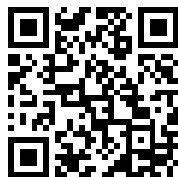


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A DIGEST  
OF THE  
CRIMINAL LAW



A DIGEST  
OF THE  
CRIMINAL LAW

(CRIMES AND PUNISHMENTS).

BY THE LATE  
SIR JAMES FITZJAMES STEPHEN, BART.  
K.C.S.I., D.C.L. ~~==~~  
FORMERLY ONE OF THE JUDGES OF THE HIGH COURT, AND AN HONORARY  
FELLOW OF TRINITY COLLEGE, CAMBRIDGE.

*FIFTH EDITION*

BY  
SIR HERBERT STEPHEN, BART.  
OF THE INNER TEMPLE, BARRISTER-AT-LAW  
CLERK OF ASSIZE FOR THE NORTHERN CIRCUIT,  
AND  
HARRY LUSHINGTON STEPHEN,  
OF THE INNER TEMPLE, BARRISTER-AT-LAW ; ESQUIRE.

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## PREFACE TO THE FIFTH EDITION

IN preparing this Edition of the *Digest of the Criminal Law*, we have endeavoured to make it as nearly as possible what it would have been if it had been prepared by the Author.

Not many cases of the first importance have been decided since the publication of the Fourth Edition at the beginning of 1887. *R. v. Tolson*, 1889, 23 Q.B.D. 168, *R. v. Brown*, 1889, 24 Q.B.D. 357, *Connor v. Kent*, 1891, 2 Q.B. 545, and all other cases which seem either to alter, or more fully to expound the law, have been incorporated either in the text or by way of illustration.

The principal statutes altering the law as to indictable offences, or creating new offences enacted in the same period, are the Merchandise Marks Act 1887 (50 & 51 Vict. c. 28); the Newspaper Libel Act 1888 (51 & 52 Vict. c. 64); the Official Secrets Act 1889 (52 & 53 Vict. c. 59)—a marvellous specimen of drafting; the Corruption of Public Bodies Act 1889 (52 & 53 Vict. c. 69); the Lunacy Act 1890 (53 Vict. c. 5); the Stamp Duties' Management Act 1891 (54 & 55 Vict. c. 38); the Penal Servitude Act 1891 (54 & 55 Vict. c. 69); the

Prevention of Cruelty to Children Act 1894 (57 & 58 Vict. c. 41); and the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60). These, with some others of less importance, will be found in the appropriate parts of the work.

When the book was originally published in 1877, it contained 398 Articles. In the Second, Third, and Fourth Editions a considerable number of Articles were added, but the numeration was left unaltered, the subsequently inserted Articles being distinguished by letters (*e.g.*, "262 A"). We think the time has now come to renumber the Articles, and have accordingly numbered them consecutively throughout the work. There are not many more than in the Fourth Edition, but they amount in all to 444.

We have taken advantage of the provision of the Penal Servitude Act 1891, to the general effect that power to pass any given sentence of penal servitude includes power to pass a sentence of imprisonment with or without hard labour, and of the consequent repeal by Statute Law Revision Acts of words thus made redundant, to shorten the Articles by omitting the words "as a maximum punishment," and the statements of alternative punishments of imprisonment.

The footnotes have of course undergone some modification, but wherever any statement they contain is made in the first person singular the words are those of the Author.

We have added at the end of the book an alphabetical table of Indictable Offences, including a

statement of the offence, whether felony or misdemeanor, whether an offence at common law or created by what statute, the punishment, whether triable at Quarter Sessions, and the page at which it may be found. It is not exhaustive, as there are probably from one to two hundred indictable offences omitted, of which most are perjury, forgery, or offences which only a small class of persons can commit. It may be worth while to observe that the table contains four hundred and twelve offences, and that therefore, following the classification there adopted, the total number of indictable offences known to the law is five or six hundred. The arrangement of the table is substantially that of the similar table in Oke's *Magisterial Synopsis* (14th Edition), and it has been adopted by the permission of Mr. Butterworth, to whom we are grateful for his courtesy.

We have rewritten the Index.

H. S.

H. L. S.

4, PAPER BUILDINGS, TEMPLE,  
24th October, 1894.





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## LIST OF ABBREVIATIONS

(OMITTING REFERENCES TO THE LAW REPORTS)

A. & E. . . .	Adolphus & Ellis.
B. & A. . . .	Barnewall & Alderson.
B. & Ad. . . .	Barnewall & Adolphus.
B. & B. . . .	Broderip & Bingham.
B. & C. . . .	Barnewall & Cresswell.
B. & P. . . .	Bosanquet & Fuller.
Bell, C. C. . .	Bell's Crown Cases.
Brooke's Abt. .	Brooke's Abridgment.
Burr. . . . .	Burrow's Reports.
Cald. . . . .	Caldecott's Settlement Cases.
Camp. . . . .	Campbell's Reports.
Car. & Mar. . .	Carrington & Marshman.
C. & K. . . . .	Carrington & Kirwan.
Cl. & F. . . . .	Clark & Finnely.
C. L. C. . . . .	Criminal Law Commission.
Co. . . . .	Coke's Report.
Cox, C. C. . . .	Cox's Criminal Cases.
C. & P. . . . .	Carrington & Payne.
D. & B. . . . .	Dearsly & Bell.
D. & P. . . . .	Dearsly & Pearce.
Den. . . . .	Dennison's Crown Cases.
Doug. . . . .	Douglas.
Ea. . . . .	East's Reports.
East, P. C. . . .	East's Pleas of the Crown
E. & B. . . . .	Ellis & Blackburn.
E. B. & E. . . .	Ellis, Blackburn, & Ellis.
Esp. . . . .	Espinasse.
F. & F. . . . .	Foster & Finlason.
Foster . . . . .	Foster's Crown Cases.
Gen. View Cr. L.	Stephen's General View of the Criminal Law.
Hale, P. C. . . .	Hale's Pleas of the Crown.
Hawk. P. C. . . .	Hawkins's Pleas of the Crown (Curwood's edition).
Hist. Cr. Law . .	Stephen's History of the Criminal Law.

Inst.	Coke's Institutes.
Kel.	Kelynge.
L. & C.	Leigh & Cave.
Lew.	Lewin's Crown Cases.
L. J. (M.C.)	Law Journal, Magistrates' Cases.
L. J. (Q. B.)	Law Journal, Queen's Bench.
L. R. H. L.	Law Reports, House of Lords.
L. R. P. C.	Law Reports, Privy Council.
L. T. (N.S.)	Law Times, New Series.
Mod.	Modern Reports.
Moo.	Moody's Crown Cases.
Moo. & R.	Moody & Robinson.
M. & S.	Maule & Selwyn.
N. R.	New Reports.
Rep. C. L. C.	Report of the Criminal Law Commission.
W. Rob.	W. Robinson's Admiralty Reports.
R. & M.	Ryan & Moody.
Roscoe, Cr. Ev.	Roscoe's Criminal Evidence.
R. & R.	Russell & Ryan.
Russ. Cr.	Russell on Crimes, 5th edition.
Salk.	Salkeld's Reports.
S. L. C.	Smith's Leading Cases.
Starkie, N. P.	Starkie's Nisi Prius Reports
Steph. Com.	Stephen's Commentaries.
St. Tr.	State Trials.
Str.	Strange's Reports.
T. R.	Term Reports
Ves.	Vesey's Reports.
Viner's Abt.	Viner's Abridgment.
W. R.	Weekly Reporter.
Wils.	Wilson's Reports.

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# A DIGEST OF THE CRIMINAL LAW

## PART I

### PRELIMINARY

EXPLANATION OF TERMS.

CHAP. I.—PUNISHMENTS.

CHAP. II.—CLASSIFICATION OF  
CRIMES AND GENERAL PROVISIONS  
AS TO THEIR PUNISHMENT.

CHAP. III.—GENERAL EXCEPTIONS.

CHAP. IV.—PARTIES TO THE COM-  
MISSION OF CRIMES—PRINCIPAL  
AND ACCESSORY.

CHAP. V.—DEGREES IN THE COM-  
MISSION OF CRIME—INCITEMENT—  
CONSPIRACY—ATTEMPTS.

### EXPLANATION OF TERMS.

#### PENAL SERVITUDE.

<sup>1</sup> WHENEVER it is stated that an offender is liable to a specified term of penal servitude, the meaning is that he may be sentenced to that or to any shorter term of penal servitude not being less than three years, or to imprisonment for any term not exceeding two years with or without hard labour.

<sup>2</sup> In cases where the punishment appointed for an offence by statute is transportation, penal servitude has been substituted.

<sup>1</sup> 54 & 55 Vict. c. 69, s. 1. The effect of this and the repealed 27 & 28 Vict. c. 47, s. 2, seems to be that where the term of five years was the maximum sentence in Acts previous to 5 August, 1891, it still remains so.

<sup>2</sup> 16 & 17 Vict. c. 99, 20 & 21 Vict. c. 3.

## IMPRISONMENT.

If the punishment specified is a term of imprisonment with hard labour, or a fine of a specified amount, the meaning (unless any qualification is specified) is that the offender may be sentenced to that or to any shorter term of imprisonment, with or without hard labour, or to pay any fine of less amount.

## WHIPPING.

The letter W at the end of a reference to a statute means that the offender may, if a male under sixteen years of age, be sentenced to whipping.

## ALTERATIONS IN LANGUAGE OF STATUTES.

The future and the past future are uniformly altered to the present tense. Where "shall" is used as an imperative "must" is substituted. Where the language of a statute appeared needlessly verbose for common purposes, the leading word or an equivalent is preserved in the text, and the words omitted are inserted in a foot-note for reference if necessary.

The language of the statutes is in most cases rearranged for the sake of clearness; but the words "redrawn," "condensed," or others of the same sort, indicate the cases in which the greatest alterations have been made.

## DRAFT CODE.

The expression "Draft Code" means the Draft Code appended to the Report of the Criminal Code Commission published in 1879, and marked C. 2345.

## CHAPTER I

## 1 OF PUNISHMENTS

## ARTICLE 1.

## PUNISHMENTS.

THE following punishments are inflicted by the law of England for the crimes hereinafter defined:—Death, penal servitude, imprisonment, detention in a reformatory school, subjection to police supervision, whipping, fines, putting under recognizance.

## ARTICLE 2.

## PUNISHMENT OF DEATH.

<sup>2</sup>The punishment of death is inflicted by hanging the offender by the neck till he is dead.

## ARTICLE 3.

## PUNISHMENT OF PENAL SERVITUDE.

<sup>3</sup>The punishment of penal servitude consists in keeping the offender in confinement and compelling him to labour in the manner and under the discipline appointed by the Acts relating to penal servitude.

<sup>1</sup> See 1 Hist. Cr. Law, ch. xiii. p. 457; see Draft Code, Pt. II., ss. 7-18.

<sup>2</sup> As to treatment of prisoners under sentence of death in prison, see 28 & 29 Vict. c. 126, Sch. 1, 61. As to the history of the punishment of death and benefit of clergy, see 1 Hist. Cr. Law, 457-80.

<sup>3</sup> 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47; 42 & 43 Vict. c. 55, s. 2; 54 & 55 Vict. c. 69; and see 5 Geo. 4, c. 84. The subject of the nature of the punishment of penal servitude is discussed at length in *R. v. Mount*, 1875, L. R. 6 P. C. 283. See, too, 1 Hist. Cr. Law, 480-483.

## ARTICLE 4.

## PUNISHMENT OF IMPRISONMENT.

<sup>1</sup> The punishment of imprisonment consists in the detention of the offender in prison, and in his subjection to the discipline appointed for prisoners during the period expressed in the sentence.

Imprisonment is of three kinds :

- (i.) Imprisonment with hard labour.
- (ii.) Imprisonment without hard labour.
- (iii.) Imprisonment as a misdemeanor of the first division.

