although, for some purposes, New Jersey is bounded by the middle of the Hudson river, and the state owns the land under the water to that extent, exclusive jurisdiction, not only over the water, but also over the land, to low-water mark on the New Jersey shore, is granted to, or rather acknowledged to belong to, the state of New York by the compact between those states, and it has been held, therefore, that the courts of New Jersey have no jurisdiction to punish as a nuisance the obstruction of the river by placing vessels and wrecks on the shore below the low-water line.[16]

(*d*) *Ohio River.*—By the Virginia act of 1783 dominion of the territory lying northwest of the Ohio River was ceded to the Federal government, and by the Virginia compact of 1789 concurrent jurisdiction over the river itself was established in the states bounded by it. The ultimate title to the river itself is in West Virginia and Kentucky, which as successors of Vir-

[14] U. S. v. Rodgers, 150 U. S. 249. And see U. S. v. Peterson, 64 Fed. 145.

[14a] Act Sept. 4, 1890 (26 Stat. p. 424, c. 874); U. S. v. Peterson, 64 Fed. 145.

[15] U. S. v. Peterson, 64 Fed. 145, 147; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[15a] Treaty of Peace with Great Britain, 1783. 8 U. S. Stat. at Large, p. 80, art. II.

Certain counties in Michigan and Wisconsin, bordering on the great lakes, have common jurisdiction of an offense committed anywhere on the lake within the territorial limits of the state. People v. Bouchard, 82 Mich. 156, 46 N. W. 232; State v. McDonald, 109 Wis. 506, 85 N. W. 502.

[16] State v. Babcock, 30 N. J. Law, 29. See, also, In re Devoe Mfg. Co., 108 U. S. 401; People v. Central R. Co., 42 N. Y. 283.

ginia, own to low water mark on the northwest shore. Concurrent jurisdiction however rests in Ohio, Indiana and Illinois, each of which has power to serve process and punish crimes committed anywhere on the surface of the river between their lateral boundaries.[16a]

(*e*) *Mississippi River.*—By the treaty between Great Britain, France and Spain in 1763 the middle of the River Mississippi became the boundary between the English possessions on the east and the French and Spanish possessions on the west.[17] The treaty of 1795 with Spain recognized the same boundary and guaranteed to both nations freedom of navigation of the river throughout its whole length and breadth.[17a] In 1803, by the Louisiana purchase, the Federal government succeeded to all the rights of France and Spain to the shores of the Mississippi, and incidentally to their rights in the river itself.[18] Following the precedent established by the treaties it has been the practice in admitting states bordering on the river to define their boundaries as extending to the middle thereof, but to give states on opposite sides of the river concurrent jurisdiction over its whole breadth.[18a]

[16a] Wedding v. Meyler, 192 U. S. 573; Dugan v. State, 125 Ind. 130, 25 N. E. 171, 9 L. R. A. 321; Welsh v. State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; State v. Stevens, 1 Ohio Dec. (Reprint) 82, 2 West. Law J. 66; Com. v. Louisville & E. Packet Co. (Ky.) 80 S. W. 154.

[17] Missouri v. Kentucky, 11 Wall. (U. S.) 395.

[17a] 8 St. at Large, p. 140.

[18] 8 St. at Large, p. 200.

[18a] Missouri v. Kentucky, 11 Wall. (U. S.) 395; State v. George, 60 Minn. 503, 63 N. W. 100; State v. Cameron, 2 Chand. (Wis.) 172, 2 Pin. 490; Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953; Wiggins Ferry Co. v. Reddig, 24 Ill. App. 260; State v. Metcalf, 65 Mo. App. 681; State v. Mullen, 35 Iowa, 199; State v. Seagraves (Mo. App.) 85 S. W. 925.

The case of Phillips v. People, 55 Ill. 429, in apparent conflict with this rule, if so construed, is of doubtful authority. The fact that the boat in the Phillips case was tied to the Illinois shore might be regarded as a controlling circumstance, but the same fact, though present, was not deemed material in Wedding v. Meyler, 192 U. S. 573. See, also, State v. Plants, 25 W. Va. 119, 52 Am. Rep. 211.

(*f*) *Missouri River.*—The Missouri enabling act provided that the state of Missouri should extend to the middle of the main channel of the Missouri river, and should have concurrent jurisdiction over its whole width.[19]

490. Vessels of a Nation as a Part of its Territory.

(*a*) *In General.*—With respect to offenses committed on vessels, it is settled beyond any question that the admiralty jurisdiction of a nation extends over vessels sailing under its flag, while they are on the high seas, for the vessels of a nation are, as "floating islands" would be, a part of its territory.[19a]

"By the received law of every nation, a ship on the high seas carries its nationality and the law of its own nation with it, and in this respect has been likened to a floating portion of the national territory. All on board, therefore, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on its territory on land, and are liable to the penalties of that law for any offense committed against it."[20] The same is true of the vessels of a nation when they are in the ports or navigable waters of another nation.[21]

[19] State v. Metcalf, 65 Mo. App. 681. The provision for concurrent jurisdiction seems to have been overlooked in State v. Keane, 84 Mo. App. 127. See State v. Seagraves (Mo. App.) 85 S. W. 925.

[19a] 1 Kent, Comm. 26; Reg. v. Anderson, L. R. 1 C. C. 161, 11 Cox, C. C. 198, Beale's Cas. 895; Reg. v. Lopez, Dears. & B. C. C. 525, 7 Cox, C. C. 431; Reg. v. Lesley, Bell, C. C. 220, 8 Cox, C. C. 269, Beale's Cas. 311; Reg. v. Carr, 10 Q. B. Div. 76, 15 Cox, C. C. 129, 52 L. J. Mag. Cas. 12, 47 Law Times (N. S.) 451; Reg. v. Armstrong, 13 Cox, C. C. 184; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[20] Per Cockburn, C. J., in Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403; Reg. v. Lopez, 7 Cox, C. C. 431; s. c. sub. nom. Reg. v. Sattler, Dears. & B. 525; U. S. v. Rodgers, 150 U. S. 249.

[21] Reg. v. Anderson, L. R. 1 C. C. 161, 11 Cox, C. C. 198, Beale's Cas. 895; Rex v. Allen, 7 Car. & P. 664, 1 Mood. C. C. 494; U. S. v. Gordon, 5 Blatchf. 18, Fed. Cas. No. 15,231. And see U. S. v. Mc-

(*b*) *Concurrent Jurisdiction of Other Nations.*—The fact that a nation has jurisdiction over its vessels while they are in the ports or navigable waters of another nation does not, in the absence of treaty provisions, exclude the jurisdiction of the other nation. The latter has concurrent jurisdiction. "It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement,"[22] for, as was said by Chief Justice Marshall, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."[23] Thus, if a seaman on a British vessel should kill another seaman while the vessel is in a port of the United States, or *vice versa,* either nation would have jurisdiction to punish him for murder, without regard to his nationality.[24]

491. Jurisdiction over Foreigners.

(*a*) *In General.*—As a general rule, foreigners residing or being in a country are subject to its laws, and are just as much liable to indictment for offenses committed against its laws as citizens are.[25] This principle applies to foreigners commit-

Glue, 1 Curt. 1, Fed. Cas. No. 15,679; U. S. v. Armstrong, 2 Curt. 446, Fed. Cas. No. 14,467.

[22] Wildenhus' Case (Mali v. Keeper of Jail), 120 U. S. 1, Beale's Cas. 925; Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897; Reg. v. Cunningham, Bell, C. C. 72, 8 Cox, C. C. 104.

[23] The Exchange, 7 Cranch (U. S.) 116.

[24] Reg. v. Keyn, supra; Wildenhus' Case (Mali v. Keeper of Jail), supra; and other cases cited above.

[25] Reg. v. McCafferty, Ir. R. 1 C. L. 363, 10 Cox, C. C. 603; U. S. v. Wiltberger, 5 Wheat. (U. S.) 97; In re Wolf, 27 Fed. 606; People v. McLeod (N. Y.) 25 Wend. 483, 1 Hill, 377, 37 Am. Dec. 328; State v. Neighbaker (Mo.) 83 S. W. 523; Com. v. Blodgett, 12 Metc. (Mass.)

ting crimes upon vessels sailing under the flag of a country, whether the vessel is on the high seas, or in the ports or navigable waters of another country, for the vessels of a country, as we have seen, are a part of its territory.[26]

(*b*) *Ambassadors and Consuls.*—This rule does not apply to foreign ambassadors or ministers and their retinue. By the law of nations, they cannot be arrested or punished for offenses committed in the country to which they are deputed.[27] This is not true, however, of foreign consuls.[28]

(*c*) *Belligerents.*—It is settled that, in time of war, a belligerent who commits in a country or state acts which would, under ordinary circumstances, be punishable as a crime against its laws, is not punishable therefor in the civil courts, but must be treated as a prisoner of war only.[29] This principle was applied during the late Civil War in this country.[30] It seems that, even in time of peace, a subject of one of two foreign sovereigns who are at war is not punishable in our courts for illegal acts in our territory, if he is an officer or functionary of the foreign sovereign, or if the foreign sovereign adopts his act, but we must seek redress from the foreign sovereign.[31]

(*d*) *Offenses by Foreigners Abroad.*—Unless jurisdiction is conferred by some statute, the courts of a state or country have

56; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452. And see State v. Knight, Tayl. (N. C.) 65, 2 Hayw. 109, Beale's Cas. 406.

[26] Reg. v. Anderson, L. R. 1 C. C. 161, 11 Cox, C. C. 198, Beale's Cas. 895; Reg. v. Lopez, Dears. & B. C. C. 525, 7 Cox, C. C. 431; Reg. v. Carr, 10 Q. B. Div. 76, 15 Cox, C. C. 129, 52 L. J. Mag. Cas. 12, 47 Law Times (N. S.) 451; ante, § 490.

[27] 1 Kent, Comm. 39; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, Mikell's Cas. 33; U. S. v. Lafontaine, 4 Cranch, C. C. 173, Fed. Cas. No. 15,550; State v. De La Foret, 2 Nott & McC. (S. C.) 217.

[28] State v. De La Foret, 2 Nott & McC. (S. C.) 217.

[29] 1 Whart. Crim. Law, § 283.

[30] Id., citing The Emulous, 1 Gall. 563, Fed. Cas. No. 4,479; Com. v. Blodgett, 12 Metc. (Mass.) 56; People v. McLeod (N. Y.) 25 Wend. 483, 1 Hill, 377, 37 Am. Dec. 328.

[31] See Coleman v. State of Tennessee, 97 U. S. 509; Com. v. Holland, 1 Duv. (Ky.) 182; Hammond v. State, 3 Cold. (Tenn.) 129.

no jurisdiction to punish a citizen or subject of another state or country for an offense committed beyond its territorial limits, unless the act takes effect and constitutes an offense within such limits.[32] Nor, according to the better opinion, can the legislature of a state punish acts committed by foreigners abroad, where the act does not take effect and constitute an injury and offense within its territorial limits. This was decided in an early North Carolina case, in which it was held that the legislature could not punish the counterfeiting of its bills of credit by citizens of Virginia in Virginia. "This state," said the court, "cannot declare that an act done in Virginia by a citizen of Virginia shall be criminal and punishable in this state. Our penal laws can only extend to the limits of this state, except as to our own citizens."[33] The principle has also been recognized in other states.[34] In Texas there is a decision apparently to the contrary. A statute of that state punishing any person who, out of the state, should commit an offense punished by the laws of the state, and not requiring personal presence, was held valid, and it was held that it applied to and rendered punishable forgery in another state of instruments affecting the title to lands in Texas.[35] Congress has enacted a statute punishing perjury or subornation of perjury before United States secretaries of legation and consular officers without express restriction to citizens of the United States.[36] It seems never to have been decided

[32] Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897; U. S. v. Palmer, 3 Wheat. (U. S.) 610; People v. Merrill, 2 Park. Cr. R. (N. Y.) 590; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[33] State v. Knight, Tayl. (N. C.) 65, 2 Hayw. (N. C.) 109, Beale's Cas. 406.

[34] People v. Merrill, 2 Park. Cr. R. (N. Y.) 590; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407. And see Reg. v. Lewis, Dears. & B. C. C. 182, 7 Cox, C. C. 277; State v. Kelly, 75 Me. 331, 49 Am. Rep. 620.

[35] Hanks v. State, 13 Tex. App. 289.

[36] See Rev. St. U. S. § 4083 et seq.

whether this statute applies to foreigners, or, if so, whether it is valid; but when the question does arise it will very probably be held that it was not intended to apply to foreigners.[37]

Homicide.—In England there is a statute punishing for homicide and giving the English courts jurisdiction, where a person is feloniously stricken, poisoned, or otherwise hurt on the high seas, or in any other place outside of England, and dies, by reason of the injury, in England. There are similar statutes in the United States. These statutes are undoubtedly valid as applied to homicide committed by subjects or citizens of England or of the state, as the case may be.[38] In England it has been held that the statute only applies where the homicide is committed by a British subject.[39] In this country it has been held in New Jersey that such a statute is not within the power of the legislature, as applied to homicide committed by foreigners or citizens of other states.[40] But in Massachusetts such a statute was held constitutional, and applicable to a homicide by a foreigner and a citizen of another state, who inflicted the injury upon the deceased in a British ship on the high seas.[41]

Effect of Statutes.—In England, if parliament enacts laws punishing acts by foreigners abroad, the courts must give them effect, whether parliament ought to have enacted them or not, and leave it for the government to settle the question of international law with other nations.[42] In this country, state stat-

[37] See Reg. v. Lewis, Dears. & B. C. C. 182, 7 Cox, C. C. 277; State v. Knight, Tayl. (N. C.) 65, 2 Hayw. (N. C.) 109, Beale's Cas. 406.