## ARTICLE 5.

## IMPRISONMENT TO BE SEPARATE.

<sup>2</sup> All prisoners sentenced to imprisonment with or without hard labour must be prevented from holding any communication with each other, either by every prisoner being kept in a separate cell by day and by night, except when he is at chapel or taking exercise, or by every prisoner being confined by night to his cell and being subjected to such superintendence during the day as will, consistently with the provisions of the Prisons Act, 1865, prevent his communication with any other prisoner.

## ARTICLE 6.

## HARD LABOUR.

<sup>3</sup> Hard labour is of two classes, consisting—

(1.) Of work at the tread-wheel, shot-drill, crank, capstan, stone-breaking, or such other like description of hard

<sup>1</sup> See 28 & 29 Vict. c. 126. As to the history of the punishment of imprisonment, see 1 Hist. Cr. Law, 483-487.

<sup>2</sup> 28 & 29 Vict. c. 126, s. 17. This has practically superseded sentences of solitary confinement.

<sup>3</sup> 28 & 29 Vict. c. 126, s. 19.

bodily labour as may be appointed by<sup>1</sup> the Secretary of State.

(2.) Of such other description of bodily labour as may be appointed by the <sup>1</sup>Secretary of State.

<sup>2</sup> Every male prisoner of sixteen years of age and upwards sentenced to hard labour must, during the whole of his sentence, be kept at hard labour of the first class for such number of hours, not more than ten or less than six (exclusive of meals), as may be prescribed by the visiting justices, subject to the following provisions:—

(1.) In cases in which the sentence is for more than three months the visiting justices may, after the expiration of the first three months of the sentence, substitute hard labour of the second for hard labour of the first class.

(2.) If the surgeon certifies that any prisoner is unfit to be kept at either class of hard labour during the whole or any part of the prescribed hours, he shall not be kept to such labour during such time.

(3.) If the sentence is for a period not exceeding fourteen days, prisoners may, in pursuance of rules made by <sup>1</sup> the Secretary of State, be kept in separate confinement at hard labour of the second class during the whole period of their sentences.

<sup>3</sup> Every male prisoner under the age of sixteen sentenced to hard labour, and every female prisoner sentenced to hard labour, must be kept at hard labour of the second class during such number of hours—not more than ten or less than six (exclusive of meals)—in each day as may be prescribed by the visiting justices, unless the surgeon certifies that he or she is unfit for hard labour.

<sup>1</sup> Formerly the justices in Sessions explained in 28 & 29 Vict. c. 126, s. 6; but see 40 & 41 Vict. c. 21, s. 5 (2).

<sup>2</sup> Ibid. Sch. I. 34 (redrawn).

<sup>3</sup> Ibid. Sch. I. 35.

## ARTICLE 7.

## EMPLOYMENT OF PRISONERS NOT SENTENCED TO HARD LABOUR.

<sup>1</sup> Provision must be made by the visiting justices for the employment of all prisoners sentenced to imprisonment without hard labour. The visiting justices must make rules as to the nature and amount of such employment; but no prisoner not sentenced to hard labour can be punished for neglect of work, excepting by such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such prisoners.

## ARTICLE 8.

## SOLITARY CONFINEMENT.

It was formerly lawful for the Court to order solitary confinement as an incident of imprisonment. This became obsolete on the passing of 28 & 29 Vict. c. 126, s. 17 (see Art. 5, *ante*), and has now been abolished by various Statute Law Revision Acts. See in particular 56 & 57 Vict. c. 54.

## ARTICLE 9.

## IMPRISONMENT AS A MISDEMEANANT OF THE FIRST DIVISION.

<sup>2</sup> Imprisonment as a misdemeanant of the first division is inflicted by confining the offender within the prison. Such a misdemeanant is not to be deemed to be a criminal prisoner.

He is permitted to maintain himself, and to procure or receive, at proper hours, food, wine, malt liquor, clothing,

<sup>1</sup> 28 & 29 Vict. c. 126, Sch. I. 38.

<sup>2</sup> 28 & 29 Vict. c. 126, s. 67 and Sch. I. 16, 31. The rules upon which this article is founded, apply in terms to debtors only; but as a misdemeanant of the first division is not to be regarded as a "criminal prisoner," it would seem to follow that he is to be treated as a debtor.

bedding or other necessities; but subject to examination and to such rules as may be approved by the visiting justices.

He may be permitted to work and follow his trade or profession, provided such employment does not interfere with the regulations of the prison.

#### ARTICLE 10.

##### DETENTION IN A REFORMATORY.

<sup>1</sup> The punishment of detention in a reformatory school is inflicted by detaining the offender in such a school, and subjecting him to the discipline thereof, in the manner provided by the statutes relating to reformatory schools.

#### ARTICLE 11.

##### SUBJECTION TO POLICE SUPERVISION.

<sup>2</sup> The punishment of subjection to police supervision consists in the subjection of every person so punished to the following obligations when at large :—

(a.) He must notify the place of his residence, and every change of his residence, within the same <sup>3</sup> police district, to the <sup>3</sup> chief officer of police of the district in which his residence is situate. <sup>4</sup> He must comply with this requirement by personally presenting himself and declaring his place of residence to the constable, or person who at the time when such notification is made is in charge of the police station or office of which notice has been given to such holder or person as the place for receiving such notification, or if no such notice has been given in charge of the chief office of such chief officer of police.

<sup>1</sup> 29 & 30 Vict. c. 117.

<sup>2</sup> 34 & 35 Vict. c. 112, s. 8 (language slightly altered).

<sup>3</sup> For definitions of "police district," and "chief officer of police," see 34 & 35 Vict. c. 112, s. 20.

<sup>4</sup> 42 & 43 Vict. c. 55, s. 2. The section contains some other very slight additions to the earlier Act.



(b.) <sup>1</sup> Whenever he is about to leave a police district he must notify such his intention to the chief officer of police of that district stating the place to which he is going, and also if required, and, so far as is practicable, his address at that place, and whenever he arrives in any police district he must forthwith notify his place of residence to the chief officer of police of such last-mentioned district. Notification is made as stated above. He is excused from making the notifications required to be made in (a) and (b) if he can prove that being on a journey he tarried no longer in the place in respect of which he is charged with failing to notify his place of residence than was reasonably necessary, or that otherwise he did his best to act in conformity with the law.

(c.) <sup>2</sup> Once in each month he must—if a male—report himself at such time, and personally, or by letter, as may be prescribed by the chief officer of police of the district, either to such chief officer himself, or to such person as he may direct.

(d.) If he fails to do any one of these things within the proper time he is liable to be imprisoned, with hard labour, for any period not exceeding one year.

## ARTICLE 12.

### PUNISHMENT OF WHIPPING.

(a.) <sup>3</sup> When no special provisions are made as to the punishment of whipping, the number of strokes and the instrument to be used are left to the discretion of the person by whom the whipping is inflicted.

(b.) <sup>4</sup> When the punishment of whipping is awarded by

<sup>1</sup> 54 & 55 Vict. c. 69, s. 8, which is enacted in substitution of a part of 34 & 35 Vict. c. 112, s. 8.

<sup>2</sup> 34 & 35 Vict. c. 112, s. 8.

<sup>3</sup> Such was the practice when whipping was inflicted as a common law punishment, and such must still be the practice where no statutory directions are given as to the mode of inflicting it. The only limitation is contained in the declaration of the Bill of Rights against "illegal and cruel punishments" (1 W. & M. sess. 2, c. 2, preamble).

<sup>4</sup> 25 Vict. c. 18, ss. 1, 2.

order of one or more justices, in exercise of their power of summary conviction, the order awarding such punishment must specify the number of strokes to be inflicted, and the instrument to be used in the infliction of them. In the case of an offender whose age does not exceed fourteen years the number of strokes inflicted must not exceed twelve, and the instrument used must be a birch rod. No such offender may be whipped more than once for the same offence.

(c.) <sup>1</sup> When the punishment of whipping is awarded by order of a Court for an indictable offence, under the Larceny Act, 1861, the Malicious Injuries to Property Act, 1861, or the Offences against the Person Act, 1861, the Court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they are to be inflicted must be specified by the Court in the sentence

(d.) <sup>2</sup> When the punishment of whipping is awarded under the Act for the further security of Her Majesty's subjects from personal violence (26 & 27 Vict. c. 44), the Court may direct that the offender—if a male—in addition to the other punishment awarded to him, be once, twice, or thrice privately whipped, subject to the following provisions:—

(i.) In the case of an offender whose age does not exceed sixteen years, the number of strokes at each such whipping must not exceed twenty-five, and the instrument used must be a birch rod.

(ii.) In the case of any other male offender, the number of strokes must not exceed fifty at each such whipping.

(iii.) In each case the Court in its sentence must specify the number of strokes to be inflicted and the instrument to be used.

(iv.) Such whipping must in no case take place after the expiration of six months from the passing of the sentence.

(v.) Every such whipping to be inflicted on a person sentenced to penal servitude must be inflicted on him before he is removed to a convict prison, with a view to undergoing his sentence of penal servitude.

<sup>1</sup> 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 100, s. 70.

<sup>2</sup> 26 & 27 Vict. c. 44, s. 1.

## ARTICLE 13.

## FINE.

<sup>1</sup>The punishment of fining consists in ordering the offender to pay to Her Majesty a sum of money expressed in the sentence. When no particular sum is limited as the maximum amount of a fine, the fine imposed must not be excessive.

## ARTICLE 14.

## PUTTING UNDER RECOGNIZANCES.

The punishment of putting under recognizances consists in ordering the offender to promise to pay to Her Majesty a sum of money expressed in the recognizance if he breaks the condition thereof, and to find other persons to make a similar promise on his behalf and as his sureties. In cases in which the Court or magistrate is authorized to require such securities, they may direct the offender to be imprisoned till he enters into the recognizance and finds the sureties.

<sup>1</sup> 1 W. & M. sess. 2, c. 2. See also Magna Charta, 'Salvo contenemento suo.'

## CHAPTER II

*<sup>1</sup> CLASSIFICATION OF CRIMES AND GENERAL PROVISIONS  
AS TO THEIR PUNISHMENT*

## ARTICLE 15.

## TREASON, FELONY, AND MISDEMEANOR.

EVERY crime is either treason, felony, or misdemeanor. Every crime which amounts to treason or felony is so denominated in the definitions of crimes hereinafter contained. All crimes not so denominated are misdemeanors.

## ARTICLE 16.

## CONSEQUENCES OF A CONVICTION OF TREASON OR FELONY.

The consequences of a conviction of treason or felony are as follows :—

(a.) <sup>2</sup> Every person convicted of treason or felony may be condemned to the payment of the whole or any part of the costs and expenses incurred in and about his prosecution and conviction.

(b.) <sup>3</sup> Immediately upon the conviction of any person for felony, the Court before which he is convicted may award any sum of money not exceeding £100, by way of satisfaction or compensation for any loss of property suffered by any person through or by means of such felony, upon the application of such person. Such sum is to be deemed to be a judgment debt due to the person entitled to receive the same from the person so convicted.

<sup>1</sup> 2 Hist. Cr. Law, ch. xx. pp. 192-6.

<sup>2</sup> 33 & 34 Vict. c. 23, s. 3. The section contains various subsidiary provisions as to costs, which do not bear on the punishment of the offence. See 1 Hist. Cr. Law, 487-9.

<sup>3</sup> 33 & 34 Vict. c. 23, s. 4.

(c.) <sup>1</sup> Every person sentenced to death, to penal servitude, or to any term of imprisonment with hard labour, or exceeding twelve months :

(i.) Becomes incapable of holding any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever in England, Wales, or Ireland.

Such incapacity continues until such person has suffered the punishment to which he has been sentenced, or such other punishment as by competent authority may be substituted for the same, or until he receives a free pardon from Her Majesty.

(ii.) If any such person holds, at the time of his conviction, any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation, or is entitled to any pension or superannuation allowance, payable by the public or out of any public fund ; such office, benefice, employment, or place, forthwith becomes vacant, and such pension or superannuation allowance, or emolument, forthwith determines and ceases to be payable, unless such person receives a free pardon from Her Majesty within two months after such conviction, or <sup>2</sup> before the filling up of such office, benefice, employment, or place, if given at a later period.