[38] Reg. v. Conolly, cited in Dears. & B. C. C. 183; Reg. v. Azzopardi, 1 Car. & K. 203, 2 Mood. C. C. 289.

[39] Reg. v. Lewis, Dears. & B. C. C. 182, 7 Cox, C. C. 277.

[40] State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407. And see State v. Kelly, 76 Me. 331, 49 Am. Rep. 620. But see Hunter v. State, 40 N. J. Law, 495.

[41] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89, Beale's Cas. 409. And see People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[42] Per Cockburn, C. J., in Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897.

utes undertaking to punish for crimes committed in other states by citizens of such other states have been held void.[43]

Acts Without, Taking Effect Within, a Country or State.—A country or state may punish acts of citizens of other states and foreigners committed in fact outside of its territorial limits, if they take effect and constitute an injury to its own citizens or subjects within its limits.[44] Thus, a state may punish a person for advising and procuring a woman, within its limits, to take a drug with intent to cause an abortion, though the drug may be procured in another state, and sent to the woman by mail.[45] In like manner, a state may punish for acts done in another state, which take effect and constitute a nuisance within its limits.[46] And it may punish a man, if it can obtain jurisdiction of his person, for murder committed by shooting across the line from another state,[47] or for committing a crime within its limits by means of an innocent agent.[48] In these cases, however, the offense is, in contemplation of the law, committed within the state.[49] In an Indiana case it was said: "While it is clear that the criminal law of a state can have no extraterritorial operation, it is equally clear that each state may protect her own citizens in the enjoyment of life, liberty, and property, by determining what acts within her own limits shall be deemed criminal, and by punishing the commission of those acts. And the right of punishment extends not only to persons who commit infractions of the criminal law *actually* within the state, but also to all *persons who*

[43] State v. Knight, Taylor (N. C.) 65, 2 Hayw. (N. C.) 109, Beale's Cas. 406; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407.

[44] See Holmes v. Jennison, 14 Pet. (U. S.) 540.

[45] State v. Morrow, 40 S. C. 221, 18 S. E. 853.

[46] Post, § 510.

[47] See State v. Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822.

[48] Post, § 497.

[49] Post, § 494 et seq.

commit such infractions as are, in *contemplation of law,* within the state."[50]

492. Jurisdiction over Subjects or Citizens Abroad.

In the absence of legislation on the subject, the courts of a state or nation have no jurisdiction to punish offenses committed by its subjects or citizens in another state or country.[51] Thus, where a citizen of North Carolina, while standing on the North Carolina side of the line between that state and Tennessee, shot across the line and killed a man in Tennessee, it was held that the murder was committed in Tennessee, and the North Carolina courts had no jurisdiction.[52] So, where a citizen of the United States, on board a United States merchant vessel in a foreign port, shot at and killed a person on board a foreign vessel, it was held that the homicide was committed on board the foreign vessel, and the federal courts of this country had no jurisdiction to punish therefor.[53]

It is well settled, however, that a nation has the power to prohibit and punish acts by its own subjects or citizens while they are in a foreign state or country, if the legislature sees fit to do so.[54] For the United States to do so, it has been held,

[50] Johns v. State, 19 Ind. 421, 81 Am. Dec. 408. And see People v. Adams, 3 Denio (N. Y.) 190, 45 Am. Dec. 468, 1 N. Y. 173.

[51] 3 Coke, Inst. 48, Mikell's Cas. 584; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, Beale's Cas. 398; State v. Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822; People v. Merrill, 2 Park. Cr. R. (N. Y.) 590; In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562; Musgrave v. Medex, 19 Ves. 652; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[52] State v. Hall, supra.

[53] U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, Beale's Cas. 398.

[54] 1 Whart. Crim. Law, §§ 273, 285, note; Com. v. Gaines, 2 Va. Cas. 172; U. S. v. Dawson, 15 How. (U. S.) 467; State v. Main, 16 Wis. 398.

In England, a statute punishes the murder of one British subject by another, though committed in a foreign country. 9 Geo. IV. c. 31, § 7; Rex v. Sawyer, Russ. & R. 294; Reg. v. Azzopardi, 2 Mood. C. C. 289, 1 Car. & K. 203.

does not violate the provision of the federal constitution entitling a person accused of a crime to a trial in the state and district in which it was committed, for this provision only applies to offenses committed within the United States.[55]

Acts of Congress.—The power to punish acts committed in foreign countries has been recognized by congress. Statutes have been enacted giving ministers and consuls of the United States, in pursuance of treaties with China, Japan, and certain other countries, jurisdiction to arraign and try, in the manner therein provided, all citizens of the United States charged with offenses against law, committed in such countries,[56] and giving like jurisdiction to consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States.[57] Another act punishes any citizen of the United States, though residing or abiding in a foreign country, who shall, without the permission or authority of the United States, "directly or indirectly commence or carry on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or any officer or agent thereof, in relation to any disputes or controversies with the United States."[58] Another statute punishes correspondence with rebels, though the offense may be committed in a foreign country.[59] Another statute punishes perjury or subornation of perjury abroad before secretaries of legation and consular officers, and forgery of consular papers.[60]

[55] U. S. v. Dawson, 15 How. (U. S.) 467.

[56] Rev. St. § 4084. See In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562.

[57] Rev. St. § 4088.

[58] Id. § 5335.

[59] Act Cong. Feb. 26, 1863.

[60] Rev. St. § 4083 et seq.

II. Locality of Offenses.

493. In General.

The chief difficulty in determining whether a country or state has jurisdiction to take cognizance of and punish an offense is in determining the locality of offenses. An offense is committed, of course, where the act constituting the offense is committed, and ordinarily, therefore, the locality of offenses is clear. In some cases, however, it is otherwise. Thus, if a man stands in one state, and kills another by shooting across the line into another state, or if he wounds a person in one state, and the victim dies in another, or if a man steals goods in one state, and carries them into another, or if he does an act in one state, which takes effect and constitutes a crime in another,—in these and many other cases, difficulty has been experienced in determining the locality of the offense.

494. Act Committed in One Jurisdiction and Taking Effect in Another.

To render one guilty of an offense in a particular jurisdiction, it is not always necessary that he shall be personally within such jurisdiction at any time. A person who, in one jurisdiction, does an act which takes effect and constitutes a crime in another, may be punished in the latter jurisdiction,[61] if he can be apprehended therein.[62] And a person who com-

[61] Rex v. Brisac, 4 East, 164; Reg. v. Jones, 1 Den. C. C. 551, 4 Cox, C. C. 198; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Simpson v. State, 92 Ga. 41, 17 S. E. 984, 44 Am. St. Rep. 75; Johns v. State, 19 Ind. 421; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, Beale's Cas. 398; Ex parte Hedley, 31 Cal. 109; State v. Morrow, 40 S. C. 221, 18 S. E. 853; Robbins v. State, 8 Ohio St. 131; State v. Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822.

[62] Of course he cannot be punished if he cannot be apprehended, and if he does not come within the state in which his act takes effect, there is no way in which he can be apprehended without the consent of the country or state in which he is. The act of congress relating to interstate rendition of fugitives from justice does not apply, for it only applies to persons who flee from justice, and a person

mits a crime in one jurisdiction, for which he may be there punished, is liable for its continuous operation in another jurisdiction, if he can be apprehended in the latter.[63] We shall see the application of this principle in considering the locality of particular offenses. We shall see, for example, that it applies where a man in one state shoots across the line, and kills or wounds a man in another state,[64] or assaults him,[65] where a man in one state sends a letter containing false pretenses by mail to another state, and there obtains money or property by means of such pretenses,[66] where a man erects a nuisance in one state, and it also takes effect and constitutes a nuisance in another state,[67] or publishes a libel in one state in a newspaper which circulates in another state,[68] where a man commits a crime in another state by means of an innocent agent,[69] and in many other cases.

who has never been in a state cannot be a fugitive from its justice. A short time ago, a man stood in North Carolina, and, by shooting across the line, killed a man in Tennessee. He was tried for murder in North Carolina, and acquitted on the ground that the homicide was committed in Tennessee, where the shot took effect. The authorities of Tennessee afterwards applied for his surrender by the governor, but the demand was refused, on the ground that he was not a fugitive from the justice of Tennessee, as he had not been in that state. State v. Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822; State v. Hall, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501.

[63] 2 Hawk. P. C. c. 25, § 37; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

[64] State v. Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822; post, § 505 c.

[65] Simpson v. State, 92 Ga. 41, 17 S. E. 984, 44 Am. St. Rep. 75; post, § 507.

[66] Reg. v. Jones, 1 Den. C. C. 551, 4 Cox, C. C. 198; post, § 501.

[67] 2 Hawk. P. C. c. 25, § 37; post, § 510.

[68] Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; post, § 508. A prohibited advertisement in a newspaper is published only at the place of publication of the paper and not in each county in which the paper circulates. State v. Bass, 97 Me. 484, 54 Atl. 1113.

[69] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; People v. Adams, 3 Denio (N. Y.) 190, 1 N. Y. 173; post, § 497.

495. Accessaries.

(*a*) *Different Counties.*—When a felony was committed in one county of England, and a person was accessary before or after the fact in another county, it was uncertain, at common law, whether he could be punished in either county. Sir Matthew Hale said: "If a man were accessary before or after in another county than where the principal felony was committed, at common law it was dispunishable."[70] Other writers were of opinion that the accessary might be punished where the felony was committed.[71] The question was finally set at rest by the statute of 2 & 3 Edw. VI. c. 24, § 4, making accessaries liable to indictment in the county in which they should become accessary.[72] This statute is old enough to have become a part of our common law, but in many states similar statutes have been enacted. Under these statutes, the prosecution must be in the county in which the accused became accessary.[73]

(*b*) *Different States.*—In Connecticut it has been held that a person who, while in another state, becomes accessary to a felony committed in Connecticut, may be punished as accessary in Connecticut, if he can be apprehended,[74] but the decision is not supported by any authority whatever, and cannot be sustained. A person who, in one state, becomes accessary, either before or after the fact, to a felony committed by the principal in another state, is guilty of a crime in the state in which he becomes accessary, and may be punished there, but he is not guilty as an accessary, and cannot be punished as such, unless by express statutory provision, in the state in

[70] 1 Hale, P. C. 623; 2 Hale, P. C. 163. The reason was that it was thought that a grand jury of one county could not take cognizance of the acts in the other. 2 Hale, P. C. 163.

[71] 1 East, P. C. 360.

[72] See 1 Hale, P. C. 623.

[73] See Baron v. People, 1 Park. Cr. R. (N. Y.) 246; Tully v. Com., 13 Bush (Ky.) 142, 151; Com. v. Pettes, 114 Mass. 307.

[74] State v. Grady, 34 Conn. 118. See, also, State v. Ayers, 8 Baxt. (Tenn.) 96.

which the felony is committed.[75] As the principal is a guilty agent, the doctrine in relation to crimes committed by means of an innocent agent does not apply.[76] In some states, jurisdiction to punish in such cases is expressly conferred by statute, and such statutes are undoubtedly valid. Where a statute provided that "every person, being without the state, committing or consummating an offense by an agent, or means within the state," should be liable to punishment by the laws thereof in the same manner as if he were present, and had commenced and consummated the offense within the state, it was held that it applied only where a person out of the state should commit a crime which, in legal contemplation, could be deemed as having been committed within the state under circumstances which would make him a principal in the crime, and that it did not render punishable in the state one who, in another state, became accessary to a felony committed within the state.[77]

496. Parties Concerned in Misdemeanors.

In misdemeanors, all who are concerned are principals, whether present or absent, and therefore one who, while in one jurisdiction, commits a misdemeanor by means of an agent in another jurisdiction, even when the agent is not an innocent agent, is guilty of the offense in the latter jurisdiction, and may be punished there if he can be apprehended. In contemplation of law, he is present where the offense is committed.[78] This is true, for example, when a person procures the publication of a libel in another jurisdiction,[79] or induces another to

[75] Johns v. State, 19 Ind. 421, 81 Am. Dec. 408; State v. Wyckoff, 31 N. J. Law, 65, Beale's Cas. 399; State v. Moore, 26 N. H. 448; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452.

[76] Post, § 497.

[77] Johns v. State, 19 Ind. 421, 81 Am. Dec. 408.

[78] Rex v. Brisac, 4 East, 164; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214. And see State v. Grady, 34 Conn. 118.

[79] Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

commit perjury in another jurisdiction,[80] or to unlawfully sell lottery tickets.[81] On the same principle, an employe of a seller of intoxicating liquors in one state, who there receives an order for such liquors from a person in another state, in which the sale of intoxicating liquors is a misdemeanor, having authority from his employer to receive or reject orders, and who accepts the order, and sends the liquors by another employe to the buyer, may be indicted in the state into which the liquors are thus sent.[82] Conspiracy is a misdemeanor, and, where a conspiracy is entered into in one state to commit a felony or a misdemeanor in another, all the conspirators may be indicted *for the conspiracy* in the latter state, if an overt act is done by any one of them in that state.[83]

497. Acts Committed by Means of an Innocent Agent.

As we have seen, one who commits a crime by means of an innocent agent is himself guilty as the principal in the first degree.[84] And, in contemplation of the law, he is personally present and commits the crime, by means of such agent, in the jurisdiction in which it is actually committed.[85] In accordance with this principle, a person who, while in one jurisdiction, procures poison to be administered in another jurisdiction by an innocent agent, and thereby causes a death, is guilty of murder as principal in the jurisdiction in which the poison is administered.[86] The same is true where a person in one

[80] See Com. v. Smith, 11 Allen (Mass.) 243.

[81] Com. v. Gillespie, 7 Serg. & R. (Pa.) 469.

[82] Com. v. Eggleston, 128 Mass. 408.

[83] Rex v. Brisac, 4 East, 164; post, § 498.