(d.) <sup>3</sup> Every person sentenced to death, or to penal servitude, or against whom sentence of death is recorded, is disabled from suing any person, from alienating or charging any property, and from making any contract.

(e.) <sup>4</sup> The custody and management of the property of any such person may be committed to an administrator.

<sup>1</sup> 33 & 34 Vict. c. 23, s. 2.

<sup>2</sup> I suppose this means if the pardon is given more than two months after the conviction.

<sup>3</sup> 33 & 34 Vict. c. 23, s. 8.

<sup>4</sup> See ss. 9-29 inclusive.

or interim curator, appointed in the manner and invested with the powers described in the statute, 33 & 34 Vict. c. 23.

(f.) <sup>1</sup> Any person subject to the provisions of clauses (d.) or (e.) ceases to be affected by them when he dies, or is made bankrupt, or has suffered any punishment to which sentence of death has been commuted, or has undergone the full term of penal servitude to which he was sentenced, or such other punishment as may have been substituted for it by lawful authority, or receives Her Majesty's pardon.

#### ARTICLE 17.

##### RECORDING SENTENCE OF DEATH.

<sup>2</sup> When any person is convicted of any felony, except murder, punishable with death, the Court may, if it thinks fit, instead of pronouncing judgment of death on such offender, order the same to be entered of record, and a record of every judgment so entered has the same effect as if the judgment had been duly pronounced and the offender relieved by the Court.

#### ARTICLE 18.

##### PUNISHMENT FOR FELONY IF NO EXPRESS PUNISHMENT PROVIDED—FELONIES UNDER THE CONSOLIDATION ACTS.

<sup>3</sup> Every person convicted of any felony for which no punishment is specially provided by the law in force for the time being, is liable upon conviction thereof to be sentenced to penal servitude for any period not exceeding seven years.

<sup>1</sup> 33 & 34 Vict. c. 23, s. 7.

<sup>2</sup> 4 Geo. 4, c. 48, ss. 1, 2 (very much abridged). By 6 & 7 Will. 4, c. 30, the same power was given to the Court in cases of murder (*R. v. Hogg*, 1849, 2 Moo. & R. 380), but this Act was repealed by 24 & 25 Vict. c. 95. As to the history of the subject see 1 Hist. Cr. Law, 472.

<sup>3</sup> 7 & 8 Geo. 4, c. 28, ss. 8, 9, modified by 1 Vict. c. 90, s. 5; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

<sup>1</sup> Every person convicted of any felony (except murder) punishable under any of the Criminal Law Consolidation Acts, 1861, may, in addition to any punishment thereby authorized, be required to enter into his own recognizances and to find sureties, both or either, for keeping the peace, and in default thereof may be imprisoned for any period not exceeding a year.

## ARTICLE 19.

### PREVIOUS CONVICTIONS.

(a) <sup>2</sup> If any person is convicted of any felony, not punishable with death on the 1st July, 1827, committed after a previous conviction for felony, he is liable, on such subsequent conviction, to be sentenced to penal servitude for life, or to be imprisoned with or without hard labour, for any term not exceeding four years.

<sup>1</sup> 24 & 25 Vict. c. 96, s. 117; *Ibid.* c. 97, s. 73; *Ibid.* c. 98, s. 51; *Ibid.* c. 99, s. 38; *Ibid.* c. 100, s. 71.

<sup>2</sup> 7 & 8 Geo. 4, c. 28, s. 11. By this Act a person convicted of larceny, after a previous conviction, was liable to transportation for life, &c. By 16 & 17 Vict. c. 99, s. 12, it was enacted that no person shall be liable to be transported by reason only of a previous conviction for larceny, but every such person may be sentenced to not more than ten or less than four years penal servitude. This enactment was repealed by 24 & 25 Vict. c. 95, after having been to some extent superseded by 20 & 21 Vict. c. 3, s. 2, which abolished transportation. By 24 & 25 Vict. c. 96, s. 7, it was enacted that a person convicted of simple larceny after a previous conviction for felony should be liable to a maximum punishment of ten years penal servitude (W.). Probably this was meant to be a substitute for 7 & 8 Geo. 4, c. 28, s. 11, so far as that section applies to convictions for simple larceny, but they are not in terms inconsistent. Theoretically, therefore, I suppose, a person might on a second conviction for larceny be sentenced to penal servitude for life, or imprisonment with hard labour for four years, and to be thrice publicly whipped. The question of the legality of such a sentence is not likely to occur in practice; see Article 347, Note 2. By 27 & 28 Vict. c. 47, s. 2, a person sentenced to penal servitude, after a previous conviction for felony, could not be sentenced to less than seven years. But this was repealed by 42 & 43 Vict. c. 54, s. 1. Practically, therefore, the net result of all this legislation is as stated in the text. The "simple" larceny of the 24 & 25 Vict. c. 96, obviously means larceny not subjected to any special punishment by reason of any of the aggravating circumstances provided for in that Act. Hale uses the expression "simple" larceny in contradistinction to larceny with violence, which is robbery: 1 Hale, P. C. 503. As to what constitutes a previous conviction see *R. v. Blahy*, 1894, 2 Q. B. 170, *post*, p. 359.

Provided that a person convicted of simple larceny after a previous conviction for felony, cannot be sentenced to a longer term of penal servitude than ten years.

(b) <sup>1</sup> When any person is convicted of any felony, or of any of the misdemeanors, mentioned in the note hereto, <sup>2</sup> and a previous conviction of any felony, or any such misdemeanor is proved against him, the Court having cognizance of the indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or such less period as the Court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes.

#### ARTICLE 20.

##### SPECIAL OFFENCES IN THE CASE OF PERSONS TWICE CONVICTED.

<sup>3</sup> Every person convicted on indictment of any felony or any such misdemeanor as is mentioned in the note hereto, <sup>4</sup> and having had a previous conviction of any such offence proved against him, is liable to a punishment of a year's imprisonment and hard labour, if at any time within seven years immediately after the expiration of the sentence passed upon him for the last of such offences,

(a.) on his being charged by a constable with getting his livelihood by dishonest means, and being brought before a Court of summary jurisdiction, it appears to such Court that there are reasonable grounds for believing that he is getting his livelihood by dishonest means; or if,

(b.) on being charged with any offence punishable on in-

<sup>1</sup> 34 & 35 Vict. c. 112, s. 8, and s. 20, which defines the word "crime" employed in s. 8.

<sup>2</sup> Viz., 1. Uttering false or counterfeit coin. 2. Possessing counterfeit gold or silver coin. 3. Obtaining goods or money by false pretences. 4. Conspiracy to defraud. 5. Being found by night armed with intent to break into a dwelling-house. 6. Being found by night, without lawful excuse, with housebreaking implements. 7. Being found by night with face blackened, &c., with intent to commit felony. 8. Being found by night in any dwelling-house or building with intent to commit felony.

<sup>3</sup> 34 & 35 Vict. c. 112, ss. 7, 20.

<sup>4</sup> See Note 2, *supra*.



dictment or summary-conviction, and on being required by the Court of summary jurisdiction to give his name and address, he refuses to do so, or gives a false name or false address; or if

(c.) he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction; or if

(d.) he is found in or upon any dwelling-house, or any building, yard, or premises being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure-ground, or nursery-ground, or in any building, or erection in any garden, orchard, pleasure-ground, or nursery-ground, without being able to account to the satisfaction of the Court before whom he is brought for his being found on such premises.

## ARTICLE 21.

### PUNISHMENT OF PERSONS UNDER SIXTEEN YEARS OF AGE.

<sup>1</sup> Whenever any offender who, in the judgment of the Court, justices, or magistrate before whom he is charged is under the age of sixteen years, is convicted, on indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the term of ten days or a longer term, the Court, justices, or magistrate may also sentence him to be sent at the expiration of his period of imprisonment to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years.

A youthful offender under ten is not to be so directed to be sent to a reformatory school unless he has been previously

<sup>1</sup> 29 & 30 Vict. c. 117, s. 14

charged with some crime or offence punishable with penal servitude or imprisonment, or is sentenced by a judge of assize or court of general quarter or quarter sessions.

## ARTICLE 22.

### PROBATION OF FIRST OFFENDERS.

<sup>1</sup> In any case in which a person is convicted of larceny or false pretences, or any other offence punishable with not more than two years imprisonment, before any Court, and no previous conviction is proved against him, if it appears to the Court before whom he is so convicted that, regard being had to the youth, character and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the Court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the Court may direct, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour. The Court may direct that the offender do pay the costs of the prosecution, or a portion thereof within a given time and by given instalments.

The original Court or any Court of summary jurisdiction, if satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, may issue a warrant for his apprehension; on which he may be remanded till judgment.

The Court before directing the release of an offender under this Act must be satisfied that he or his surety has a fixed place of abode or regular occupation in the place for which the Court acts, or in which the offender is likely to live during the period named for the observance of the conditions.

<sup>1</sup> 50 & 51 Vict. c. 25. I do not see how this Act conferred on the Court any powers which it did not already possess, except that on a breach of a condition of the recognizance the offender may be arrested and remanded or held to bail.

## ARTICLE 23.

## PUNISHMENT OF MISDEMEANORS.

<sup>1</sup> Every person convicted of a misdemeanor for which no special punishment is provided by law is liable to fine and imprisonment without hard labour (both or either), and to be put under recognizances to keep the peace and be of good behaviour at the discretion of the Court.

<sup>2</sup> Whenever any person convicted of misdemeanor is sentenced to imprisonment without hard labour, the Court or judge before whom such person has been tried may order, if such Court or judge thinks fit, that such person shall be treated as a misdemeanant of the first division.

<sup>3</sup> Any person convicted of any indictable misdemeanor punishable under any one of the Criminal Law Consolidation Acts, 1861, may, in addition to or in lieu of the punishment by such Act provided, be fined and required to enter into his own recognizances, and to find sureties (both or either) for keeping the peace and being of good behaviour, but no person may be imprisoned for more than one year for not finding such sureties.

## ARTICLE 24.

## CUMULATIVE PUNISHMENTS.

<sup>4</sup> Wherever sentence is passed for felony on a person already imprisoned under sentence for another crime, the Court may award imprisonment for the subsequent offence

<sup>1</sup> 1 Russ. Cr. 92; *R. v. Dunn*, 1848, 12 Q. B. 1041.

<sup>2</sup> 28 & 29 Vict. c. 126, s. 67.

<sup>3</sup> 24 & 25 Vict. c. 96, s. 117; *Ibid.* c. 97, s. 73; *Ibid.* c. 98, s. 51; *Ibid.* c. 99, s. 38; *Ibid.* c. 100, s. 71. The provisions of these Acts will be found in Parts V. and VI. of the Digest.

<sup>4</sup> 7 & 8 Geo. 4, c. 28, s. 10. When felonies as a rule were capital, there could be no cumulative sentences in regard of them, whether they were charged in different indictments or in different counts of the same indictment. If they were charged in separate indictments, the prisoner having been convicted and sentenced on one, might plead "autrefois attain" to any subsequent charge. There was no use in passing two sentences of death upon him (see Chitty's Criminal Law, 463). If two felonies were

to commence at the expiration of the imprisonment to which such person was previously sentenced. When such a person is already under sentence either of imprisonment or penal servitude, the Court, if empowered to pass sentence of penal servitude, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or penal servitude to which such person was previously sentenced, although the aggregate term of imprisonment or penal servitude respectively may exceed the term for which either of those punishments could be otherwise awarded.

<sup>1</sup> When an offender is convicted of more misdemeanors than one, he may be sentenced to a separate punishment for each offence, and the Court may, if it thinks fit, direct that the one punishment shall not begin until the other has been undergone.

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charged in one indictment, the prosecutor was put to his election—as indeed he still is. When death ceased to be the punishment for felonies as such (7 & 8 Geo. 4, c. 28, s. 7) it was necessary to make provision for the punishment of persons already under sentence. Hence the provision in the text. Cumulative punishment in cases of misdemeanor depends on the common law principles.