[84] Ante, § 168.

[85] Reg. v. Garrett, Dears. C. C. 232, 6 Cox, C. C. 260; Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404; Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; Com. v. Hill, 11 Mass. 136; Bishop v. State, 30 Ala. 34; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452. See Ex parte Hedley, 31 Cal. 109.

[86] See Robbins v. State, 8 Ohio St. 131; State v. Morrow, 40 S. C. 221, 18 S. E. 853.

jurisdiction utters a forged instrument, or obtains money by false pretenses, by means of an innocent agent in another jurisdiction.[87] And in those states in which it is held, or provided by statute, that the carrying into one state of goods stolen in another is larceny in the latter, a person who steals goods in one state, and sends them into another state by an innocent agent, is himself guilty of larceny in the latter state.[88] One who receives the goods in such state from the innocent agent, knowing that they have been stolen, receives them, in contemplation of law, from the original thief, and is guilty of receiving stolen goods.[89]

498. Conspiracy.

Since the gist of the offense of conspiracy is the conspiring or agreement, and no overt act is necessary,[90] the offense is committed in the state or country in which the conspiracy is formed, and is indictable there, although it may be to commit a crime in another country or state.[91] All the conspirators, if they can be apprehended, are also indictable for the conspiracy in the other state, whether the conspiracy is to commit a felony or a misdemeanor, if any one of them does an overt act in the other state in pursuance of the conspiracy, since the agreement or conspiring is renewed or continued in such state as to all the conspirators, whether actually present or not.[92] It was said in

[87] Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404; People v. Adams, 3 Denio (N. Y.) 190, 1 N. Y. 173; Com. v. Hill, 11 Mass. 136; Bishop v. State, 30 Ala. 34. And see Reg. v. Garrett, Dears. C. C. 232; 6 Cox, C. C. 260.

[88] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[89] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[90] Ante, §§ 135, 136.

[91] Thompson v. State, 106 Ala. 67, 17 So. 71; Bloomer v. State, 48 Md. 521. And see State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452.

[92] Rex v. Brisac, 4 East, 164; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Com. v. Corlies, 3 Brewst. (Pa.) 575; U. S. v. Newton, 52 Fed. 275, 283; Noyes v. State, 41 N. J. Law, 418; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469.

substance in a New York case: The law considerss that, wherever the conspirators act, they there renew, or, to speak more properly, continue, their agreement, and this agreement is renewed or continued as to all wherever any one of them does an act in pursuance of their common design.[93] In such a case, if the conspiracy was to commit a felony, and the overt act was a felony, the indictment against the parties who were not in the state must be, not for the overt act or felony, but for the conspiracy, for, by the weight of authority, as we have seen, an accessary in one state to a felony committed in another cannot be indicted as accessary in the latter.[94] If the conspiracy was to commit a misdemeanor only, and the overt act was a misdemeanor, the indictment against all the parties, whether present or absent, may be either for the conspiracy or for the overt act, since in misdemeanors all are principals.[95]

499. Larceny.

(*a*) *In General.*—To constitute the offense of larceny in a particular country, state, or county, every essential element of the offense must exist there,—a taking, an asportation, and the felonious intent. If any one is wanting, the crime cannot be committed. Difficult questions arise when goods are taken in one country, state, or county, and carried into another.

(*b*) *Taking in One County and Carrying into Another.*—In England, both at common law and by express statutory provision, if goods are taken in one county, and carried into another, *animo furandi,* it is larceny in the latter as well as in the former, and the thief may be prosecuted in either.[96]

[93] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

[94] State v. Wyckoff, 31 N. J. Law, 65, Beale's Cas. 399; Johns v. State, 19 Ind. 421, 81 Am. Dec. 408; ante, § 495.

[95] Com. v. Gillespie, 7 Serg. & R. (Pa.) 460; ante, § 496.

[96] Anon., Year Book 7 Hen. IV. 43, pl. 9, Beale's Cas. 595; Anon., Year Book 4 Hen. VII. 5, pl. 1, Beale's Cas. 596; 3 Inst. 113; 1 Hale, P. C. 507, 536; 4 Bl. Comm. 305; Rex v. Parkin, 1 Mood. C. C. 45; Rex v. Smith, Ryan & M. 295. It is now so provided in England by the statute of 24 & 25 Vict. c. 96, § 114.

The same is true in this country when goods are stolen in one county of a state, and carried into another county of the same state.[97] The reason is that the carrying in the county into which the goods are taken is a continuance of the original trespass, so that there is in that county a taking, an asportation, and a felonious intent.[98] The fact that a long time elapses between the original theft and the carrying of the goods into the other county does not make it any the less larceny in the latter.[99] The principle applies as well to the taking of property which is made the subject of larceny by statute, as outstanding crops, fixtures, and choses in action, for example, as it does to property which is the subject of larceny at common law.[100] It

[97] Com. v. Dewitt, 10 Mass. 154; Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455; Haskins v. People, 16 N. Y. 344; Johnson v. State, 47 Miss. 671; State v. Douglas, 17 Me. 193, 35 Am. Dec. 248; Myers v. People, 26 Ill. 173; Com. v. Cousins, 2 Leigh (Va.) 708; Powell v. State, 52 Wis. 217, 9 N. W. 17; State v. Price, 55 Kan. 606, 40 Pac. 1000; People v. Mellon, 40 Cal. 648; State v. Johnson, 2 Or. 115; State v. Brown, 8 Nev. 208.

Statutes allowing prosecution in either county are constitutional. State v. Price, 55 Kan. 606, 40 Pac. 1000.

[98] Ante, § 320; 1 Hale, P. C. 507; Watson v. State, 36 Miss. 593; State v. Somerville, 21 Me. 14, 19.

[99] Rex v. Parkin, 1 Mood. C. C. 45.

[100] Rex v. Parkin, 1 Mood. C. C. 45; Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455.

In Reg. v. Newland, 2 Cox, C. C. 283, it was held that a man who kills an animal in one county, and carries the carcass into another county, is guilty of stealing, taking, and driving away the animal in the latter county; but that a man who kills an animal in one county, and carries the carcass into another, is not guilty of killing the animal with intent to steal it in the latter county.

The fact that goods stolen by a person in one county, and brought into another, were so brought by accomplices of the original thief, and not by the original thief personally, does not prevent his indictment in the latter county if he is afterwards personally concerned there in the custody or disposal of them. Com. v. Dewitt, 10 Mass. 154.

Sending stolen goods by railway to a confederate in another county has been held a larceny in that county, on the ground that the con-

also applies when goods are altered in their character before being carried from one county into another, but in such a case the larceny in the latter county is of the goods in their new state, and they must be so described in the indictment.[101] The larceny is regarded as committed, for the purposes of the prosecution, in the county in which the prosecution is instituted, and the indictment must so allege, instead of alleging the offense in the county in which the property was originally stolen.[102]

(*c*) *Taking in One Country and Carrying into Another, or Taking on the High Seas.*—In England it is settled at common law that the doctrine that stealing goods in one county, and carrying them into another, is larceny in the latter, does not apply when goods are stolen in one country, and carried into another, or where goods are stolen on the high seas, and carried into a country, for in such a case the original taking is not a felony of which the common law can take cognizance.[103] This distinction has been recognized where goods have been stolen in a foreign country, and brought into one of our states,[104]

structive possession remains in the thief. Reg. v. Rogers, L. R. 1 C. C. 136, 11 Cox, C. C. 38.

[101] 2 Russ. Crimes, 328; Rex v. Edwards, Russ. & R. 497; Rex v. Halloway, 1 Car. & P. 127; Com. v. Beaman, 8 Gray (Mass.) 497; State v. Somerville, 21 Me. 14, 19.

This rule has been applied, for example, to stealing live birds or animals in one county or state, and carrying them into another county or state after killing them, Rex v. Edwards, supra; Com. v. Beaman, supra; and to the stealing of a brass furnace in one county, and carrying it into another county after breaking it to pieces, Rex v. Halloway, supra.

[102] Johnson v. State, 47 Miss. 671. And see post, note 111.

[103] Butler's Case, 3 Inst. 113, 13 Coke, 53, Mikell's Cas. 712; Rex v. Prowes, 1 Mood. C. C. 349, Beale's Cas. 597; Reg. v. Carr, 15 Cox, C. C. 131, note, Beale's Cas. 774; Rex v. Anderson, 2 East, P. C. 772; Reg. v. Debruiel, 11 Cox, C. C. 207.

[104] Thus, in the leading case of Com. v. Uprichard, 3 Gray (Mass.) 434, 63 Am. Dec. 762, where goods had been stolen in Nova Scotia, and brought into Massachusetts, it was held that an indictment would

though there are several decisions to the contrary.[105] In some states, statutes have been enacted punishing any one who shall bring into the state goods stolen in a foreign country, and such statutes have been upheld and applied to foreigners.[106]

(*d*) *Taking in One State and Carrying into Another.*— Whether the carrying into one of our states of goods stolen in another state or territory subject to the same national sovereignty, and not in a foreign country or on the high seas, is larceny at common law in the former, is a question upon which the courts have differed. Some of the courts have regarded it as the same as when goods stolen in a foreign country are brought into a state, on the ground that each state is, as to its laws, an independent sovereignty, and have held, therefore, that it is not larceny.[107] Most of the courts, however, have held that it is larceny in the state into which the goods are carried, on the ground that the peculiar relation of the different states as members of the Union makes the case analogous to the taking of goods in one county, and carrying them into another.[108] In most of the states, the question is now set at rest

not lie for larceny in Massachusetts. See, also, Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; Stanley v. State, 24 Ohio St. 166, 15 Am. Rep. 604, Beale's Cas. 605. And see the cases cited in note 107, infra, all of which support this view.

[105] State v. Underwood, 49 Me. 181, 77 Am. Dec. 254; State v. Bartlett, 11 Vt. 650.

[106] People v. Burke, 11 Wend. (N. Y.) 129.

[107] People v. Gardner, 2 Johns. (N. Y.) 477, Beale's Cas. 598; People v. Schenck, 2 Johns. (N. Y.) 479; State v. Brown, 1 Hayw. (N. C.) 100, 1 Am. Dec. 548; Lee v. State, 64 Ga. 203, 37 Am. Rep. 67; Simmons v. Com., 5 Binn. (Pa.) 617; State v. Le Blanch, 31 N. J. Law, 82; People v. Loughridge, 1 Neb. 11, 93 Am. Dec. 325; Van Buren v. State, 65 Neb. 223, 91 N. W. 201; Beal v. State, 15 Ind. 378; State v. Reonnals, 14 La. Ann. 278; Simpson v. State, 4 Humph. (Tenn.) 456. And see La Vaul v. State, 40 Ala. 44; Morrissey v. People, 11 Mich. 327.

[108] Com. v. Uprichard, 3 Gray (Mass.) 434, 63 Am. Dec. 762; Com. v. Holder, 9 Gray (Mass.) 7, Beale's Cas. 598; Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; State v. Ellis, 3 Conn. 185, 8 Am. Dec. 175; State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208; Myers v.

by statutes expressly declaring it to be larceny to bring into the state goods stolen in another state. And these statutes have been held constitutional. They do not undertake to punish the offense committed in the other state, but punish the bringing of the stolen goods into the state.[109] Under such statutes the question whether the offense was larceny in the state in which the goods were stolen is determined by the law of the state in which the prosecution is had.[109a] Where a person who carries into one state goods stolen in another is guilty of larceny in the former state, a person who steals goods in one state, and sends them into another state by an innocent agent, is guilty of larceny in the latter state, but it is otherwise where

People, 26 Ill. 173; Stinson v. People, 43 Ill. 397; Watson v. State, 36 Miss. 593; State v. Newman, 9 Nev. 48, 16 Am. Rep. 3; Hamilton v. State, 11 Ohio, 435; State v. Hill, 19 S. C. 435; Worthington v. State, 58 Md. 403, 42 Am. Rep. 338; State v. Bennett, 14 Iowa, 479; State v. Johnson, 2 Or. 115. And see Cummings v. State, 1 Har. & J. (Md.) 340.

Stealing goods in the District of Columbia, and carrying them into Connecticut, was held larceny in Connecticut. State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208.

The Nevada court, following the dictum of Mr. Bishop, has held that, where goods are stolen in one state, and brought into another, mere possession in the latter with intent to steal is not sufficient to constitute larceny in the latter; but that a new and distinct larceny is committed if there is any removal or asportation of the goods animo furandi. State v. Newman, 9 Nev. 48, 16 Am. Rep. 3; State v. Bouton, 26 Nev. 34.

The decisions cited above seem to be based upon a consideration of "the mischiefs which would result from the establishment of a principle whereby a commerce in stolen goods might be carried on with impunity." See Com. v. Andrews, 2 Mass. 14, 22; State v. Ellis, 3 Conn. 185, 8 Am. Dec. 175.

[109] People v. Williams, 24 Mich. 156, 9 Am. Rep. 119; McFarland v. State, 4 Kan. 68; People v. Burke, 11 Wend. (N. Y.) 129; Ferrill v. Com., 1 Duv. (Ky.) 153; State v. Seay, 3 Stew. (Ala.) 123, 20 Am. Dec. 66; Alsey v. State, 39 Ala. 664; La Vaul v. State, 40 Ala. 44; Hemmaker v. State, 12 Mo. 453, 51 Am. Dec. 172; State v. Williams, 35 Mo. 229; State v. Butler, 67 Mo. 59; Barclay v. U. S., 11 Okl. 503, 69 Pac. 798. Compare Morrissey v. People, 11 Mich. 327.