<sup>1</sup> Opinion of the judges in *Wilken's Case*, 1770, 19 St. Tr. 1132-3, and see *R. v. Castro*, 1881; 6 App. Ca. 229, 5 Q. B. D. 490. In the case of *Rhenwick Williams*, 1790, 1 Leach, 529, cumulative sentences, amounting in all to six years' imprisonment, were passed upon three indictments for similar offences.

## CHAPTER III

<sup>1</sup>GENERAL EXCEPTIONS

## ARTICLE 25.

## DEFINITIONS SUBJECT TO EXCEPTIONS.

EVERY definition hereinafter contained of any crime is subject to the following general exceptions, except in the cases in which the contrary is expressed:—

## ARTICLE 26.

## CHILDREN UNDER SEVEN.

<sup>2</sup> No act done by any person under seven years of age is a crime.

## ARTICLE 27.

## CHILDREN BETWEEN SEVEN AND FOURTEEN.

<sup>3</sup> No act done by any person over seven and under fourteen years of age is a crime, unless it be shewn affirmatively that such person had sufficient capacity to know that the act was wrong.

## ARTICLE 28.

## INSANITY.

<sup>4</sup> No act is a crime if the person who does it is at the time when it is done prevented [<sup>5</sup> either by defective mental power or] by any disease affecting his mind

(a.) from knowing the nature and quality of his act; or,

<sup>1</sup> See 2 Hist. Cr. Law, chaps. xviii., xix., pp. 94-186. See Draft Code, Pt. III. ss. 19-70.

<sup>2</sup> 1 Hale, P. C. 27-8; 1 Russ. Cr. 109; Draft Code, s. 20.

<sup>3</sup> *R. v. Owen*, 1830, 4 C. & P. 236; and see cases collected 1 Russ. Cr. 109-112; Draft Code, s. 20.

<sup>4</sup> The whole subject is discussed at full length in 2 Hist. Cr. Law, chap. xix., pp. 124-186. Cf. Draft Code, s. 22.

<sup>5</sup> The parts of the article bracketed are doubtful.

- (b.) from knowing that the act is <sup>1</sup> wrong; [<sup>2</sup> or,  
 (c.) from controlling his own conduct, unless the absence of the power of control has been produced by his own default.]

But an act may be a crime although the mind of a person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act.

### *Illustrations.*

(1.) A kills B under an insane delusion that he is breaking a jar. A's act is not a crime.

(2.) A kills B knowing that he is killing B, and knowing that it is wrong to kill B; but his mind is so imbecile that he is unable to form such an estimate of the nature and consequences of his act as a person of ordinary intelligence would form. A's act is not a crime if the words within the first set of brackets are law. If they are not it is.

(3.) A kills B knowing that he is killing B, and knowing that it is illegal to kill B; but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to produce that result by those means. A's act is a crime if the word "wrong" has the second of the two meanings ascribed to it in the note.<sup>3</sup> It is not a crime if the word "wrong" has the first of those two meanings.

(4.) A suddenly stabs B under the influence of an impulse caused by disease, and of such a nature that nothing short of the mechanical restraint of A's hand would have prevented the stab. A's act is a crime if (c.) is not law. It is not a crime if (c.) is law.

(5.) A suddenly stabs B under the influence of an impulse caused by disease, and of such a nature that a strong motive, as, for instance, the fear of his own immediate death, would have

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<sup>1</sup> The word "wrong" is variously interpreted as meaning:—1. Morally wrong. 2. Illegal. The practical effect of these differences is shown in Illustrations (4), (5), and (6).

<sup>2</sup> The parts of the article bracketed are doubtful.

<sup>3</sup> In extreme strictness this ought to be, "If the word 'wrong' has the first of these two meanings the criminality of the act would depend upon the question whether the jury thought that God's command under the circumstances altered the moral character of the act."

prevented the act. A's act is a crime whether (c.) is or is not law.

(6.) A permits his mind to dwell upon and desire B's death; under the influence of mental disease this desire becomes uncontrollable, and A kills B. A's act is a crime whether (c.) is or is not law.

(7.) A, a patient in a lunatic asylum, who is under a delusion that his finger is made of glass, poisons one of his attendants out of revenge for his treatment, and it is proved that the delusion had no connection whatever with the act. A's act is a crime.

#### ARTICLE 29.

##### PRESUMPTION OF SANITY.

<sup>1</sup> Every person is presumed to be sane, and to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person; but the jury may have regard to his appearance and behaviour in court.

#### ARTICLE 30.

##### DRUNKENNESS.

<sup>2</sup> Voluntary drunkenness is not regarded as a disease affecting the mind within the meaning of Article 28; but involuntary drunkenness, and diseases caused by voluntary drunkenness, fall, so far as they affect the mind, within that Article.

If the existence of a specific intention is essential to the commission of a crime, the fact that the offender was drunk when he did the act which, if coupled with that intention, would constitute such crime, should be taken into account by the jury in deciding whether he had that intention.

#### *Illustrations.*

(1.) <sup>2</sup> A, in a fit of voluntary drunkenness, shoots B dead, not knowing what he does. A's act is a crime.

<sup>1</sup> *R. v. Oxford*, 1840, 9 C. & P. 525; *R. v. Stokes*, 1848, 3 C. & K. 185; Draft Code, s. 22.

<sup>2</sup> 1 Hale, P. C. 32-3. Illustrations (1), (2), and (3) are founded on this passage.

(2.)<sup>1</sup> A, under the influence of a drug fraudulently administered to him, shoots B dead, not knowing what he does. A's act is not a crime.

(3.)<sup>1</sup> A, in a fit of delirium tremens caused by voluntary drunkenness, kills B, mistaking him for a wild animal, attacking A. A's act is not a crime.

(4.)<sup>2</sup> A is indicted for inflicting on B an injury dangerous to life with intent to murder B. The fact that A was drunk when he inflicted the injury ought to be taken into account by the jury in deciding whether A intended to murder B or not.

## ARTICLE 31.

### MARRIED WOMEN.

<sup>2</sup> If a married woman commits a theft or receives stolen goods knowing them to be stolen in the presence of her husband she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case shew that in point of fact she was not coerced.

It is uncertain how far this principle applies to felonies in general.

It does not apply to high treason or murder.

It probably does not apply to robbery.

It applies to uttering counterfeit coin.

It seems to apply to misdemeanors generally.

<sup>1</sup> 1 Hale, P. C. 32-3. Illustrations (1), (2), and (3) are founded on this passage.

<sup>2</sup> *R. v. Cruse*, 1838, 8 C. & P. at p. 546.

<sup>2</sup> 1 Hale, P. C. 45; 1 Hawk. P. C. 4; *R. v. Hughes*, 1813, 1 Russ. Cr. 146; 2 Lew. 229; *R. v. Atkinson*, 1814, 1 Russ. Cr. 141; *R. v. Smith*, 1858, D. & B. 553; *R. v. Archer*, 1826, 1 Moo. 143; *R. v. Brooks*, 1853, D. & P. 184; *R. v. Wardroper*, 1860, Bell C. C. 249. As to felonies in general, see 1 Russ. Cr. 140. As to high treason, murder, and robbery, see 1 Hale, P. C. 45; Dalton, c. 157; 1 Hawk. P. C. 4; *R. v. Buncombe*, 1845, 1 Cox, C. C. 183; but as to robbery, see Mr. Carrington's argument in *R. v. Cruse*, 1838, 8 C. & P. at p. 555. Mr. Russell Gurney, Recorder of London, held that the doctrine applied to robbery, *R. v. Torpey*, 1871; 12 Cox. C. C. 45, and I followed this decision in *R. v. Dykes*, 1885; 15 Cox, C. C. 771; cf. Draft Code, s. 23. As to misdemeanors in general, see *R. v. Price*, 1837, 8 C. & P. 19, and note p. 20; and 1 Russ. Cr. p. 145, note (b), ub. sup.; see too *R. v. Torpey*, ub. sup. As to uttering, see *R. v. Price*, 8 ub. sup. As to false swearing, *R. v. Dicks*, 1781, 1 Russ. Cr. 141. As to the general doctrine, see Note I. The principle is not affected by the Married Women's Property Act, 45 & 46 Vict.c. 75.



## ARTICLE 32.

## COMPULSION.

<sup>1</sup> An act which if done willingly would make a person a principal in the second degree and 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 in which it is being done, the person who does it is compelled to do it by threats on the part of the <sup>2</sup> offenders instantly to kill him or to do him grievous bodily harm if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence.

*Illustrations.*

(1.) <sup>3</sup> A, B, and C, engaged in a rebellion, force D to join the rebel army and to do duty as a soldier by threats of death continuing during the whole of his services. D's act is not a crime.

(2.) <sup>4</sup> A mob employed in breaking threshing machines force several persons to go with them, and force each person to give each threshing machine a blow with a sledge-hammer; A, one of the persons so forced, runs away as soon as he can. A's act is not a crime.

## ARTICLE 33.

## NECESSITY.

An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in order to avoid consequences which could not

<sup>1</sup> Draft Code, s. 23.

<sup>2</sup> 1 Hale, P. C. 43-4, 49, and see Illustrations.

<sup>3</sup> *R. v. M'Growther*, 1746, 18 St. Tr. 391.

<sup>4</sup> *R. v. Crutchley*, 1831, 5 C. & P. 133. The report says nothing as to the nature of the force. Probably it was by threats of personal violence. It is singular that the law upon this subject should be so very meagre. The subject is treated at some length in 1 Hale, cc. vii., viii., and ix. pp. 43-57, but in a very unsatisfactory way. It would seem that in all common cases the fact that a crime is done unwillingly and in order to avoid injury, ought to affect rather the punishment than the guilt.

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.

<sup>1</sup> The extent of this principle is unascertained. It does not extend to the case of shipwrecked sailors who kill a boy, one of their number, in order to eat his body.

<sup>1</sup> *R. v. Dudley & Stephens*, 1884, 14 Q. B. D. 273. In this case the Court commented on the passage in the text, and Lord Coleridge in delivering judgment said (p. 286), "We have the best authority for saying that" my "language was not meant to cover the case then under consideration." I authorized this statement, and on consideration I feel that my language was not vague enough—vague as it was—to represent fully the vagueness of the law. I have slightly altered it, so as to make it more vague. I should have agreed with the rest of the Court had I been a member of it in *R. v. Dudley*, though not in all the reasoning of the judgment. I should have based my judgment on the fact that the special verdict found only that if the boy had not been killed and eaten the survivors "would *probably* not have survived"; and on the principle that in this particular class of cases an error on the side of severity is an error on the safe side. Great danger would be involved in admitting a principle which might be easily abused. I could not go so far as to say, as the judgment delivered by Lord Coleridge says, that any case can impose on a man "a duty" (if the word means a legal duty) "not to live but to die." Nor do I agree with what is said on p. 287, which appears to me to base a legal conclusion upon a questionable moral and theological foundation, and to be rhetorically expressed. "It would be a very easy and cheap display of commonplace learning" (it is said with obvious truth) to "quote from" four specified "Greek and Latin authors passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics. It is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow." Whatever estimate may be formed of self-sacrifice, it seems to me to be a duty of which the law can take no notice, if indeed it is a duty at all, which is not a legal question, / I can discover no principle in the judgment in *R. v. Dudley*. It depends entirely on its peculiar facts. The boy was deliberately put to death with a knife in order that his body might be used for food. This is quite different from any of the following cases—(1) The two men on a plank. Here the successful man does no direct bodily harm to the other. He leaves him the chance of getting another plank. (2) Several men are roped together on the Alps. They slip, and the weight of the whole party is thrown on one, who cuts the rope in order to save himself. Here the question is not whether some shall die, but whether one shall live. (3) The choice of evils. The captain of a ship runs down a boat, as the only means of avoiding shipwreck. A surgeon kills a child in the act of birth, as the only way to save the mother. A boat being too full of passengers to float, some are thrown overboard. Such cases are best decided as they arise. See on

*Illustrations.*

(1.) <sup>1</sup> A, the Governor of Madras, acts towards his council in an arbitrary and illegal manner. The council depose and put him under arrest, and assume the powers of government themselves. This is not an offence if the acts done by the council were the only means by which irreparable mischief to the establishment at Madras could be avoided.