[109a] Barclay v. U. S., 11 Okl. 503, 69 Pac. 798.

they are carried into the other state by an accomplice.[110] In those states in which a person who steals goods in one state, and carries them into another, is held guilty of larceny in the latter, the idea is not that the original larceny is punishable, but that the possession and carrying of the goods is a new larceny in the state into which they are brought, and the indictment must be for this larceny, and not for the original taking.[111] The prosecution in the state in which the goods are carried proceeds on the theory that the goods have been stolen, and that there is a continuing trespass, and therefore the original taking in the other state or country must have been under such circumstances as to amount technically to larceny under its laws.[112] As we have seen in a previous section, where goods are stolen in one county, and carried into another, after having been altered in their character, an indictment for larceny in the latter county must describe the goods in their new state.[113] This applies where goods are stolen in one state, and carried into another, and the thief is indicted in the latter.[114]

(*e*) *Compound Larceny.*—If a compound larceny, such as larceny from a person or dwelling house, is committed in one county, and the stolen property is carried by the thief into another county, an indictment will lie in the latter county for simple larceny, but it will not lie in such county for the compound larceny, since the facts making the offense compound larceny exist only in the county in which the larceny was originally committed.[115]

500. Robbery.

This is true of robbery. To constitute robbery in a particular county or state, it is not enough that the property be taken

[110] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; ante, §§ 495, 497.

[111] Worthington v. State, 58 Md. 403, 42 Am. Rep. 338; Morrissey v. People, 11 Mich. 327; Watson v. State, 36 Miss. 593. See ante, note 102.

[112] State v. Morales, 21 Tex. 298; Alsey v. State, 39 Ala. 664.

[113] Ante, § 499b.

[114] Com. v. Beaman, 8 Gray (Mass.) 497.

[115] 2 Russ. Crimes, 328. And see the cases following.

and carried away there, but it must be there taken from the person or in the presence of another, and by violence or by putting him in fear.[116] If a person, therefore, takes goods in one county or state from the person or in the presence of another, and by force or by putting him in fear, and carries them into another county or state, he is not guilty of robbery in the latter county or state, but of larceny only.[117]

501. False Pretenses.

The place of prosecution, when the crime of obtaining money or property by means of false pretenses is committed by acts in two or more jurisdictions, is not without difficulty. At an early date doubt was expressed whether it could be prosecuted at all unless all the acts necessary to constitute the crime were committed in the jurisdiction in which the prosecution was brought,[118] but later cases have clearly shown that the gist of the offense is the obtaining of the property, and not the mere making of the false pretense by means of which it is obtained,[118a] and that the offense is committed where the money or property is obtained, irrespective of where the person committing the offense may be, or where the pretenses are made.[119] Thus, where the pretenses are made in one jurisdiction and the property is obtained in another, an indictment will not lie

[116] Ante, § 370.

[117] 2 Russ. Crimes, 328; 1 Hale, P. C. 507, 536; Rex v. Thomson, 2 Russ. Crimes, 328.

[118] U. S. v. Plympton, 4 Cranch, C. C. 309, Fed. Cas. No. 16,057.

[118a] Ante, § 367(a); Connor v. State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126; Com. v. Van Tuyl, 1 Metc. (58 Ky.) 1, 71 Am. Dec. 455; Com. v. Schmunk, 207 Pa. 544, 56 Atl. 1088, 99 Am. St. Rep. 801; State v. House, 55 Iowa, 466, 8 N. W. 307.

[119] Reg. v. Holmes, 12 Q. B. Div. 23, 15 Cox, C. C. 343; Com. v. Karpowski, 167 Pa. 225, 31 Atl. 572; Com. v. Schmunk, 207 Pa. 544, 56 Atl. 1088, 99 Am. St. Rep. 801; Com. v. Van Tuyl, 1 Metc. (Ky.) 1, 71 Am. Dec. 455; State v. House, 55 Iowa, 466, 8 N. W. 307; Stewart v. Jessup, 51 Ind. 413, 19 Am. Rep. 739; State v. Shaeffer, 89 Mo. 278, 1 S. W. 293; State v. Marshall (Vt.) 59 Atl. 916.

in that jurisdiction in which the pretenses were made,[119a] but in that in which they became effective and the property was obtained.[120] Thus far the authorities agree. But there is a diversity of opinion as to what constitutes an obtaining of the property, when, as frequently happens, delivery is made, not directly from the owner to the offender, but by the hand of an innocent agent, a carrier, or by mail. In several cases it has been held, to sustain jurisdiction, that delivery to a carrier or agent for defendant at his request is a delivery to defendant

[119a] Stewart v. Jessup, 51 Ind. 413, 19 Am. Rep. 739; Rex v. Buttery, cited in 3 Barn. & C. 703, 5 Dowl. & R. 619, 4 Barn. & Ald. 179.

[120] People v. Adams, 3 Denio, 190, affd. 1 N. Y. 173; Com. v. Van Tuyl, 1 Metc. (Ky.) 1, 71 Am. Dec. 455.

To obtain money on a fraudulent draft, drawn on a bank in a foreign state or country, is no crime against the foreign jurisdiction if the offender received the money on first presentation of the draft. Reg. v. Garrett, Dears. C. C. 232, 6 Cox, C. C. 260; but if the bank to whom it was presented received and forwarded it for collection only, and merely paid him the proceeds, after collection, the crime is against the foreign jurisdiction and not that in which the defendant received the money. State v. Shaeffer, 89 Mo. 271, 1 S. W. 293. Compare Dechard v. State (Tex. Cr. App.) 57 S. W. 813.

[120a] Com. v. Karpowski, 167 Pa. 225, 31 Atl. 572; State v. Lichliter, 95 Mo. 408, 8 S. W. 720; In re Stephenson, 67 Kan. 556, 73 Pac. 62.

The property is obtained in the state in which the owner delivers it, whether he sends it by the hand of an agent of defendant or by mail. Com. v. Wood, 142 Mass. 459, 8 N. E. 432.

Where defendant, being present, induced a manufacturer to ship goods to fictitious persons in another state to which he then went and received them, it was held that he could be prosecuted in the state where the representations were made and the goods shipped. Com. v. Taylor, 105 Mass. 172.

Where a letter containing false representations is posted in one county, addressed to and received by prosecutor in another county, and in consequence prosecutor sends funds by mail to the prisoner, the prosecution may be had in the county where prosecutor receives the false representations and deposits the funds in the mail. Reg. v. Leech, 7 Cox, C. C. 100, Dears. C. C. 642; Reg. v. Jones, 1 Den. C. C. 551, 3 Car. & K. 346, 4 Cox, C. C. 198.

[121] Norris v. State, 25 Ohio St. 217; State v. Shaeffer, 89 Mo. 271, 1 S. W. 293.

and completes the offense at the point of such delivery,[120a] and it has been further held that in such a case the prosecution not only may but must be had at the point of such delivery.[121] But it has also been held that the delivery in such case is only partial or conditional, the owner's right of stoppage in transitu remaining, and that therefore the offense may also be prosecuted at the place where the offender receives the property from the carrier.[121a] In an English case, the accused wrote and posted in England a letter containing false pretenses addressed to a person out of England, and by such means induced such person to mail him a draft, which he received and cashed in England. The court held that the pretenses were made, and the money obtained, in England.[121b] Undoubtedly, this decision was right, not because the pretenses were made in England, as they were not, since the postoffice, in carrying the letter containing the false pretenses, was the agent of the accused, and the pretenses were not made until the letter was received, but because the money was obtained in England. The cases in which the question is as to which of two counties of the same state has the venue are distinguishable from those in which the question is whether the prosecution may be had in the state at all,[122] and there seems to be no reason why an offender of this sort may not be prosecuted either in the state in which the owner parts with manual possession of his property, or in that in which the fraudulent scheme reaches its intended culmina-

[121a] Com. v. Schmunk, 207 Pa. 544, 56 Atl. 1088, 99 Am. St .Rep. 801. And see the opinion in Superior Court of Orlady, J., in the same case, 22 Pa. Super. Ct. 348; Com. v. Everett, 22 Pa. Co. Ct. R. 67.

Where goods were bought on a verbal order, void under the statute of frauds, delivery to the carrier did not constitute delivery to the defendant. Ex parte Parker, 11 Neb. 309, 9 N. W. 33.

Where accused made a report, supported by affidavit, in Northampton and sent it to Westminster, on the basis of which money was paid him out of the treasury at Westminster, the venue was sustained at Northampton. Reg. v. Cooke, 1 Fost. & F. 64.

[121b] Reg. v. Holmes, 12 Q. B. Div. 23, 15 Cox, C. C. 343.

[122] Com. v. Schmunk, 22 Pa. Super. Ct. 353.

tion and the actual physical possession is obtained. A person who obtains goods by false pretenses in one state or county, and carries them into another, is not guilty in the latter of the offense of obtaining goods by false pretenses. The doctrine with respect to larceny[123] does not apply in such a case.[124]

502. Embezzlement.

The offense of embezzlement, which, as we have seen, is the fraudulent conversion by a person of money or property intrusted to him by another, is committed in the state or county in which the money or property is converted, and not necessarily where it is received.[125] To constitute a conversion, however, there need be no disposal or expenditure of the money or property, but the offense is complete whenever a person who has been intrusted therewith forms an intent to convert it to his own use, and has possession with such intent. A person, therefore, may be indicted for embezzlement in the jurisdiction in which he had possession of the property or money with intent to convert it to his own use, or in the jurisdiction in which he fraudulently refused or failed to account for it to his employer, as it was his duty to do, although he may not have expended or disposed of it in such jurisdiction.[126] In an English case, the prisoner, who was traveling salesman for a tradesman living at Nottingham, received money for his em-

[123] Ante, § 499.

[124] Reg. v. Stanbury, Leigh & C. 128, 9 Cox, C. C. 94.

[125] Reg. v. Treadgold, 39 Law Times (N. S.) 291; People v. Murphy, 51 Cal. 376; Ex parte Palmer, 86 Cal. 631; Dix v. State, 89 Wis. 250, 61 N. W. 760; Campbell v. State, 35 Ohio St. 70; State v. New, 22 Minn. 76; Wallis v. State, 54 Ark. 611, 16 S. W. 821.

[126] Rex v. Hobson, Russ. & R. 56, 2 Leach, C. C. 975; Rex v. Taylor, Russ. & R. 63, 2 Leach, C. C. 974, 3 Bos. & P. 596; Reg. v. Murdock, 2 Den. C. C. 298, 5 Cox, C. C. 360; Reg. v. Rogers, 3 Q. B. Div. 28, 14 Cox, C. C. 22; State v. Small, 26 Kan. 209; State v. Baumhager, 28 Minn. 226, 9 N. W. 704; Brown v. State, 23 Tex. App. 214, 4 S. W. 588; Campbell v. State, 35 Ohio St. 70; State v. Bailey, 50 Ohio St. 636, 36 N. E. 233. And see State v. New, 22 Minn. 76. Compare Dix v. State, 89 Wis. 250, 61 N. W. 760.

ployer in the county of Derbyshire, and neglected to return and account for it, as it was his duty to do. About two months after his receipt of the money, he met his employer in Nottingham, and, when asked about the money, said that he had spent it. It was held that the evidence was sufficient to go to the jury on an indictment for embezzlement in Nottingham.[127] In another case, where a traveler employed to collect money in the country, and remit it at once to his employers in Middlesex, collected money in Yorkshire, appropriated it there, and rendered false accounts to his employers by post, it was held that he was rightfully convicted of embezzlement in Middlesex.[128] In a late Ohio case, a contract of employment was made in Lucas county, in that state, by which the accused was authorized to canvass for the sale of and sell his employer's goods in Sandusky county, and required to account therefor in Lucas county weekly, either by letter or in person, and, at his request, goods were sent by express from his employer's place of business, in Lucas county, to him in Sandusky county, where he received and sold them. He converted part of the proceeds to his own use in Sandusky county, and part in the state of New York. After the sale of the goods, he wrote a false account of the transaction to his employers, and mailed it to them on the railroad train while absconding, and they received it in Lucas county. Under these circumstances, it was held that an indictment for embezzlement would lie in Lucas county. "If the entire transaction constituting the embezzlement occurred in one county only," said the court, "the venue, as a matter of course, should be laid therein." But if the transaction extended to different counties, the authorities generally hold that the jurisdiction of the county in which the act of conversion occurred is not exclusive.[129]

[127] Reg. v. Murdock, 2 Den. C. C. 298, 5 Cox, C. C. 360.

[128] Reg. v. Rogers, 3 Q. B. Div. 28, 14 Cox, C. C. 22. And see State v. Bailey, 50 Ohio St. 636, 36 N. E. 233.

[129] State v. Bailey, 50 Ohio St. 636, 36 N. E. 233.

Agent Outside the State.—An agent may be guilty of embezzlement in a state without ever being personally within the limits of the state. Thus, in a California case it was held that an agent, residing out of the state of California, of a principal in the state, committed embezzlement in the state by drawing telegraphic checks on the principal, in the course of his agency, and converting the money to his own use, with intent to embezzle the same.[130]

Possession of Property Embezzled in Another State.—Following out the principle under which one who steals property in one state, and carries it into another, is held guilty of larceny in the latter, it has been held in Massachusetts that a person who embezzles property in another state, and brings it into Massachusetts, may be indicted there for embezzlement, as each moment's possession is a new conversion.[131]

Particular Statutes.—In Texas, by statute, "embezzlement may be prosecuted in any county of the state in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it."[132] In Maine, by statute, it is an offense punishable in that state if a person to whom property has been intrusted to be by him carried for hire, and delivered in another state, shall, before such delivery, fraudulently convert the same to his own use, and it makes no difference, under this statute, whether the act of conversion is within or without the state.[133]

503. Receiving Stolen Goods.

To constitute the offense of receiving stolen goods in a particular state or country, it is not only necessary that the goods be received there, but they must be stolen goods, and the lar-

[130] Ex parte Hedley, 31 Cal. 109.

[131] Com. v. Parker, 165 Mass. 526, 43 N. E. 499. Knowlton, J., dissented.

[132] Cole v. State, 16 Tex. App. 461; Reed v. State, 16 Tex. App. 586; Cohen v. State, 20 Tex. App. 224.

[133] State v. Haskell, 33 Me. 127.

ceny must have been committed against the laws of the particular state or country,—that is, they must have been stolen there. It is obvious, therefore, that, with regard to this offense, we meet with the same difficulties and the same conflict of opinion as in the case of larceny. If goods are stolen in one county, and carried into another county of the same state, and there received, the offense of receiving stolen goods is certainly committed in the latter county. As to this there can be no question.[184] If goods are stolen in one country, and brought into another, or on the high seas, and brought into a country, and there received, the offense of receiving stolen goods is not committed, for there has been no larceny of which the courts of that country can take cognizance.[185] If goods are stolen in one of the states, or in a territory, and brought into another state, and there received, whether the offense of receiving stolen goods is committed in the latter will depend upon whether, in that state, the bringing into the state of goods stolen in another state is regarded as larceny.[186] If it is, the offense of receiving is committed;[187] otherwise not.[188] If it is larceny to carry into a state goods stolen in another state, and a person steals goods in one state, and sends them by an innocent agent into another, one who receives them from such agent in the latter state, with knowledge that they have been so stolen, is guilty of receiving stolen goods, for, in contemplation of law, he receives them from the original thief.[189] If goods are stolen in one county, and shipped by carrier to a person in another county, in accordance with a preconcerted arrange-

[184] Ante, § 499b.

[185] Reg. v. Carr, 15 Cox, C. C. 131, note, Beale's Cas. 774; Reg. v. Debruiel, 11 Cox, C. C. 207; ante, § 499c. As we have seen, in several states the courts have taken a contrary view. Ante, § 499c, note 105.

[186] Ante, § 499d.

[187] Com. v. Andrews, 2 Mass. 14, 3 Am. Dec. 17; Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[188] Ante, § 499d.

[189] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; ante, §§ 497, 499.

ment, delivery to the carrier is a delivery to the person to whom they are sent, and he is therefore guilty of receiving the stolen goods in the county where they are delivered to the carrier.[140] The offense of receiving stolen goods is committed where the goods are received, and not elsewhere. Carrying them elsewhere afterwards is not a new receiving.[141]

504. Forgery and Uttering.

In the absence of a statute, an indictment for forgery will lie only in the state and county in which the act of forgery is committed,[142] but it is otherwise in some jurisdictions by statute.[143] As to the locality in which a forged instrument is to be considered as uttered, there is some conflict of opinion. By the weight of authority, the uttering is not complete until the instrument is transferred and comes to the hands or possession of some person other than the utterer, his agent, or servant, and the place where it is received by such other person is the place where the offense of uttering is committed.[144] And, according to this view, it is held that, if the instrument is sent

[140] State v. Habib, 18 R. I. 558. As we have seen, receipt and possession by an agent is sufficient to constitute a receiving. Ante, § 381(d).

[141] Roach v. State, 5 Cold. (Tenn.) 39; Campbell v. People, 109 Ill. 565; Licette v. State, 75 Ga. 253.

[142] Com. v. Parmenter, 5 Pick. (Mass.) 279. And see State v. Poindexter, 23 W. Va. 805; Cohen v. People, 7 Colo. 274; Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404.

[143] In Texas, by statute, forgery may be prosecuted in any county in the state in which the instrument was forged or used or passed, or attempted to be used or passed. Mason v. State, 32 Tex. Cr. R. 95, 22 S. W. 144, 408.

Under a Texas statute punishing any person who, out of the state, should commit an offense punished by the laws of the state, and not requiring personal presence, it was held that an indictment would lie in Texas for forging, in another state, instruments affecting the title to lands in Texas. Hanks v. State, 13 Tex. App. 289.

[144] People v. Rathbun, 21 Wend. (N. Y.) 509; Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404; State v. Hudson, 13 Mont. 112; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

by mail, the mail is the sender's agent, and the uttering is at the place where it is received, and not at the place where it is deposited in the mails.[145] In England it has been held that the instrument is to be regarded as uttered in the county or state in which it is deposited in the mail.[146] A person who forges a check in one state on a bank in another state, and obtains the money on it from a bank in the state in which the forgery is committed, cannot be indicted in the state in which the bank on which the check is drawn is situated, though the check is forwarded to that bank by the bank cashing it.[147]

Innocent Agent.—As was shown in another place, if a person in one state or county procures an innocent agent to utter a forged instrument in another state or county, he is himself guilty of uttering it, and may be indicted in the latter state or county.[148]

505. Homicide.

(*a*) *Injury in One County and Death in Another.*—At an early period in England, if a wound was inflicted or poison administered in one county, and the party died in consequence thereof in another, it was doubted by some whether the homicide could be punished in either, for it was supposed that a jury of the first county could not take cognizance of the death in the second, and that a jury of the second could not inquire into the wounding or poisoning in the first, the common-law rule being that a jury for the trial of facts must come from the vicinage where the matters of fact occurred.[149] Coke said

[145] Lindsey v. State, supra; People v. Rathbun, supra; State v. Hudson, supra; U. S. v. Wright, 2 Cranch, C. C. 296, Fed. Cas. No. 16,773.

[146] Perkin's Case, 2 Lewin, C. C. 150. See, also, U. S. v. Bickford, 4 Blatchf. 337, Fed. Cas. No. 14,591.

[147] Thulemeyer v. State, 34 Tex. Cr. R. 619, 31 S. W. 659. And see Reg. v. Garrett, Dears. C. C. 232, 6 Cox, C. C. 260; In re Carr, 28 Kan. 1.

[148] Com. v. Hill, 11 Mass. 136; Bishop v. State, 30 Ala. 34; Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404; ante, § 497.

[149] 1 Chit. Crim. Law, 177, 178; 2 Hawk. P. C. c. 25, § 36; 1 East,

that there could be no prosecution at all in such a case at common law.[150] Hale and other recognized authorities were of a contrary opinion, and maintained that the offender might be indicted, tried and punished in the county where the mortal blow was given, as "the death was but a consequence, and might be found in another county."[151] There are English cases to the same effect.[152] Some of the courts in this country have taken the same view, while others have held that the offender may be indicted, tried, and punished in the county where the death occurred.[153] In England and in most of our states the question has been set at rest by statutes. In England, by the statute of 2 & 3 Edw. VI. c. 24, the offense was made indictable and punishable in the county where the death happened.[154] This statute is old enough to be a part of our common law.[155] In some states, statutes to the same effect have been enacted, while in others statutes have been enacted making the offense indictable and punishable in the county where the blow was given, or injury otherwise inflicted, or in either county, and these statutes have been upheld as constitutional.[156]

P. C. 361; Bac. Abr. "Indictment," F.; Stout v. State, 76 Md. 317, 25 Atl. 299.

[150] 3 Inst. 48, Mikell's Cas. 584.

[151] 1 Hale, P. C. 426; Year Book 9 Edw. IV. p. 48; Year Book 7 Hen. VII. p. 8; 1 Hawk. P. C. c. 31, § 13; 1 East, P. C. 361.

[152] Rex v. Hargrave, 5 Car. & P. 170.

[153] State v. Bowen, 16 Kan. 475; Riley v. State, 9 Humph. (Tenn.) 646; Stout v. State, 76 Md. 317, 25 Atl. 299. And see People v. Gill, 6 Cal. 637; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; Archer v. State, 106 Ind. 426, 7 N. E. 225; State v. Gessert, 21 Minn. 369.

[154] 2 & 3 Edw. VI. c. 24; 1 Chit. Crim. Law, 179; 1 Hale, P. C. 426.

[155] State v. McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301; State v. Orrell, 1 Dev. (N. C.) 139; Riley v. State, 9 Humph. (Tenn.) 646, 657.

But of course this statute does not apply in those of our states in which a conflicting statute has been enacted. State v. Stout, 76 Md. 317, 25 Atl. 299.

[156] Com. v. Parker, 2 Pick. (Mass.) 550; State v. Pauley, 12 Wis. 537; Riggs v. State, 26 Miss. 51; Turner v. State, 28 Miss. 684; Coleman v. State, 83 Miss. 290, 35 So. 937, 64 L. R. A. 807; Com. v. Jones (Ky.) 82 S. W. 643; Hicks v. Territory (N. M.) 30 Pac. 872.

(*b*) *Injury on the High Seas or in One Country or State, and Death in Another Country or State—Common Law.*—Under the common law, if a blow was given or poison administered in a foreign country or on the high seas (and not on an English ship),[157] and the person stricken or poisoned died in England, the homicide could not be punished in England, for the English courts could not take cognizance of the injury. Nor could a homicide be punished in England, when the injury was inflicted there, and the death occurred in a foreign country or on the high seas, for it was supposed that the courts could not take cognizance of the death.[158] In the absence of a statute on the subject, the same doctrine has been recognized in this country in the case of a death here from an injury inflicted in a foreign country or on the high seas,[159] and also in the case of an injury inflicted here, and causing death in a foreign country.[160] It has been held that a person who administers a poison or otherwise inflicts an injury in one state or territory, resulting in death in another state or territory, cannot be punished for homicide in the latter,[161] but most courts hold that he can be punished in the former, on the ground that the homicide is committed where the injury is inflicted, and the death is a mere consequence.[162]

[157] Ante, § 490.

[158] 3 Inst. 48, Mikell's Cas. 584; 2 Hale, P. C. 163; 1 Hale, P. C. 426.

[159] See State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407, Mikell's Cas. 585.

[160] See Com. v. Linton, 2 Va. Cas. 205.

[161] State v. Carter, 27 N. J. Law, 499, Beale's Cas. 4v., Mikell's Cas. 585. And see State v. Kelly, 76 Me. 331.

[162] State v. Gessert, 21 Minn. 369, Beale's Cas. 403; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407, Mikell's Cas. 585; Hunter v. State, 40 N. J. Law, 495; U. S. v. Guiteau, 1 Mackey (D. C.) 498; Stout v. State, 76 Md. 317, 25 Atl. 299; Green v. State, 66 Ala. 40, 41 Am. Rep. 744, Mikell's Cas. 588; State v. McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301; State v. Bowen, 16 Kan. 475; People v. Gill, 6 Cal. 637. And see Riley v. State, 9 Humph. (Tenn.) 646; State v. Kelly, 76 Me. 331, 49 Am. Rep. 620; Moran v. Ter., 14 Okl. 544, 78 Pac. 111.

There was a decision to the contrary in Com. v. Linton, 2 Va. Cas. 205.

Statutes.—In many jurisdictions, statutes have been enacted expressly covering these cases. By the statute of Geo. II. c. 21, it was provided that, where any person feloniously stricken or poisoned at any place out of England shall die of the same in England, or, being feloniously stricken or poisoned in England, shall die of such stroke or poisoning out of England, an indictment therefor, found by the jurors of the county in which either the death or the cause of death shall respectively happen, shall be as good and effectual in law, as well against principals as accessaries, as if the offense had been committed in the county where such indictment may be found.[163] It has

Thus, the murder of President Garfield by Guiteau was held to have been committed in the District of Columbia, where the injury was inflicted, and Guiteau was tried and executed there, though after the injury the President was removed to Elberon, New Jersey, and died there. U. S. v. Guiteau, 1 Mackey (D. C.) 498. And in a late Maryland case, it was held, independently of any statute, that where a wound is inflicted or poison administered in Maryland, and the injured party goes or is carried into another state, and dies there, the homicide is committed and may be punished in Maryland. Stout v. State, 76 Md. 317, 25 Atl. 299.

The reason for this view is thus stated by Alvey, C. J., in the last-mentioned case: "In such case it is the law of the state where the mortal wound or poison is given that is violated, and not the law of the state where death may happen to occur. By the felonious act of the accused, not only is there a great personal wrong inflicted upon the person assaulted or mortally wounded while under the protection of the law of the state, but the peace and dignity of the state where the act is perpetrated is outraged; and though death may not immediately follow, yet, if it does follow as the consequence of the felonious act within the year, the crime of murder is complete. In inflicting the mortal wound, then and there the accused expends his active agency in producing the crime, no matter where the injured party may languish, or where he may die, if death ensues within the time, and as a consequence of the stroke or poison given. The grade and characteristics of the crime are determined immediately that death ensues, and that result relates back to the original felonious wounding or poisoning. The giving the blow (or poison) that caused the death constitutes the crime."

[163] This statute was superseded by the statute of 9 Geo. IV. c. 31, § 7, and this, in turn, by the present statute of 24 & 25 Vict. c. 100, §

been held that this statute is not in force in this country,[164] but somewhat similar statutes have been enacted in some of our states. Some of the statutes cover the case where injury is inflicted on the high seas or in a foreign country or another state, and death ensues in the state. In Massachusetts, such a statute has been held constitutional, on the ground that the homicide is committed where the death occurs.[165] Conceding that the decision is right, the ground upon which it is based is wrong. A homicide is committed where the injury is inflicted.[166] A statute punishing homicide where the injury is inflicted in the state, and the death occurs without the state, is clearly constitutional.[167]

In England, as was shown in a previous section, the statute punishing for homicide in the case of death in England from an injury inflicted on the high seas or in a foreign country was held inapplicable in the case of injury inflicted by a for-

10, which is to substantially the same effect. See Reg. v. Azzopardi, 1 Car. & K. 203, 2 Mood. C. C. 289.

[164] State v. Stout, 76 Md. 317, 25 Atl. 299.