(2.) <sup>2</sup> A and B, swimming in the sea after a shipwreck, get hold of a plank not large enough to support both; A pushes off B, who is drowned. This is not a crime.

## ARTICLE 34.

## IGNORANCE OF LAW.

<sup>3</sup> The fact that an offender is ignorant of the law is in no case an excuse for his offence, but it may be relevant to the question whether an act which would be a crime if accompanied by a certain intention or other state of mind, and not otherwise, was in fact accompanied by that intention or state of mind or not.

<sup>4</sup> In interpreting a statute which makes unlawful a continuous act which till the statute passed was not unlawful, it is to be presumed that the legislature intended to allow a reasonable time for the discontinuance of the act so made unlawful, and the ignorance of the agent that the statute

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the whole subject my History of Criminal Law, ii. 108-15. In the United States (*Commonwealth v. Holmes*, 1 Wall. Jr. 1, quoted at length in Wharton on Criminal Law, s. 511 (n.)) shipwrecked sailors and passengers escaping in a boat which could not hold all, the sailors threw some of the passengers overboard. The Court held that the passengers ought to have been preferred to the sailors, unless the presence of all the sailors was required for the common safety, but "under any circumstances it was held the proper method of determining who was to be the first victim out of the particular class was by ballot." I doubt whether an English Court would take this view. It would be odd to say that the two men on the raft were bound to toss up as to which should go.

<sup>1</sup> *R. v. Stratton & Others*, 1780, 21 St. Tr. 1045; see Lord Mansfield's judgment, pp. 1222-6.

<sup>2</sup> Bacon's Maxims, No. 5.

<sup>3</sup> Draft Code, 24.

<sup>4</sup> See Illustration (3).

had been passed, is a fact relevant to the question whether his discontinuance of it was within such reasonable time or not.

### *Illustrations.*

(1.)<sup>1</sup> A, a foreigner unacquainted with the law of England, kills B in a duel in England. A's act is murder although he may have supposed it to be lawful.

(2.)<sup>2</sup> A, a poacher, sets wires for game, which are taken by B, a gamekeeper, under the authority of an Act of Parliament (5 Anne, c. 14, s. 4), of the existence of which A is ignorant. A forcibly takes the wires from B, and is tried for robbery. His ignorance of the Act is relevant to the question whether he took the wires under a claim of right.

(3.)<sup>3</sup> A is in command of a ship on a voyage, which during its continuance is rendered unlawful by the passing of the kidnapping Act, 1872 (35 & 36 Vict. c. 19), but A was not aware that the Act had been passed till a considerable time afterwards, and he continued his voyage in ignorance of the Act. The fact of A's ignorance is relevant to the question whether the particular voyage in which A was engaged was one to which the Act was intended by the legislature to apply.

## ARTICLE 35.

### IGNORANCE OF FACT.

An alleged offender is in general deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.

When an offence is so defined by statute that the act of the offender is not a crime unless some independent fact co-exists with it, the Court must decide whether it was

<sup>1</sup> *Ex parte Barronet*, 1852, 1 E. & B. 1.

<sup>2</sup> *R. v. Hale*, 1828, 3 C. & P. 409. In *R. v. Reed*, 1842, Car. & Mar. 306, Coleridge, J., said: "Ignorance of the law cannot excuse any person, but at the same time when the question is with what intent a person takes, we cannot help looking into their state of mind, as if a person takes what he believes to be his own it is impossible to say he is guilty of felony."

<sup>3</sup> *Burns v. Nowell*, 1880, 5 Q. B. D. 444.

the intention of the legislature that the person doing the forbidden act should do it at his peril, or that his ignorance as to the existence of the independent fact, or his mistaken belief in good faith and on reasonable grounds that it did not exist, should excuse him.

Voluntary or negligent ignorance of any such fact is no excuse for any such offence.

In cases of the infliction of bodily harm or restraint for the purpose of arresting or retaking a person honestly and reasonably but erroneously supposed to be liable to be arrested or retaken, the person inflicting such harm or restraint is not justified by such belief unless the state of facts in the existence of which he erroneously believed would, if it had really existed, have made it his legal duty to act as he did, or would have been such as to make his conduct an act of defence of his person or habitation.

#### *Illustrations.*

(1.) <sup>1</sup> A being deserted by her husband is informed, and in good faith and on reasonable grounds believes, that he is dead. She marries again within seven years after the desertion. She is not guilty of bigamy.

(2.) <sup>2</sup> A, under an insane delusion, kills B. If the delusion is such that its truth would justify him in doing so, his act is not a crime. The delusion would also be evidence that A did not know he was doing wrong even if its truth would not justify the act.

(3.) <sup>3</sup> A, making a thrust with a sword at a place where, upon reasonable grounds, he supposes a burglar to be, kills a person who is not a burglar. A is in the same situation as if he had killed a burglar.

(4.) <sup>4</sup> A abducts B, a girl under fifteen years of age, from her father's house, believing in good faith and on reasonable grounds that B is eighteen years of age. A commits the offence of abduction, although if B had been eighteen years of age she would not have been within the statute.

<sup>1</sup> *R. v. Tolson*, 1889, 23 Q. B. D. 168.

<sup>2</sup> *MacNaughten's Case*, 1843, 10 C. & F. 200.

<sup>3</sup> *Lever's Case*, 1640, 1 Hale, 474.

<sup>4</sup> *R. v. Prince*, 1875, 2 C. C. R. 154.

(5.)<sup>1</sup> A, in the last illustration, abducts B, in ignorance of her age, and without making any inquiry about it. A commits the offence of abduction.

(6.)<sup>2</sup> A received into her house, not being a registered lunatic asylum, several persons to be medically treated, being persons who were in fact lunatics though A honestly believed on reasonable grounds that they were not lunatics but sufferers under other disorders. Notwithstanding such belief A committed an offence against 8 & 9 Vict. c. 100, s. 44.

(7.)<sup>3</sup> A, a constable, honestly and on reasonable grounds, but wrongly, believing B to have committed murder and not being able otherwise to arrest him shoots at him and kills him. A is justified. If A had been a private person his act would have been manslaughter at least.

(8.) (SUBMITTED.) B, pretending by way of a practical joke to be a robber, presents an empty pistol at A and demands his money. A, believing that B really is a robber, kills B. A is justified.

(9.) (SUBMITTED.) A breaks into B's house in Dundalk, at 5.45 A.M., local mean time, supposing that it is past six, but forgetting that A's watch is set to London time. A commits burglary.

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<sup>1</sup> *R. v. Prince*, Ibid. See judgment of Brett, J., p. 169, and see p. 174. *R. v. Tolson*, sup. seems to be distinguishable from *R. v. Prince* only on the ground that abducting a girl is morally wrong and marrying a woman is not.

<sup>2</sup> *R. v. Bishop*, 1880, 5 Q. B. D. 259.

<sup>3</sup> 2 Hale, P. C. 82, 85, see also *Thompson v. Farrer*, 1882, 9 Q. B. D. 372.

## CHAPTER IV.

<sup>1</sup> PARTIES TO THE COMMISSION OF CRIMES—PRINCIPAL AND ACCESSORY.

## ARTICLE 36.

## PRINCIPALS IN FIRST DEGREE.

<sup>2</sup> WHOEVER actually commits, or takes part in the actual commission of a crime, is a principal in the first degree, whether he is on the spot when the crime is committed or not; and if a crime is committed partly in one place and partly in another, every one who commits any part of it at any place is a principal in the first degree.

*Illustrations.*

(1.) <sup>3</sup> A lays poison for B, which B takes in A's absence. A is a principal in the first degree.

(2.) <sup>4</sup> A steals goods from a ship, and lays them in a place at some distance, whence B, by previous concert, carries them away for sale. A and B are both principals in the first degree.

## ARTICLE 37.

## INNOCENT AGENT.

Whoever commits a crime by an innocent agent is a principal in the first degree.

<sup>1</sup> 2 Hist. Cr. Law, ch. xxii. pp. 221-241; Draft Code, ss. 71-74.

<sup>2</sup> Foster, 347-50, gives the history of the distinction between principals in the first and second degree. See also Hale, ch. xxii. 1 P. C. 233; Ibid. ch. xxxiv. 435, and ch. Ibid. 612.

<sup>3</sup> Foster, 349, says simply that A is "a principal" without mentioning the degree, but as no one has "aided" or "abetted," it would seem that he must be a principal in the first degree.

<sup>4</sup> *R. v. Kelly*, 1847, 2 C. & K. 379.

*Illustrations.*

(1) <sup>1</sup> A tells B, a child under seven, to bring him money belonging to C. B does so. A is a principal in the first degree.

(2.) <sup>2</sup> A, knowing a note to be forged, asks B, who does not know it to be forged, to get it changed for him. B does so, and gives A the money. A is a principal in the first degree.

(3.) <sup>3</sup> B, in the last illustration, knows that the note is forged. A is an accessory before the fact.

## ARTICLE 38.

## PRINCIPALS IN THE SECOND DEGREE.

<sup>4</sup> Whoever aids or abets the actual commission of a crime, either at the place where it is committed, or elsewhere, is a principal in the second degree in that crime.

<sup>5</sup> Mere presence on the occasion when a crime is committed does not make a person a principal in the second degree, even if he neither makes any effort to prevent the offence or to cause the offender to be apprehended, but such presence may be evidence for the consideration of the jury of an active participation in the offence.

When the existence of a particular intent forms part of the definition of an offence, a person charged with aiding or abetting the commission of the offence must be shewn to have known of the existence of the intent on the part of the person so aided.

*Illustrations.*

(1.) <sup>6</sup> A, B, and C go out with a common design to rob. A commits the robbery; B stands by ready to help; C is stationed

<sup>1</sup> Deduced from *R. v. Manley*, 1844, 1 Cox, C. C. 104.

<sup>2</sup> *R. v. Palmer*, 1804, 1 Russ. Cr. 160, 1 New Rep. 96.

<sup>3</sup> *R. v. Soares*, 1802, R. & R. 25.

<sup>4</sup> See cases in 1 Russ. Cr. 156-157. *R. v. Kelly*, 1820, R. & R. 421, perhaps marks the limit between a principal in the second degree and an accessory. In that case B stole horses and brought them to A, who was waiting half a mile off; A and B then rode away on them. It was held that A was an accessory before the fact. The distinction is now of no importance.

<sup>5</sup> *R. v. Coney and Others*, 1882, 8 Q. B. D. 534. See especially the judgment of Cave, J., 536-43.

<sup>6</sup> Foster, 350.



some way off to give the alarm if any one comes. A is a principal in the first degree, B and C are principals in the second degree.

(2.)<sup>1</sup> B is indicted for inflicting on C an injury dangerous to life with intent to murder. A is indicted for aiding and abetting B. A must be shewn to have known that it was B's intent to murder C, and it is not enough to shew that A helped B in what he did.

### ARTICLE 39.

#### COMMON PURPOSE.

<sup>2</sup> When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose.

If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories unless they actually instigate or assist in its commission.

#### *Illustrations.*

(1.)<sup>3</sup> A constable and his assistants go to arrest A at a house in which are many persons. B, C, D, and others come from the house, drive the constable and his assistants off, and one of the assistants is killed, either by B, C, D, or one of their party. Each of their party is equally responsible for the blow, whether he actually struck it or not.

(2.)<sup>4</sup> Three soldiers go to rob an orchard. Two get into a fruit tree. The third stands at the door with a drawn sword, and stabs the owner, who tries to arrest him. The men in the tree are neither principals nor accessories, unless all three came with a common resolution to overcome all opposition.

(3.)<sup>5</sup> Smugglers fight with revenue officers. In the fight a smuggler fires a gun which kills another smuggler. The gun

<sup>1</sup> *R. v. CRUNE*, 1838, 8 C. & P. 541.

<sup>2</sup> See cases referred to in the Illustrations. See also *Fost.* 350-2; 1 *Russ. Cr.* 757-8, 162, 764, 765-6.