[165] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89, Beale's Cas. 409. In this case, under such a statute, it was held that an indictment would lie against a citizen of another state, or of a foreign country, for the manslaughter of a person who died in Massachusetts in consequence of injuries inflicted upon him by the accused in a foreign vessel upon the high seas. See, also, People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320; State v. Caldwell, 115 N. C. 794, 20 S. E. 523; Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436, 32 Am. St. Rep. 831, 15 L. R. A. 226.

Such a statute was held void in New Jersey as applied to an injury inflicted in New York by a citizen of New York, on the ground that the homicide in such a case is committed outside the state, and that the state has no power to punish therefor. State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407, Mikell's Cas. 585. But doubt is cast upon this decision in the case of Hunter v. State, 40 N. J. Law, 495. In the latter case, Beasley, C. J., referred to what was said on this point in State v. Carter as "entirely extrajudicial," and commended the decisions in other states holding the contrary.

[166] See the cases cited in note 162, supra.

[167] Hunter v. State, 40 N. J. Law, 495; Green v. State, 66 Ala. 40, 41 Am. Rep. 744, Mikell's Cas. 588.

eigner in a foreign vessel on the high seas or in a foreign country.[168] In this country, similar statutes have been held applicable to foreigners and citizens of other states,[169] but it is very doubtful, to say the least, whether these decisions are sound.[170]

(c) *Act in One Country, State, or County Taking Effect in Another.*—When a person in one country, state, or county does an act there which takes effect and causes death in another country, state, or county, he commits the homicide in the latter. Thus, if a person in one state shoots across the state line, and kills a person in another state, the murder is committed in the latter state, and not in the former, and, if he can be apprehended in the latter state,[171] he can be punished there, but cannot be punished in the former unless by virtue of some statute.[172] The same would be true of a person who, being in one state, sends poisoned candy by mail to a person in another state, and causes his death in the latter.[172a] The principle also applies where a person on the shore shoots at and kills a person in a vessel on the sea. In such a case, the homicide is committed on the vessel, and is within the admiralty jurisdiction.[173] And where a person on one ship shoots at and kills a person on another ship, the homicide is committed on the latter, and it is punishable by the nation to which the latter belongs, but not by the nation to which the former belongs.[174]

[168] Reg. v. Lewis, Dears. & B. C. C. 182, 7 Cox, C. C. 277.

[169] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89, Beale's Cas. 409; State v. Caldwell, 115 N. C. 794, 20 S. E. 523.

[170] See State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407; State v. Knight, Tayl. (N. C.) 65, 2 Hayw. 109, Beale's Cas. 406.

[171] Ante, § 494.

[172] 1 Hale, P. C. 475; State v. Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822.

[172a] In California a statute provides for punishment of the sender in such a case. People v. Botkin, 132 Cal. 231, 64 Pac. 286, 84 Am. St. Rep. 39.

[173] Rex v. Coombs, 1 Leach, C. C. 388.

[174] U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, Beale's Cas. 398. Compare Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897.

(*d*) *Homicide by Administering Poison.*—The overt act of homicide by administering poison, within the meaning of a statute, consists, not simply in prescribing or furnishing the poison, but also in directing and causing it to be taken, and therefore, if poison is prescribed and furnished to a person in one county, and he carries it into another county, and takes it there in accordance with the directions, and is poisoned and dies there, the administering is consummated, and the crime is committed, in that county.[175]

506. Abortion.

A person who, while in one state, sends a drug to a woman in another state by mail, with intent to have her take the same for the purpose of causing an abortion, which she does, is not guilty of procuring an abortion in the latter state, unless the woman does not know the nature of the drug, and is therefore an innocent agent. But he is indictable in the state to which the drug is thus sent, under a statute punishing any person who shall advise or procure a woman to take a drug with intent to cause an abortion.[176]

507. Assault and Assault and Battery.

An assault or an assault and battery is committed, of course, in the state or county in which the battery is inflicted or attempted, and ordinarily, therefore, there is no difficulty in determining the locality of the offense. When a force is put in motion in one jurisdiction, with intent to inflict a battery, and it takes effect in another, the offense is committed in the latter. Thus, if a person standing in one state or county shoots or throws across the line at a person standing in another state or county, he is guilty of assault and battery in the latter state or county if he strikes him, or of assault if he does not strike him; and if his intent is to murder, he is guilty in such state

[175] Robbins v. State, 8 Ohio St. 131.
[176] State v. Morrow, 40 S. C. 221, 18 S. E. 853.

or county of assault with intent to murder.[177] The same is true where a person in one state or county sends poison or any other deleterious drug by mail to a person in another state or county, and the latter takes it there.[178] In accordance with the principle in relation to crimes committed by means of an innocent agent, one who sends poison into another state or county by an innocent agent, and causes it to be administered there, is guilty of assault and battery in that state or county.[179]

508. Libel.

A libel is committed where, and only where, it is published. If it is published in several jurisdictions, it is an offense in each. One who publishes a libel in one jurisdiction in a newspaper which circulates also in another jurisdiction is liable to indictment in the latter.[180] A libel sent by mail is published, not where it is posted, but where it is received. Thus, where a letter containing a libel on the administration of the government, and on certain public officers, was mailed in Ireland, and addressed to and received by a person in England, it was held that it was published in England, and indictable there.[181]

509. Sending Threatening Letter.

It has been held that the offense of sending a threatening letter, where the letter is sent by mail, is committed where the letter is received.[182]

[177] State v. Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822; Simpson v. State, 92 Ga. 41, 17 S. E. 984, 44 Am. St. Rep. 75. And see Robbins v. State, 8 Ohio St. 131; State v. Morrow, 40 S. C. 221, 18 S. E. 853; ante, § 494.

[178] See Robbins v. State, 8 Ohio St. 131.

[179] Ante, § 497.

[180] Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

[181] Rex v. Johnson, 7 East, 65. Contra, Rex v. Burdett, 4 Barn. & Ald. 175.

[182] People v. Griffin, 2 Barb. (N. Y.) 427; Rex v. Girdwood, 1 Leach, C. C. 142; Rex v. Esser, 2 East, P. C. 1125.

510. Nuisance.

A nuisance is committed in the jurisdiction in which the act takes effect and constitutes a nuisance, and in that jurisdiction only; but the same act may cause a nuisance and be indictable in more than one jurisdiction, and an act may cause a nuisance and be indictable in a jurisdiction in which the person doing the act has never been. According to the better opinion, therefore, a man who erects or creates a nuisance in one jurisdiction, as by depositing offensive matter in a stream or building a dam, is liable criminally as well as civilly in any other jurisdiction in which it takes effect and constitutes a nuisance.[183]

511. Bigamy.

The offense of bigamy is committed in the jurisdiction in which the bigamous marriage takes place, and an indictment will not lie in any other jurisdiction.[184] In some states, however, statutes have been enacted punishing persons who cohabit after a bigamous marriage, and under these statutes a conviction may be had for such cohabitation, although the marriage may have taken place in another jurisdiction.[185]

511½. Abduction.

Where a girl leaves her father's home with his consent with a male companion for a proper purpose and her companion afterwards, in another county or state, conceives and carries out the intent of making her his concubine, or placing her in a

[183] 2 Hawk. P. C. c. 25, § 37; State v. Lord, 16 N. H. 357; State v. De Wolfe (Neb.) 93 N. W. 746; American Strawboard Co. v. State, 70 Ohio St. 140, 71 N. E. 284; State v. Glucose Sugar Refining Co., 117 Iowa, 524, 91 N. W. 794. And see Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13,446; Thompson v. Crocker, 9 Pick. (26 Mass.) 59. Contra, In re Eldred, 46 Wis. 530, 1 N. W. 175; State v. Babcock, 30 N. J. Law, 29.

[184] State v. Barnett, 83 N. C. 615; Johnson v. Com., 86 Ky. 122, 5 S. W. 365; Scoggins v. State, 32 Ark. 205; Williams v. State, 44 Ala. 24.

[185] State v. Sloan, 55 Iowa, 217, 7 N. W. 516.

house of prostitution, his offense is committed in the latter county or state.[185a]

III. State and Federal Jurisdiction.

512. In General.—The United States, by congress, has jurisdiction to punish for offenses, but only in so far as such jurisdiction has been conferred upon it by the federal constitution. It has no common-law jurisdiction.[186]

The states have inherent jurisdiction to punish for any offenses committed within their limits, except in so far as the federal constitution has conferred exclusive jurisdiction upon congress.[187]

513. Jurisdiction Conferred upon Congress by the Federal Constitution.

(*a*) *General Clause.*—The constitution of the United States, to which instrument congress owes all its powers of legislation, expressly confers, in the different articles and sections, certain specific powers. These will be presently noticed, as will also some of the acts of congress in pursuance of such grants of power. Section 8 of article 1, after giving congress certain specified powers, contains a general clause conferring the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."[188] This clause, it will be noticed, is very broad. It authorizes any measures, including penal statutes, which are not prohibited by the constitution, and which are appropriate to carry into effect any of the powers given by the constitution, either to congress, or to any federal department or officer, judicial or ex-

[185a] People v. Lewis, 141 Cal. 543, 75 Pac. 189; State v. Gordon, 46 N. J. Law, 432; State v. Round, 82 Mo. 679.

[186] Ante, § 34 et seq.

[187] Ante, § 33 et seq.

[188] Const. U. S. art. 1, § 8, cl. 18.

ecutive.[189] The word "necessary" in the clause does not mean "indispensable." If a certain measure is appropriate, and not within any constitutional prohibition, the degree of its necessity is a question within the discretion of congress, and not cognizable by the courts.[190]

It was said by Mr. Justice Field in reference to this clause: "There is no doubt of the competency of congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. * * * Any act, committed with a view of evading the legislation of congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States. But an act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States unless it have some relation to the execution of a power of congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate."[191]

Particular Acts.—Among the various acts of congress which have been enacted under the power thus granted, and which are undoubtedly valid, are statutes punishing, as offenses against the United States, illegally holding public office,[192] conspiring to prevent a person from holding or accepting a federal office, or injuring a person holding such an office,[193] bribery or corruption of federal officers,[194] extortion or embezzlement by federal officers,[195] false personation of owners of public stocks or

[189] U. S. v. Fox, 95 U. S. 670; U. S. v. Shaw-Mux, 2 Sawy. 364, Fed. Cas. No. 16,268.

[190] McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 413; U. S. v. Fisher, 2 Cranch (U. S.) 358, 396.

[191] U. S. v. Fox, 95 U. S. 670.

[192] Rev. St. § 1787.

[193] Id. § 5518.

[194] Id. §§ 5451, 5500-5502.

[195] Id. §§ 5481-5487.

other claims against the United States, and other frauds in making or presenting claims,[196] stealing implements used in stamping or printing bonds, notes, stamps, or other obligations or instruments of the United States,[197] corruption or intimidation of witnesses, jurors, or officers in the federal courts, or otherwise obstructing the administration of justice therein,[198] perjury or subornation of perjury in the federal courts, or before federal officers,[199] etc. Other acts which have been made offenses against the United States are mentioned in the paragraphs following.

(*b*) *Offenses on the High Seas and Offenses against the Law of Nations.*—Express power is given congress "to define and punish piracies and felonies on the high seas and offenses against the law of nations."[200] This power has been exercised by congress by the enactment of statutes punishing piracy, and murder, and other felonies committed on the high seas,[201] and of various statutes punishing offenses against the law of nations,—among others, statutes punishing the violation of safe-conducts and passports,[202] the suing out or executing of any writ or process against any minister of any foreign prince or state, or his servants,[203] or assaults or other violence against a foreign minister,[204] counterfeiting or forging foreign coins, securities, or stamps,[205] breaches of neutrality, as by accepting or executing within the jurisdiction of the United States a commission to serve a foreign state against a state at peace with the United States,[206] enlisting within the United States,

196 Id. §§ 5435-5438.
197 Id. § 5453.
198 Id. §§ 5404-5407.
199 Id. §§ 5392, 5393.
200 Const. U. S. art. 1, § 8, cl. 10.
201 Rev. St. §§ 5339, 5340, 5346, et seq.
202 Id. § 4062.
203 Id. §§ 4063, 4064.
204 Id. § 4062.
205 Id. §§ 5457, 5465.
206 Id. § 5281.

or going out of the United States with intent to enlist, in the service of a foreign state,[207] fitting out and arming, within the United States, any vessel, with intent that it shall be employed in the service of a foreign state to cruise or commit hostilities against a state at peace with the United States,[208] increasing or augmenting, within the United States, the force of any armed vessel of a foreign state at war with a state with which the United States are at peace,[209] beginning or setting on foot, within the United States, or providing or preparing the means for, any military expedition or enterprise against a state at peace with the United States,[210] etc.

The clause of the constitution above quoted gives congress the power to punish any act whatever that offends against the law of nations, whether the act affects foreign states themselves, or merely the subjects or citizens thereof. It gives the power to punish the counterfeiting, within its jurisdiction, of the notes, bonds, and other securities issued by foreign governments, or by corporations under their authority, and such a statute has been enacted.[211]

(*c*) *Offenses in the District of Columbia, and in Forts, Arsenals, Dockyards, etc.*—Congress is also expressly empowered "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."[212] Under this clause, congress

[207] Id. § 5382.

[208] Id. § 5283.

[209] Id. § 5285.

[210] Id. § 5286.

[211] Act Cong. May 16, 1884 (23 Stat. 22); U. S. v. Arjona, 120 U. S. 479.