<sup>3</sup> *Sissinghurst House Case*, 1672, 1st Resolution; 1 *Hale*, P. C. 462.

<sup>4</sup> *Foster*, 353.

<sup>5</sup> *Plummer's Case*, 1701, *Foster* 352. More fully reported in *Kelynge* 155 (edition of 1873). *Holt*, in his judgment fully explains the whole law.

was not fired at any of the revenue officers. The man who fired the gun is responsible for the act, but not his companions.

(4.)<sup>1</sup> Two parties of persons fight in the street about the removal of goods to avoid a distress. One of the persons engaged kills a looker-on, totally unconcerned in the affray. The other persons present are not responsible for his crime.

(5.)<sup>2</sup> Two persons go out to commit theft. One, unknown to the other, puts a pistol in his pocket, and shoots a man with it. The other person is not responsible for the shot.

(6.)<sup>3</sup> Three persons go out to practise with a rifle and manage their practice so carelessly that a person is killed by a shot fired by one of them : all are guilty of manslaughter.

## ARTICLE 40.

### ACCESSORIES BEFORE THE FACT.

<sup>4</sup> An accessory before the fact is one who <sup>5</sup> directly or indirectly counsels, procures, or commands any person to commit any felony or piracy <sup>6</sup> which is committed in consequence of such counselling, procuring, or commandment.

Every one who would have been an accessory before the fact if the crime committed, procured, or commanded had been a felony, is a principal if that crime is misdemeanor.

Knowledge that a person intends to commit a crime, and conduct connected with and influenced by such knowledge, is not enough to make a person who possesses such knowledge, or so conducts himself, an accessory before the fact to any such crime, unless he does something to encourage its commission actively.

<sup>1</sup> *R. v. Hodgson and Others*, 1730, 1 Leach, 6.

<sup>2</sup> *Per Park, J., Duffey's Case*, 1830, 1 Lew. 194.

<sup>3</sup> *R. v. Salmon*, 1880, 6 Q. B. D. 79.

<sup>4</sup> 1 Hale, P. C. 615 ; 2 Hawk. P. C. 442 ; 1 Russ. Cr. 165-171. As to principals and accessories in forgery, see 2 Russ. Cr. 689-694. In the following Articles I use the word "instigate" as equivalent to "counsel, procure, or command." Draft Code, s. 71.

<sup>5</sup> *R. v. Cooper*, 1833, 5 C. & P. 535.

<sup>6</sup> 11 & 12 Will. c. 7, s. 9.

*Illustrations.*

(1.)<sup>1</sup> A supplies B with corrosive sublimate, knowing that B means to use it to procure her own abortion, but being unwilling that she should take the poison, and giving it to her because she threatened to kill herself if he did not. B does so use it and dies. Even if B is guilty of murdering herself, A is not an accessory before the fact to such murder.

(2.)<sup>2</sup> B and C agree to fight a prize fight for a sum of money; A, knowing of their intention, acts as stakeholder. B and C fight, and C is killed. A is not present at the fight and has no concern with it except being stakeholder. Even if in such a case there can be an accessory before the fact, A is not accessory before the fact to the manslaughter of C.

## ARTICLE 41.

WHERE CRIME SUGGESTED IS COMMITTED IN A DIFFERENT WAY.

<sup>3</sup> When a person instigates another to commit a crime, and the person so instigated commits the crime which he was instigated to commit, but in a different way from that in which he was instigated to commit it, the instigator is an accessory before the fact to the crime.

*Illustration.*

A advises B to murder C by shooting, B murders C by stabbing, A is accessory before the fact to the murder of C.

## ARTICLE 42.

WHERE CRIME COMMITTED IS PROBABLE CONSEQUENCE OF CRIME SUGGESTED.

<sup>4</sup> If a person instigates another to commit a crime, and the person so instigated commits a crime different from the one

<sup>1</sup> *R. v. Fretwell*, 1862, L. & C. 161. Contrast with this *R. v. Russell*, 1832, 1 Moody, 356.

<sup>2</sup> *R. v. Taylor*, 1875, 2 C. C. R. 147.

<sup>3</sup> Foster, 369-70; Draft Code, s. 72.

<sup>4</sup> Ibid. 370; Ibid. s. 72.

which he was instigated to commit, but likely to be caused by such instigation, the instigator is an accessory before the fact.

### *Illustrations.*

(1.) <sup>1</sup> A describes C to B, and instigates B to murder C. B murders D, whom he believes to be C, because D corresponds with A's description of C. A is accessory before the fact to the murder of D.

(2.) <sup>1</sup> A instigates B to rob C, B does so, C resists and B kills C. A is accessory before the fact to the murder of C.

(3.) <sup>2</sup> A advises B to murder C (B's wife) by poison. B gives C a poisoned apple, which C gives to D (B's child). B permits D to eat the apple, which it does, and dies of it. A is not accessory to the murder of D.

## ARTICLE 43.

### WHERE INSTIGATION IS COUNTERMANDED.

<sup>3</sup> If an accessory before the fact countermands the execution of the crime before it is executed, he ceases to be an accessory before the fact, if the principal had notice of the countermand before the execution of the crime, but not otherwise.

### *Illustration.*

<sup>3</sup> A advises B to murder C, and afterwards, by letter, withdraws his advice. B does murder C. A is not an accessory before the fact if his letter reaches B before he murders C; but he is if it arrives afterwards.

<sup>1</sup> Foster, 370.

<sup>2</sup> *Saunders' Case*, 1576, Plowd. 475; 1 Hale, P. C. 431. This decision is of higher authority than Foster's *dicta*; and marks the limit to which they extend, if it does not throw some doubt on them.

<sup>3</sup> 1 Hale, P. C. 618. In the case supposed the instigator would probably have committed the offence of inciting to the commission of a crime (Art. 48), though he would not be an accessory before the fact. It may also be doubted whether this doctrine would extend to the case of a man who did his best to countermand his advice, but failed, as by an accident in the course of post, &c.

## ARTICLE 44.

## INSTIGATION TO COMMIT A CRIME DIFFERENT FROM THE ONE COMMITTED.

<sup>1</sup> When a person instigates another to commit a crime, and the person so instigated commits a different crime, the instigator is not accessory before the fact to the crime so committed.

*Illustration.*

<sup>2</sup> A instigates B to murder C, B murders D, A is not accessory before the fact to the murder of D.

## ARTICLE 45.

## ACCESSORIES AND PRINCIPALS IN SECOND DEGREE TREATED AS PRINCIPALS IN FIRST DEGREE.

<sup>3</sup> Accessories before the fact, principals in the second degree, and principals in the first degree in any felony, are each considered as having committed that felony, and each may be indicted, tried, convicted and punished as if he alone and independently had committed the felony; although any other party to the crime may have been acquitted.

## ARTICLE 46.

## ACCESSORIES AFTER THE FACT.

<sup>4</sup> Every one is an accessory after the fact to felony who knowing a felony to have been committed by another,

<sup>1</sup> Cf. Draft Code, s. 72.

<sup>2</sup> Foster, 369.

<sup>3</sup> 24 & 25 Vict. c. 94, s. 2, as explained by *R. v. Hughes*, 1860, Bell, C. C. 242. The section referred to applies only to cases in which a felony has been committed, and does not affect the common law offence of inciting to commit a felony (Art. 48). *R. v. Gregory*, 1867, 1 C. C. R. 77.

<sup>4</sup> 1 Russ. Cr. 171-174; 1 Hale, P. C. 618-20; 2 Hawk. P. C. Bk. II. c. 29; Draft Code, s. 73.

receives, comforts or assists him,<sup>1</sup> in order to enable him to escape from punishment ;

or rescues him from an arrest for the felony ;

or having him in custody for the felony, intentionally and voluntarily suffers him to escape ;

or opposes his apprehension,

Provided that a married woman who receives, comforts, or relieves her husband knowing him to have committed a felony, does not thereby become an accessory after the fact.

#### ARTICLE 47.

##### PUNISHMENT OF ACCESSORIES AFTER THE FACT IN GENERAL AND UNDER THE CONSOLIDATION ACTS.

<sup>2</sup> Every accessory after the fact to any felony is guilty of a substantive felony for which he may be convicted, whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and for which he may be indicted either together with the principal felon or alone (except where it is otherwise specially enacted).

Every such offender is liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with hard labour, and the Court may require the offender to enter into his own recognizance, and to find sureties (both or either) for keeping the peace, in addition to such imprisonment ; but no such person can be imprisoned for not finding sureties for any period exceeding one year.

<sup>3</sup> Every accessory after the fact to any felony punishable

<sup>1</sup> As to the addition of these words, see 2 Hawk. P. C. Bk. II. c. 29, ss. 28-9.

<sup>2</sup> 24 & 25 Vict. c. 94, ss. 3, 4, as interpreted by *R. v. Fallon*, 1862, L. & C. 217. Each of the Consolidation Acts contains a section providing specifically that accessories before the fact, and principals in the second degree to felonies punishable thereby, shall be liable to the same punishment as the principals. These provisions would seem to be co-extensive in their operation with those of 24 & 25 Vict. c. 94, ss. 3, 4. See the next note.

<sup>3</sup> 24 & 25 Vict. c. 96, ss. 98-117 ; *Ibid.* c. 97, ss. 56-73 ; *Ibid.* c. 98, ss. 49-51 ; *Ibid.* c. 99, ss. 35-38 ; *Ibid.* c. 100, ss. 67-71.

under the Larceny Act, 1861; the Malicious Injuries to Property Act, 1861; the Forgery Act, 1861; the Coinage Offences Act, 1861; or the Offences against the Person Act, 1861 (except murder), is liable upon conviction to the punishments above mentioned.

## CHAPTER V

<sup>1</sup> DEGREES IN THE COMMISSION OF CRIME—INCITEMENT—  
CONSPIRACY—ATTEMPTS

## ARTICLE 48.

## INCITEMENT TO COMMIT A CRIME.

<sup>2</sup> EVERY one who incites any person to commit any crime commits a misdemeanor, whether the crime is or is not committed.

## ARTICLE 49.

## CONSPIRACY TO COMMIT A CRIME.

<sup>3</sup> When two or more persons agree to commit any crime, they are guilty of the misdemeanor called conspiracy whether the crime is committed or not,<sup>4</sup> and though in the circumstances of the case it would be impossible to commit it.

## ARTICLE 50.

## DEFINITION OF ATTEMPTS.

<sup>5</sup> An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.

<sup>1</sup> 2 Hist. Cr. Law, ch. xxii. pp. 221-241.

<sup>2</sup> *R. v. Higgins*, 1801, 2 Ea. 5-22; *R. v. Schofield*, 1784, Cald. 397; *R. v. Gregory*, 1867, 1 C. C. 77. In *R. v. Liddington*, 1839, 9 C. & P. 79, a man was charged with inciting a man to commit suicide, and Alderson, B., directed an acquittal, saying, "This is a case which by law we cannot try." The reasons for this direction are not given, and a note to the case does not make them clear. As to the case of *R. v. Welham*, see Note II.

<sup>3</sup> *Mulcahy v. R.*, 1868, L. R. 3 H. L. at p. 317; *R. v. Bunn*, 1872, 12 Cox, C. C. 316, and see cases collected in Roscoe, Cr. Ev. 401-404.

<sup>4</sup> *R. v. Whitchurch*, 1890, 24 Q. B. D. 420.

<sup>5</sup> See cases referred to in Illustrations, and Draft Code, s. 74.



The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case.

An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is an attempt to commit that crime.

The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.

### *Illustrations.*

(1.) <sup>1</sup> A writes and sends to B a letter, inciting B to commit a felony. B does not read the letter. A has attempted to incite B to commit a felony.

(2.) <sup>2</sup> A procures dies for the purpose of coining bad money. A has attempted to coin bad money.

(3.) <sup>3</sup> B is a contractor for the supply of meat to a regiment. A is B's servant, and his duty is to return the surplus meat to B, after weighing out a certain allowance to each mess. By using a short weight, A sets aside, as surplus, sixty pounds instead of fifteen pounds, intending to steal the forty-five pounds, and return the fifteen pounds to B. A's fraud is discovered before he carries the meat away. A attempts to steal the forty-five pounds as soon as he sets aside the sixty pounds.