[212] Const. U. S. art. 1, § 8, cl. 17.

has passed various statutes punishing offenses against the person, as murder, rape, assaults, etc., and offenses against property, as larceny, robbery, false pretenses, forgery, etc., offenses against the habitation, as burglary and arson, and other burnings, and many other offenses, when committed in the District of Columbia or within any fort, dockyard or other place or district within the exclusive jurisdiction of the United States.[213]

This clause of the constitution, and the act of congress, including the words "or any other *place* or district" under the exclusive jurisdiction of the United States, has reference to such places only as are, like the places specifically mentioned, in their nature fixed and territorial, and it does not apply to a vessel, even though it may be a ship of war of the United States.[214]

(*d*) *Treason.*—The federal constitution also declares that "treason against the United States shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort," and that "congress shall have the power to declare the punishment of treason."[215] In pursuance of this, congress has enacted laws punishing treason and misprision of treason,[216] treasonable correspondence with a foreign government,[217] recruiting soldiers or sailors to serve against the United States,[218] and other treasonable acts.[219]

(*e*) *Revenue and Custom Laws.*—The constitution expressly gives congress the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States."[220]

[213] Rev. St. U. S. § 5339 et seq.

[214] U. S. v. Bevans, 3 Wheat. (U. S.) 336. It includes land acquired for locks and dams. U. S. v. Tucker, 122 Fed. 518.

[215] Const. U. S. art. 3, § 3.

[216] Rev. St. §§ 5331-5333.

[217] Id. § 5335.

[218] Id. § 5337.

[219] Id. §§ 5334-5338.

[220] Const. U. S. art. 1, § 8, cl. 1.

This, and the general clause above referred to, clearly confer upon congress the power, not only to provide for the collection of taxes, customs duties, etc., but also to punish, as offenses against the United States, fraudulent violation or evasion of the revenue and custom laws.[221]

(*f*) *Foreign and Interstate Commerce.*—The constitution gives congress the power "to regulate commerce with foreign nations, and among the several states,"[222] and, under this and the general clause above referred to, it may constitutionally enact penal laws in relation to commerce.[223] Thus, it may punish desertion by seamen, the carrying of explosives,[224] obstruction of railroad trains employed in commerce between the states, and other acts in connection with foreign or interstate commerce.

(*g*) *Commerce with Indians.*—The constitution gives congress the power "to regulate commerce * * * with the Indian tribes,"[225] and under this and the general clause it may enact penal laws in relation to commerce with the Indian tribes.[226] Thus it may prohibit and punish traffic in spirituous liquors with Indians, and it may do so within as well as without the limits of a state.[227]

(*h*) *Naturalization.*—The constitution gives congress power "to establish a uniform rule of naturalization * * * throughout the United States."[228] And this and the general clause authorize it to punish as offenses against the United States false personation, forgery, perjury, and other frauds in connection with naturalization proceedings, the fraudulent

[221] Rev. St. U. S. §§ 1789, 3095 et seq., 5443-5448, 5452.
[222] Const. U. S. art. 1, § 8, cl. 3.
[223] Rev. St. U. S. § 4131, et seq.; Supp. Rev. St. p. 529 et seq.
[224] Rev. St. U. S. § 5355.
[225] Const. U. S. art. 1, § 8, cl. 3.
[226] Rev. St. U. S. § 2127 et seq.
[227] U. S. v. Shaw-Mux, 2 Sawy. 364, Fed. Cas. No. 16,268.
[228] Const. U. S. art. 1, § 8, cl. 4.

use of a certificate of naturalization, or the use of forged certificates, etc.[229]

(i) *Bankruptcy.*—The constitution also gives congress the power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States."[230] This clause, and the general clause heretofore mentioned, not only gives congress the power to provide for proceedings in bankruptcy, and for distribution of the property of bankrupts among their creditors, but it also gives it the power to punish frauds and other wrongs in connection with bankruptcy proceedings.[231]

The bankruptcy act of 1898 punishes any person who shall knowingly and fraudulently appropriate to his own use, embezzle, spend, or unlawfully transfer any property, or secrete or destroy any document, belonging to a bankrupt estate, which has come into his charge as trustee. It also punishes any person who, while a bankrupt, or after his discharge, shall knowingly and fraudulently (1) conceal from his trustee any of the property belonging to his estate in bankruptcy; or (2) make a false oath or account in, or in relation to, any proceeding in bankruptcy; or (3) present under oath any false claim for proof against the estate of a bankrupt; or (4) use any such claim in composition, personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (5) receive any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the bankrupt act; or (6) extort or attempt to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

It also punishes any person who shall knowingly (1) act as a referee in a case in which he is directly or indirectly interested; or (2) purchase, while a referee, directly or indi-

[229] Rev. St. U. S. §§ 5395, 5424, et seq.; U. S. v. Severino, 125 Fed. 949.

[230] Const. U. S. art. 1, § 8, cl. 4.

[231] U. S. v. Fox, 95 U. S. 670.

rectly, any property of the estate in bankruptcy of which he is referee; or (3) refuse, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest, when directed by the court so to do.

All indictments or informations under the act must be found or filed within one year after commission of the offense.

(*j*) *Counterfeiting Securities and Coin of the United States.*—The constitution gives congress express power "to provide for the punishment of counterfeiting the securities and current coin of the United States."[232] And statutes providing for the punishment of such offenses have been enacted.[233]

(*k*) *Post Offices and Post Roads.*—The constitution also gives congress the power "to establish post offices and post roads,"[234] and under this clause, and the general clause before mentioned, congress not only has the power to establish post offices and post roads, but it also has the power, as an incident thereto, to punish acts in connection with the post offices and post roads established by it, as larceny or embezzlement from the mails, obstruction of the mails, etc.[235]

(*l*) *Patents and Copyrights.*—The constitution gives congress power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."[236] Under this clause, and the general clause heretofore mentioned, congress has the power to protect patents and copyrights granted under the patent and copyright laws enact-

[232] Const. U. S. art. 1, § 8, cl. 6.

[233] Rev. St. § 5457 et seq. That the states may also punish counterfeiting, see post, § 514b.

[234] Const. U. S. art. 1, § 8, cl. 7.

[235] Rev. St. § 5463 et seq.

[236] Const. U. S. art. 1, § 8, cl. 8.

ed by it, and to punish fraud and other wrongs in connection therewith.[237]

(*m*) *Army and Navy.*—The constitution empowers congress to raise and support armies, to provide and maintain a navy, and "to make rules for the government and regulation of the land and naval forces."[238] Under this power, and under the general clause heretofore referred to, congress has the power to enact any penal laws which may be necessary or proper in relation to the army and navy, as, for example, a law punishing larceny or embezzlement of arms and other ordnance.[239] It may also constitutionally punish, as an offense against the United States, the receipt of an excessive fee by an agent employed to collect a pension,[240] detention from a pensioner of money collected for him as his pension,[241] and embezzlement by a guardian of his ward's pension money.[242] And it may punish offenses committed on a ship of war, wherever she may be, even though in waters within the jurisdiction of a particular state.[243]

(*n*) *Elections.*—The constitution provides that the times, places, and manner of holding elections for senators and representatives in congress shall be prescribed by the state legislatures, but declares that congress "may at any time, by law, make or alter such regulations, except as to the place of choosing senators."[244] This provision not only gives congress the power to regulate the time, place, and manner of voting for representatives in congress, but it also gives it the power to protect the persons voting or entitled to vote, by appropriate statutes, penal or otherwise, from violence or intimidation,

[237] See Rev. St. §§ 4901, 4963.
[238] Const. U. S. art. 1, § 8, cls. 12-14.
[239] Rev. St. U. S. § 5439.
[240] U. S. v. Marks, 2 Abb. U. S. 534, Fed. Cas. No. 15,721.
[241] U. S. v. Fairchilds, 1 Abb. U. S. 74, Fed. Cas. No. 15,067.
[242] U. S. v. Hall, 98 U. S. 343.
[243] U. S. v. Bevans, 3 Wheat. (U. S.) 336, 390.
[244] Const. U. S. art. 1, § 4.

and the election itself from fraud and corruption.[245] Congress has no power, however, to regulate elections of state officers, or to punish fraud or intimidation in connection therewith,[246] except in so far as such power may be conferred under the fifteenth amendment of the constitution, hereafter referred to. Presidential electors are state officers, within this rule.[247]

(*o*) *Slavery and the Slave Trade.*—The constitution[247a] empowered congress to prohibit the importation of slaves after the year 1808, and by the thirteenth amendment it is declared that "neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and that "congress shall have the power to enforce this article by appropriate legislation."[248] In pursuance of these and other powers, congress has passed statutes punishing various acts for the purpose of preventing slavery and the slave trade,—as the confining or detaining of negroes on board vessels with intent to enslave, and offering or attempting to sell negroes on board such vessels, etc.;[249] seizing negroes on a foreign shore, or decoying, carrying or receiving them with intent to enslave;[250] bringing them into the United States, or holding or selling them as

[245] Ex parte Siebold, 100 U. S. 371; In re Coy, 127 U. S. 731; Ex parte Yarbrough, 110 U. S. 651; U. S. v. Quinn, 8 Blatchf. 48, Fed. Cas. No. 16,110; U. S. v. Gale, 109 U. S. 65; U. S. v. Munford, 16 Fed. 223.

[246] In re Green, 134 U. S. 377; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Reese, 92 U. S. 214; U. S. v. Amsden, 6 Fed. 819.

[247] In re Green, 134 U. S. 377.

[247a] Art. 1, § 9, cl. 1.

[248] Const. U. S. amend. 13. Acting under authority of this provision the deportation of a Chinese female, under the Chinese exclusion act, has been refused, where it appeared that such course would be equivalent to remanding her to perpetual slavery of the most degrading kind. U. S. v. Ah Sou, 132 Fed. 878.

[249] Rev. St. § 5375.

[250] Id. § 5376.

slaves;[251] equipping vessels for the slave trade;[252] transporting persons to be held as slaves;[253] hovering on the coast of the United States with slaves on board;[254] serving on vessels engaged in the transportation of slaves;[255] serving on a foreign vessel engaged in the slave trade;[256] kidnapping with intent to enslave;[257] and prohibiting the system of peonage formerly in vogue in New Mexico and other places.[257a]

(*p*) *Civil Rights—Const. art. 4 § 2.*—The constitution declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."[258] This provision prohibits any state from denying to a citizen of another state, while within its limits, any privilege or immunity of its own citizens as such, and congress has the power to enforce the same by penal legislation.[259]

Thirteenth Amendment.—The thirteenth amendment to the constitution, referred to in a preceding paragraph,[260] went no further than to prohibit slavery or involuntary servitude. It secures the civil right of liberty, but creates no other civil rights.[261] Thus, it does not prevent discrimination between negroes and white citizens with respect to accommodations in schools, railroad cars, hotels, etc., and does not give congress

[251] Id. § 5377.
[252] Id. § 5378.
[253] Id. § 5379.
[254] Id. § 5380.
[255] Id. § 5381.
[256] Id. § 5382.
[257] Id. § 5525.
[257a] Id. §§ 1990, 1991, 5526, 5527; Peonage Cases, 123 Fed. 671; U. S. v. McClellan, 127 Fed. 971.
[258] Const. U. S. art. 4, § 2.
[259] See, as to this clause, Slaughter-House Cases, 16 Wall. (U. S.) 75; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; U. S. v. Cruikshank, 92 U. S. 555.
[260] Ante, § 513o.
[261] Civil-Rights Cases, 109 U. S. 3; Donnell v. State, 48 Miss. 676, 12 Am. Rep. 375; State v. Strauder, 11 W. Va. 803, 27 Am. Rep. 606.

the power to punish individuals for denying to negroes equal accommodations.[262]

Fourteenth Amendment.—The fourteenth amendment to the constitution provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the states wherein they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and declares that congress "shall have power to enforce, by appropriate legislation, the provisions of this article."[263]

This amendment creates no rights, except the right of citizenship. It merely prohibits the states from passing any law denying to citizens of the United States rights, privileges, or immunities to which they are entitled, as citizens of the United States; from depriving any person of life, liberty, or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws. It protects, in the first clause, such rights only as belong to persons as citizens of the United States, and not such as belong to persons as citizens of the states.[264] It applies, not to acts of individuals merely, which may constitute an invasion of the rights of citizens of the United States, but to the invasion or

[262] Civil-Rights Cases, 109 U. S. 3. See, also, Plessy v. Ferguson, 163 U. S. 537; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405.

[263] Const. U. S. amend. 14.

[264] Slaughter-House Cases, 16 Wall. (U. S.) 36; U. S. v. Sanges, 48 Fed. 78; People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232.

For this reason it does not secure the right to attend the public schools of a state. People v. Gallagher, supra. And see Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738. Neither does it secure the rights of personal liberty and security, these being within the primary jurisdiction of the state. U. S. v. Eberhart, 127 Fed. 254.

denial of such rights by the states,[265] and therefore congress has no power, by virtue of the amendment, to punish acts of individuals merely, as distinguished from acts by or under authority of the state.[266] For this reason, an act of congress (the Civil Rights Act of 1875) making it an offense for the proprietors of hotels, public conveyances, theaters, etc., to deny equal accommodations to any persons, was held unconstitutional.[267] The same is true of the act of congress punishing conspiracies to deprive any person of equal privileges and immunities under the laws, or equal protection of the laws, for it is directed against acts of individuals only.[268]

Congress, however, has the power to punish acts of individuals depriving citizens of the United States of rights given them by the federal constitution, and therefore the supreme court has sustained acts punishing conspiracies to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or to prevent or hinder his free exercise or enjoyment thereof,[269] as the right to inform a United States marshal of violations of the revenue laws,[270] or the right to establish a homestead claim to public lands,[271] or the right to vote at an election of representatives in congress,[272] etc. Congress also has the power, under this

[265] Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Harris, 106 U. S. 635; U. S. v. Sanges, 48 Fed. 78.

[266] Civil-Rights Cases, 109 U. S. 3, 23; U. S. v. Cruikshank, 92 U. S. 542, 555.

[267] Civil-Rights Cases, 109 U. S. 3, 23.

[268] Rev. St. § 5519; U. S. v. Harris, 106 U. S. 629; Baldwin v. Franks, 120 U. S. 678.

[269] In re Quarles, 158 U. S. 532; U. S. v. Waddell, 112 U. S. 76; Ex parte Yarbrough, 110 U. S. 651.

[270] In re Quarles, supra.

[271] U. S. v. Waddell, supra.

[272] Ex parte Yarbrough, supra.

amendment, to punish acts by state officers which constitute a violation thereof.[273]

Equal Protection of the Laws.—The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, and which congress has the power to enforce by penal legislation, if it sees fit, has been held to prohibit a state from passing any law which discriminates injuriously against particular persons or classes, or which abridges equal civil or political privileges, or which affords less protection to life, liberty, or property to one class than another.[274] It prohibits statutes denying to a particular class of persons *equal* accommodation in public conveyances, and public places of amusement, public schools, etc.[275] But it does not prevent a statute requiring *separate* accommodations for white persons and negroes, if the accommodations are equal.[276]

Fifteenth Amendment.—The fifteenth amendment to the constitution declares that "the right of the citizens of the United States to vote shall not be denied or abridged by the

[273] Murray v. Louisiana, 163 U. S. 101 (discrimination in selecting and summoning jurors). And see Virginia v. Rives, 100 U. S. 313; Ex parte Virginia, 100 U. S. 347.

[274] See Wurtz v. Hoagland, 114 U. S. 606; In re Ah Fong, 3 Sawy. 157, Fed. Cas. No. 102; Donnell v. State, 48 Miss. 678, 12 Am. Rep. 375.

[275] See Claybrook v. City of Owensboro, 16 Fed. 297; State v. Duggan, 15 R. I. 403; People v. King, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. Rep. 389; Ward v. Flood, 48 Cal. 50, 17 Am. Rep. 405.

[276] Carriers: Plessy v. Ferguson, 163 U. S. 537; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5, 4 Am. St. Rep. 776; Louisville, N. O. & T. Ry. Co. v. State, 66 Miss. 662, 6 So. 203, 14 Am. St. Rep. 599.

Places of amusement: Bowlin v. Lyon, 67 Iowa, 536, 25 N. W. 766, 56 Am. Rep. 355; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527.

Public schools: U. S. v. Buntin, 10 Fed. 730; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713; Ward v. Flood, 48 Cal. 56, 17 Am. Rep. 405; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 23 Am. St. Rep. 895.

United States, or by any state, on account of race, color, or previous condition of servitude," and that congress "shall have power to enforce this article by appropriate legislation."[277] Under this amendment, the authority of congress to punish offenses against the right of suffrage at state elections is limited to acts done under color of authority derived from state legislation, and does not extend to punishing individuals acting without authority.[278]

514. Exclusive and Concurrent Jurisdiction.

(*a*) *In General.*—In some cases, the jurisdiction of congress, and of the federal courts under acts of congress, is exclusive of the jurisdiction of the states and the state courts, while in other cases there is concurrent jurisdiction. If the federal constitution, or acts of congress passed in pursuance thereof, have expressly or impliedly conferred exclusive jurisdiction upon congress or upon the federal courts to punish particular acts, such acts cannot be punished by the states.[279] But if the constitution and acts of congress do not give exclusive jurisdiction to the federal courts, and a particular act, which is made punishable by an act of congress in the federal courts, is also injurious to the state in which it is committed, the state has concurrent jurisdiction to punish therefor.[280] By the

[277] Const. U. S. Amend. 15.

[278] U. S. v. Amsden, 6 Fed. 819. See, also, U. S. v. Harris, 106 U. S. 637; U. S. v. Reese, 92 U. S. 214.

[279] Ex parte Bridges, 2 Woods, 428, Fed. Cas. No. 1,862; Com. v. Felton, 101 Mass. 204; State v. Tuller, 34 Conn. 280; People v. Sweetman, 3 Park. Cr. R. (N. Y.) 358; People v. Kelly, 38 Cal. 145, 99 Am. Dec. 360; State v. Kirkpatrick, 32 Ark. 117; State v. Adams, 4 Blackf. (Ind.) 146.

[280] Fox v. Ohio, 5 How. (U. S.) 410; Moore v. Illinois, 4 How. (U. S.) 13, affirming Eells v. People, 4 Scam. (Ill.) 498; State v. Tuller, 34 Conn. 280; Com. v. Fuller, 8 Metc. (Mass.) 313, 41 Am. Dec. 509; Com. v. Tenney, 97 Mass. 50; Com. v. Barry, 116 Mass. 1; Rump v. Com., 30 Pa. 475; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Manley v. People, 7 N. Y. 295, per Edmonds, J.; Sizemore v. State, 3 Head (Tenn.) 26; Jett v. Com., 18 Grat. (Va.) 933.

terms of the federal judiciary act of 1789, the courts of the United States are vested with exclusive cognizance of all crimes that are made punishable by acts of congress, except where the act of congress makes other provision.[281]

(*b*) *Forgery, Counterfeiting, and Uttering.*—It may no doubt be regarded as settled that the fact that the constitution of the United States gives congress the power to provide for the punishment of counterfeiting the securities or coin of the United States, and that congress has done so, does not give congress exclusive jurisdiction, and that the states also have jurisdiction to punish the counterfeiting of such securities and coin, and the uttering of such counterfeits, within their limits, as an offense against the state. The supreme court of the United States has decided that a state may punish the uttering or circulating of counterfeit coin or securities of the United States,[282] but does not seem to have passed upon the question whether the states have the power to punish the counterfeiting of such coin or securities. That they have such power, however, has repeatedly been decided by the state courts.[283] There is apparently only one decision to the contrary.[284] It has also been held that a state may punish the forgery of a power of attorney to obtain a pension under an act of congress.[285]

(*c*) *Perjury.*—In some states it has been held that perjury in naturalization proceedings, even when the proceedings are had

[281] See Com. v. Felton, 101 Mass. 204, 206.

[282] Fox v. Ohio, 5 How. (U. S.) 410; Moore v. Illinois, 4 How. (U. S.) 13, affirming Eells v. People, 4 Scam. (Ill.) 498.

[283] Com. v. Fuller, 8 Metc. (Mass.) 313, 41 Am. Dec. 509; Harlan v. People, 1 Doug. (Mich.) 207; Chess v. State, 1 Blackf. (Ind.) 198; Snoddy v. Howard, 51 Ind. 411, 19 Am. Rep. 738; White v. Com., 4 Binn. (Pa.) 418; State v. Randall, 2 Aik. (Vt.) 89; Hendrick v. Com., 5 Leigh (Va.) 707; Jett v. Com., 18 Grat. (Va.) 933; Sizemore v. State, 3 Head (Tenn.) 26; State v. Pitman, 1 Brev. (S. C.) 32, 2 Am. Dec. 645; State v. Tutt, 2 Bailey (S. C.) 44, 21 Am. Dec. 508.

[284] Mattison v. State, 3 Mo. 421.

[285] Com. v. Shaffer, 4 Dall. (Pa.) xxvi.

and the oath is taken in a state court under an act of congress, is exclusively an offense against the United States, under the act of congress on the subject,[286] and that no indictment therefor will lie in a state court,[287] but the contrary has been held in Pennsylvania and New Hampshire,[288] and by a United States court sitting in New York.[288a] It has also been held that an indictment will not lie in a state court for perjury before a United States land officer,[289] or before a United States commissioner in a proceeding under an act of congress,[290] or before a notary public designated by congress to take depositions in a contest of an election of a representative in congress,[291] or before a commissioner in bankruptcy appointed under an act of congress.[292]

(*d*) *Larceny and Embezzlement.*—Larceny and embezzlement from the mails are within the exclusive jurisdiction of the federal courts, and an indictment therefor will not lie in a state court.[293] Nor can a state punish embezzlement of the funds of a national bank by an officer thereof, for this offense is covered by an act of congress, and the jurisdiction of the federal courts is exclusive.[294] This is true, however, only

[286] Ante, § 513h.

[287] People v. Sweetman, 3 Park. Cr. R. (N. Y.) 358, and cases hereafter cited.

[288] State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Rump v. Com., 30 Pa. 475.

[288a] U. S. v. Severino, 125 Fed. 949. And see In re Loney, 134 U. S. 372.

[289] People v. Kelly, 38 Cal. 145, 99 Am. Dec. 360. Or for perjury in an affidavit before a county clerk under an act of congress relating to the public lands of the United States. State v. Kirkpatrick, 32 Ark. 117. And see State v. Adams, 4 Blackf. (Ind.) 146.

[290] Ex parte Bridges, 2 Woods, 428, Fed. Cas. No. 1,862.

[291] In re Loney, 134 U. S. 372.

[292] State v. Pike, 15 N. H. 83.

[293] Com. v. Feely, 1 Va. Cas. 321.

[294] State v. Tuller, 34 Conn. 280; Com. v. Felton, 101 Mass. 204; Com. v. Ketner, 92 Pa. 372, 37 Am. Rep. 692. Nor can it punish an accessary to such offense, though he may not be punishable under the act of congress. Com. v. Felton, supra.

where the embezzlement is of the funds of the bank. Notwithstanding the act of congress, a state may punish an officer of a national bank for stealing or embezzling property specially deposited by a customer of the bank, as a package of bonds or plate specially deposited in its vaults for safe-keeping, for the property in such a case is not the property of the bank.[295] In a Connecticut case it was held that, where an act of congress creating a corporation (as a national bank) provides a punishment to be inflicted upon any officer of the corporation who embezzles its property, it is not competent for the state legislature to make the same act an offense against the laws of the state; but that, where an act of congress creates a corporation within a state, and authorizes it in general terms to pursue the business of banking, it is competent for the state legislature to protect the bank, and those who deal with it, by suitable penal enactments, since such an enactment is not predicated on, and has no relation to, any act of congress or offense created thereby. And it was therefore held that, as the act of congress authorizing the establishment of national banks, and providing for the punishment of officers of such a bank who should embezzle its property and funds, made no provision whatever for punishment in case of embezzlement or theft of the property of its customers, the state might punish embezzlement or theft by a national bank officer or employe of the property of the customers of the bank, and that embezzlement by a teller of a national bank of property deposited specially in the vaults of the bank by one of its customers was punishable under a state statute punishing officers of banks for embezzling the property of third persons deposited therein.[296] In Massachusetts it has been held that a state may punish the *larceny* of property of a national bank by its officers, though the same act may be punishable as embezzlement under the act of congress.[297] This, however, seems to go too far.

[295] State v. Tuller, 34 Conn. 280; Com. v. Tenney, 97 Mass. 50.
[296] State v. Tuller, 34 Conn. 280.
[297] Com. v. Barry, 116 Mass. 1.

(*e*) *False Pretenses.*—The fact that the obtaining of money or property by false pretenses under certain circumstances is made punishable by an act of congress as an offense against the United States does not necessarily prevent an indictment for the act in a state court as an offense against the state. Thus, it has been held that a state may punish for obtaining goods on credit by false pretenses, consisting of fraudulent representations as to solvency, although the fraud may also be punishable under the federal bankruptcy act.[298]

(*f*) *Extortion.*—The offense of obtaining money by threats to accuse one of crime may be tried in the state court, though the threatened accusation was of an offense exclusively against the United States.[298a]

(*g*) *Election Offenses.*—The fact that congress has the power to punish offenses at elections of representatives in congress does not deprive the states of jurisdiction to punish such offenses.[299]

(*h*) *Offenses in the Ports or Waters of a State.*—The words "high seas" in the acts of congress punishing offenses, and conferring jurisdiction upon the federal courts, mean the uninclosed waters of the ocean outside of the jurisdiction of the states,—outside the *fauces terrae*,—and do not include arms of the sea which are within the jurisdiction of a state.[300] Offenses there committed are not within the act of congress punishing murder and other offenses "committed upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state," but such offenses are punishable in the state courts as offenses against the state.[301]

(*i*) *United States Forts, Arsenals, Dockyards, etc.*—The constitution of the United States, as we have seen, confers

298 Abbott v. People, 75 N. Y. 602.

298a Sexton v. California, 189 U. S. 320.

299 Mason v. State, 55 Ark. 529, 18 S. W. 827.

300 Ante, § 488b.

301 U. S. v. Bevans, 3 Wheat. (U. S.) 336; U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; Com. v. Peters, 12 Metc. (Mass.) 387.

upon congress *exclusive* power to legislate over the District of Columbia, and over places purchased by the United States, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,[302] and no state has any jurisdiction to punish for offenses committed in such territory.[303] The mere purchase of land by the United States is not enough to oust state jurisdiction. The purchase must be by consent of the legislature of the state, and for one or the other of the purposes specified in the constitution.[304] Thus, where the United States purchased a cemetery in the state of Tennessee, with the consent of the state legislature, to be kept as a national cemetery, it was held that the state still had jurisdiction to punish for offenses committed therein.[305]

(*j*) *Jurisdiction Conferred by Congress on State Courts.*—In some cases, congress has undertaken to confer upon state courts jurisdiction over offenses against the United States, but it has been held that it cannot constitutionally do so. It certainly cannot compel the state courts to take jurisdiction, and, by the weight of authority, it cannot authorize them to do so.[306]

[302] Ante, § 513c.

[303] U. S. v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; State v. Kelly, 76 Me. 331; Baker v. State (Tex. Cr. App.) 83 S. W. 1122; State v. Tully (Mont.) 78 Pac. 760; State v. Seymour, 78 Miss. 134, 28 So. 799.

[304] U. S. v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; Wills v. State, 3 Heisk. (Tenn.) 141.

[305] Wills v. State, 3 Heisk. (Tenn.) 141.

[306] Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 330; Ely v. Peck, 7 Conn. 240; State v. Tuller, 34 Conn. 280; U. S. v. Lathrop, 17 Johns. (N. Y.) 4.

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