(4.) <sup>4</sup> A, by false pretences as to the number of loaves he had delivered under a contract, obtains credit in account for the loaves, and would have been paid for them but for the discovery of the fraud. This is an attempt to obtain money by false pretences, as it was the last step depending on the defendant towards obtaining it.

(5.) <sup>5</sup> A, after threatening to shoot B, points a pistol at her, his hands are seized before he can fire, but his finger and thumb are seen fumbling with the trigger. A has attempted to shoot B.

(6.) <sup>6</sup> A procures indecent prints with intent to publish them. A has attempted to publish indecent prints. (*Semble.*)

<sup>1</sup> *R. v. Ransford*, 1874, 31 L. T. (N.S.) 488.

<sup>2</sup> *Robert's Case*, 1855, D. & P., 539.

<sup>3</sup> *Cheeseman's Case*, 1862, L. & C., 140.

<sup>4</sup> *R. v. Eagleton*, 1855, D. & P., 515.

<sup>5</sup> *R. v. Duckworth*, 1892, 2 Q. B. 83.

<sup>6</sup> *Dugdale v. R.*, 1853, 1 E. & B. 435; *R. v. Dugdale*, D. & P. 64.

(7.)<sup>1</sup> A goes to Birmingham to buy dies to make bad money. A has not attempted to make bad money.

(8.)<sup>2</sup> A having in his possession indecent prints, forms an intent to publish them. A has not attempted to publish indecent prints.

(9.)<sup>3</sup> A mistaking a log of wood for B, and intending to murder B, strikes the log of wood with an axe. A has not attempted to murder B.

(10.)<sup>4</sup> A puts his hand into B's pocket with intent to steal whatever he finds there; the pocket is empty. A has attempted to steal from B's person.

(11.)<sup>5</sup> A kneels down in front of a stack of corn, and lights a lucifer match, intending to set the stack on fire; but observing that he is watched blows it out. A has attempted to set fire to the stack.

## ARTICLE 51.

### ATTEMPT—MISDEMEANOR.

Every attempt to commit an offence, whether treason, felony, or misdemeanor,<sup>6</sup> is a misdeameanor, unless it is otherwise specially provided for.

<sup>1</sup> Per Jervis, C.J., in *Roberts's Case*, 1855, D. & P. 551.

<sup>2</sup> *Dugdale v. R.*, 1857, 1 E. & B. 435; *R. v. Dugdale*, D. & P. 64.

<sup>3</sup> Per Bramwell, B., in *R. v. McPherson*, 1857, D. & B. 201.

<sup>4</sup> *R. v. Ring*, 1892, 61 L. J. M. C. 116, following *R. v. Brown*, 1889, 24 Q. B. D. 357; in which case it was held by a specially constituted court that an attempt to have carnal knowledge of a fowl, which is impossible, was an offence under 24 & 25 Vict. c. 100, s. 61. *R. v. Brown* is important as explicitly over-ruling *R. v. Collins*, 1864, L. & C. 471, which was decided on facts similar to those in *R. v. Ring*, but in the contrary way. The prisoner's intent to steal whatever he could find is more definitely stated in *R. v. Collins* than in *R. v. Ring*, but it must be taken to have existed in the latter case.

<sup>5</sup> *R. v. Taylor*, 1859, 1 F. & F. 511.

<sup>6</sup> It is difficult to put a case of an attempt to commit treason, as an overt act done with intent to commit treason would generally be treason: see the next Chapter. In the case of treasons defined in Arts. 59 and 60 there might be an attempt. See many cases collected in 1 Russ. Cr. 189-190, and 2 Hist. Cr. Law, 221-7.

## PART II

### OFFENCES AGAINST PUBLIC ORDER—INTERNAL AND EXTERNAL

CHAP. VI.—HIGH TREASON—TREASONABLE FELONIES, AND ASSAULTS ON THE QUEEN—DISCLOSING OFFICIAL SECRETS—MISAPPLYING MARKS OF A PUBLIC DEPARTMENT.	INTERNAL TRANQUILLITY BY UNLAWFUL ENGAGEMENTS AND COMBINATIONS AND CONFEDERACIES.
CHAP. VII.—AFFRAYS—UNLAWFUL ASSEMBLIES—ROUTS—RIOTS—TUMULTUOUS PETITIONING—UNLAWFUL DRILLING.	CHAP. IX.—OFFENCES AGAINST EXTERNAL PUBLIC TRANQUILLITY—OFFENCES AGAINST FOREIGN NATIONS.
CHAP. VIII.—OFFENCES AGAINST	CHAP. X.—OFFENCES AGAINST PERSONS ON THE HIGH SEAS—PIRACY—SLAVE-TRADING.

### \* CHAPTER VI

#### *HIGH TREASON, TREASONABLE FELONIES, AND ASSAULTS ON THE QUEEN, DISCLOSING OFFICIAL SECRETS, MIS- APPLYING MARKS OF A PUBLIC DEPARTMENT.*

#### ARTICLE 52.

##### HIGH TREASON BY IMAGINING THE QUEEN'S DEATH.

<sup>1</sup> EVERY one commits high treason who forms and displays by any overt act, or by publishing any printing or writing, an intention to kill or destroy the Queen, or to do her any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint.

#### ARTICLE 53.

##### WHAT AMOUNTS TO IMAGINING THE QUEEN'S DEATH.

<sup>2</sup> Every one is deemed to have formed an intention to put the Queen to death who forms and displays by any overt act an intention

\* See 2 Hist. Cr. Law, ch. xxiii. pp. 241-97, and Draft Code, Part V.

<sup>1</sup> 25 Edw. 3, st. 5, c. 2; 36 Geo. 3, c. 7, ss. 1, 6; 57 Geo. 3, c. 6; 11 Vict. c. 12, s. 2; and Draft Code, s. 75.

<sup>2</sup> Foster's Discourse of H. T. ch. i. s. 5, pp. 195-7; ch. ii. ss. 3, 4, 6, pp. 211-13; Draft Code, s. 75.

(a.) to depose the Queen from the exercise of her royal authority in any part of her dominions; or

(b.) to levy war against the Queen either in the first or in the second of the senses assigned to that expression in Article 54; or

(c.) to instigate any foreigner with force to invade this realm or any other of the Queen's dominions; or

(d.) who conspires to levy war against the Queen in the first or second but not in the third, of the senses assigned to that expression in Article 54.

#### ARTICLE 54.

##### HIGH TREASON BY LEVYING WAR.

<sup>1</sup> Every one commits high treason who levies war against the Queen in any of her dominions.

The expression "to levy war" means—

(a.) attacking in the manner usual in war the Queen herself or her military forces, acting as such by her orders, in the execution of their duty;

(b.) attempting by an insurrection of whatever nature by force or constraint to compel the Queen to change her measures or counsels, or to intimidate or overawe both Houses or either House of Parliament;

(c.) attempting by an insurrection of whatever kind to effect any general public object.

But the expression "to levy war against the Queen" does not include any insurrection against any private person for the purpose of inflicting upon him any private wrong, even if such insurrection is conducted in a warlike manner.

<sup>1</sup> 25 Edw. 3, st. 5, c. 2; Foster's Discourse on H. T. ch. ii.; as to (a.) see Foster, pp. 208 and 209; as to (b.) see s. 3; and see 36 Geo. 3, c. 7, s. 1, which, whilst in force, was a statutory recognition of Foster's doctrine; as to (c.) see s. 4; as to the proviso, see 25 Edw. 3, st. 5, c. 2, and Foster, pp. 209–10; see also Note V. to and s. 75 of the Draft Code. In *R. v. Gallagher and others*, 1883, 15 Cox, 291, it was held by Coleridge, L.C.J., Brett, M.R., and Grove, J., that war might be levied by a few persons, using for treasonable purposes explosives calculated to do great damage. I held the same at Liverpool in the summer of 1883, in *R. v. Deasy*, 1883, 15 Cox, 334.

## ARTICLE 55.

## HIGH TREASON BY ADHERING TO THE QUEEN'S ENEMIES.

<sup>1</sup> Every one commits high treason who, either in the realm or without it, actively assists a public enemy at war with the Queen. Rebels may be public enemies within the meaning of this Article.

## ARTICLE 56.

## ADHERENCE TO A DE FACTO KING NOT TREASON.

<sup>2</sup> No person who attends upon the king and sovereign lord of this land for the time being, in his person, and does him true and faithful service of allegiance in the same, or is in other places by his commandment in his wars within this land or without, is for any such act guilty of treason [even if the king *de facto* should not be king *de jure*].

## ARTICLE 57.

## KILLING THE KING'S WIFE OR SON.

<sup>3</sup> Every one commits high treason who forms and displays by any overt act an intention

(a.) to kill the wife of a king regnant; or,

(b.) to kill that son of a king or queen regnant who is for the time being heir-apparent to the king or queen.

## ARTICLE 58.

## WHEN WORDS ARE TREASON.

<sup>4</sup> The speaking of words expressive of the intentions above mentioned is not an overt act within the meaning of Articles 52, 53, and 57.

<sup>1</sup> 25 Edw. 3, st. 5, c. 2, as explained by Hale, 1 P. C. 159-69. An officer betraying his post is a traitor at common law, though such offences are usually dealt with under martial law; see 1 Hale, 168. I suppose a deserter in the field who joins the enemy commits high treason as well as a military offence. Draft Code, s. 75.

<sup>2</sup> 11 Hen. 7, c. 1; and see 6th Rep. C. L. C. p. 23.

<sup>3</sup> 25 Edw. 3, st. 15, c. 2, as explained in 1 Hale, P. C. 124-129. Draft Code, s. 75.

<sup>4</sup> Foster, 200-207.

The writing of such words is such an overt act.

The speaking or writing of words accompanied by or explanatory of conduct connected with the execution of such intentions is such an act.

The speaking of words of advice, consultation, or command, or otherwise connected with the execution of such intentions, is such an act.

#### ARTICLE 59.

##### VIOLATING THE KING'S WIFE, ETC.

<sup>1</sup> Every one commits high treason who violates (whether by her own consent or not)

the wife of a king regnant ; or

that daughter of the king or queen regnant who at the time is his or her eldest daughter, if she never has been married, and (perhaps) if she is a widow, and (probably) if her father or mother is alive ; or

the wife of that son of a king or queen regnant who for the time being is heir-apparent of such king or queen.

#### ARTICLE 60.

##### KILLING THE CHANCELLOR, ETC.

<sup>2</sup> Every one commits high treason who slays the chancellor, or the treasurer, or the king's justices of the one bench or

<sup>1</sup> 25 Edw. 3, st. 5, c. 2, as explained by Hale, 1 P. C. 128. Draft Code, s. 75.

<sup>2</sup> It may be permissible to suggest (as mere matter of curiosity) a doubt whether this would now apply to all the judges of the Supreme Court or only to those who are not members of the Chancery Division (25 Edw. 3, st. 5, c. 2). It is enacted by 13 Eliz. c. 2, that every one commits high treason who uses, or puts in use, in any place within this realm, or in any of the Queen's dominion, any bull, writing, instrument of absolution or reconciliation obtained from the Bishop of Rome to those who will be contented to forsake the due obedience to the Queen and to yield and subject themselves to the authority of the Bishop of Rome, or who willingly receive absolution or reconciliation under any such instrument. This enactment is printed in the Revised Statutes, but by 9 & 10 Vict. c. 59 it is repealed so far only as the same imposes the penalties or punishments therein mentioned. Whether the effect of this is to make the using of such bulls a treason which cannot be punished, I do not know, nor does it

the other, justices in eyre or justice of assize, and all other justices assigned to hear and determine being in their places doing their offices.

#### ARTICLE 61.

##### PUNISHMENT FOR TREASON.

<sup>1</sup> Every one who is convicted of high treason must be sentenced to be hanged by the neck until he is dead; but Her Majesty may (if the offender is a man) direct, by a warrant signed by one of her principal Secretaries of State, that instead thereof such offender's head shall be severed from his body whilst alive.

#### ARTICLE 62.

##### ALL PRINCIPALS IN TREASON.

<sup>2</sup> Every person who in the case of felony would be an accessory before or after the fact is in the case of high treason a principal traitor, <sup>3</sup> but a person who knowingly comforts or receives a traitor so far partakes of the nature of an accessory that he cannot be tried till the principal is convicted.

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much matter. As the 9 & 10 Vict. c. 59 further provides that the repeal of the penalty is not to make the forbidden acts lawful, it is impossible to be quite sure that doing them would not be a statutory misdemeanor. As to which see the 6th Rep. C. L. C. pp. 35-41. I know not why 13 Eliz. c. 2, was not repealed simply.

<sup>1</sup> For common law judgments see Chitty, *Crim. Law*, 702. It was modified by 30 Geo. 3, c. 48, as to women (who before that Act were liable to be burnt alive for treason), as to men by 54 Geo. 3, c. 146, and 33 & 34 Vict. c. 23, s. 31. The odd exception made in the parenthesis arises thus: the Act 30 Geo. 3, c. 48, applies only to women, and the 54 Geo. 3, c. 146, only to men. The proviso as to beheading occurs in the second only. The Act of 1870 repeals parts of the Acts of 1790 and 1814. It would seem, however, that the power exists at common law. See Foster, 269-70. The Act (31 Vict. c. 24) for executing sentence of death within gaols does not apply to cases of treason. Indeed ss. 2 and 16 together appear to exclude its operation in such cases. An execution for treason would, therefore, it would seem, have to be public. Sir E. Coke's Scriptural reasons for the punishment of treason may be seen in 3 Inst. 211. Cf. Draft Code, s. 75.

<sup>2</sup> Foster, 343, and see 341-6.

<sup>3</sup> 1 Hale, P. C. 238; Foster, 345-6; and see 2 Hist. Cr. Law.

## ARTICLE 63.

## TREASONABLE FELONIES.

<sup>1</sup> Every one is guilty of felony, and is liable upon conviction thereof to penal servitude for life who <sup>2</sup> forms any of the intentions hereinafter mentioned, and expresses such intention either by any overt act or by publishing any printing or writing; <sup>3</sup> that is to say,

(a.) an intention to depose the Queen, her heirs or successors, from the style, honour, and royal name of the Imperial Crown of the United Kingdom or of any other of her Majesty's dominions or countries; or

(b.) an intention to levy war against Her Majesty, Her heirs or successors, within any part of the United Kingdom in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe, both houses or either house of Parliament; or

(c.) an intention to move or stir any foreigner with force to invade the United Kingdom or any other of Her Majesty's dominions or countries under the obedience of Her Majesty, her heirs and successors.

<sup>4</sup> A conspiracy to effect any of the said intentions is an overt act within the meaning of this Article.

## ARTICLE 64.

## INCITING TO MUTINY.

<sup>5</sup> Every one commits felony, and is liable upon conviction thereof to penal servitude for life who maliciously and advisedly endeavours

<sup>1</sup> 11 Vict. c. 12, preamble and s. 3 (redrawn); Draft Code, s. 79. Accessories after the fact are liable to imprisonment with hard labour for two years, s. 8.

<sup>2</sup> "Shall . . . compass, imagine, invent, devise, or intend."

<sup>3</sup> The words "or by open advised speaking" occurred in the Act as originally passed, but by s. 4 their effect was to last for two years only; they and s. 4 were both repealed by the Statute Law Revision Act, 1891.

<sup>4</sup> *Mulcahy v. R.*, 1868, L. R. 3 H. L. 306.

<sup>5</sup> 37 Geo. 3, c. 70, s. 1. As to the punishment, see 7 Will. 4 & 1 Vict. c. 91, s. 2, and 55 & 56 Vict. c. 19; Draft Code, s. 82.



(a.) to seduce any person serving in Her Majesty's forces by sea or land from his duty and allegiance to her Majesty; or

(b.) to incite or stir up any such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatever.

#### ARTICLE 65.

##### DISCLOSURE OF OFFICIAL INFORMATION.

<sup>1</sup> Every one is guilty of a misdemeanor and is liable to imprisonment for a year with hard labour or to a fine or to both imprisonment and a fine, who does any of the acts hereinafter specified, that is to say:

(1.) (a.) who for the purpose of wrongfully obtaining information—

(i.) enters or is in any part of a place belonging to Her Majesty being a fortress, arsenal, factory, dockyard, camp, ship, office, or other like place in which part he is not entitled to be; or

(ii.) when lawfully or unlawfully in any such place as aforesaid either obtains any document, sketch, plan, model, or knowledge of any thing which he is not entitled to obtain, or <sup>2</sup> takes without lawful authority any sketch or plan; or

(iii.) when outside any fortress, arsenal, factory, dockyard or camp, belonging to Her Majesty, <sup>2</sup> takes or attempts to take without authority given by or on behalf of Her Majesty any sketch or plan of that fortress, etc.; or

(b.) who knowingly having possession of, or control over, any such document, sketch, plan, model, or knowledge, as has been obtained or taken by means of any act which constitutes an offence under this Article or the two following Articles, at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interests of the State, to be communicated at that time; or

<sup>1</sup> 52 & 53 Vict. c. 52, s. 1.

<sup>2</sup> This appears to be synonymous with "makes."

(c.) who after having been intrusted in confidence by some officer under Her Majesty with any document, sketch, plan, model or information relating to any such place as aforesaid, or to the naval or military affairs of Her Majesty, wilfully and in breach of such confidence communicates the same when in the interest of the State it ought not to be communicated; or

(2.) who having possession of any document, sketch, plan, model, or information relating to any fortress, arsenal, factory, dockyard, camp, ship, office, or other like place belonging to Her Majesty, or to the naval or military affairs of Her Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person to whom he knows the same ought not, in the interest of the State, to be communicated at that time.

(3.) Every one is guilty of a felony and is liable to penal servitude for life who commits any offence previously mentioned in this Article;<sup>1</sup> if he intended to communicate to a foreign state any information, document, sketch, plan, model, or knowledge obtained or taken by him, or intrusted to him as aforesaid; or

if he communicates the same to any agent of a foreign state.

## ARTICLE 66.

### BREACH OF OFFICIAL TRUST.<sup>2</sup>

<sup>3</sup> Any person guilty of a breach of official trust as herein after defined

<sup>1</sup> "Any act declared by this section to be a misdemeanor" are the words of the Act; but *quære* whether this applies to (2) which is only made an offence by reference to (1).

<sup>2</sup> The Official Secrets Act 1889, by which the offences mentioned in Articles 65, 66, 67 are constituted is so drafted as to be very difficult to understand. Section 1 subs. (1) creates about eighty different offences, all of which in almost every conceivable case are made offences over again with the same penalties attached to them by subs. (2). Subs. 3 makes all of them felonies if a certain condition is proved which is almost certain never to be really absent. Section 2 makes nearly all the same offences, and hardly any others separate substantive offences if committed by certain persons, and attaches to them the same penalties as are provided by section 1 when they are committed by anybody else.

<sup>3</sup> 52 & 53 Vict. c. 52, s. 2.

(a.) if the communication is made or attempted to be made to a foreign state, is guilty of felony and liable to penal servitude for life ;

(b.) in other cases is guilty of misdemeanor and is liable to imprisonment with or without hard labour for not exceeding one year, or to a fine or both.

A person is guilty of a breach of official trust who, by means of his holding or having held an office under Her Majesty, has lawfully or unlawfully either obtained possession of or control over, any document, sketch, plan, or model, or acquired any information, and at any time corruptly or contrary to his official duty communicates or attempts to communicate that document, sketch, plan, model, or information to any person to whom the same ought not in the interest of the State, or otherwise in the public interest to be communicated at that time.

This article applies to a person holding a contract with any department of the Government or with the holder of any office under Her Majesty as such holder, where such contract involves an obligation of secrecy, and to any person employed by any person or body of persons holding such a contract, who is under a like obligation of secrecy, as if the person holding the contract and the person so employed were respectively holders of an office under Her Majesty.

#### ARTICLE 67.

##### INCITEMENT TO DISCLOSURE OF OFFICIAL INFORMATION AND BREACH OF OFFICIAL TRUST.

<sup>1</sup> Any person who incites or counsels, or attempts to procure, another person to commit an offence under Acts 65, 66, is guilty of a misdemeanor, and liable to the same punishment as if he had committed the offence.

<sup>1</sup> 52 & 53 Vict. c. 52, s. 3.

## ARTICLE 68.

## MISAPPLICATION OF THE MARK OF A PUBLIC DEPARTMENT.

<sup>1</sup> Every person is guilty of a misdemeanor and is liable to imprisonment with hard labour for two years, who without lawful authority, proof of which lies on the party accused, applies any of the marks described in the first Schedule to the Public Stores Act, 1875, in or on any stores therein described.

## ARTICLE 69.

## ASSAULTS ON THE QUEEN.

<sup>2</sup> Every one who does any of the acts hereinafter specified is guilty of a high misdemeanor, and is liable upon conviction thereof to be sentenced to seven years penal servitude, and during the period of such imprisonment to be publicly or privately whipped as often (not exceeding thrice) and in such manner as the Court directs; that is to say,

(a.) Whoever wilfully and with intent to injure the person of the Queen or to alarm Her Majesty, or to break the public peace, or so as to endanger the public peace,—

(i.) points, aims, or presents at or near the person of the Queen any <sup>3</sup> firearm, loaded or not, or any other kind of arm; or

(ii.) discharges at or near the person of the Queen any loaded arms; or

(iii.) discharges or causes to be discharged any explosive material near the person of the Queen; or

(iv.) strikes, or strikes at, the person of the Queen in <sup>4</sup> any manner whatever; or

<sup>1</sup> 38 & 39 Vict. c. 25, s. 4.

<sup>2</sup> 5 & 6 Vict. c. 51, ss. 1, 2 (redrawn). I have omitted a few manifestly superfluous words. Draft Code s. 80.

<sup>3</sup> "Any gun, pistol, or any other description of firearms, or of other arms whatsoever."

<sup>4</sup> "With any offensive weapon or in any other —."

(v.) throws anything at or upon the person of the Queen; or

(vi.) attempts to do any of the things specified in (ii.) (iii.), (iv.), or (v.):—

(b.) Whoever produces or has near the person of the Queen any <sup>1</sup>arm or destructive or dangerous thing with intent to use the same to injure the person of the Queen or to alarm Her Majesty.

## ARTICLE 70.

### CONTEMPTS AGAINST THE QUEEN.

<sup>2</sup> Every one commits a misdemeanor who is guilty of any contempt against the person of Her Majesty, or her royal dignity, by means of any contumelious, insulting, or disparaging words, acts, or gestures.

## ARTICLE 71.

### SOLEMNISING OR ASSISTING AT MARRIAGE OF A MEMBER OF THE ROYAL FAMILY.

<sup>3</sup> Every person commits a misdemeanor who knowingly or wilfully presumes to solemnize, or to assist, or to be present at the celebration of any marriage of any descendant of the body of King George the Second, male or female (other than the issue of princesses married into foreign

<sup>1</sup> "Any gun, pistol, or any other description of firearms, or of other arms whatsoever."

<sup>2</sup> I have taken the words of the 7th Rep. C. L. C. p. 122, founded on Hawkins, P. C. bk. i. ch. xxiii., which contains much obsolete and even more indefinite and undefinable matter. See, too, 6th Rep. C. L. C. p. 32, and note. Hawkins treats contempts against the judges of the King's Courts under this head. Contempt of Court seems to me hardly to be a branch of the criminal law.

<sup>3</sup> 12 Geo. 3, c. 11. The punishment is præmunire, as explained by Coke, 1 Inst. 130 a; see 7th Rep. C. L. C., p. 37.

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families), or at his or her making any matrimonial contract without the consent specified in 12 Geo. 3, c. 11.

<sup>1</sup> Every person committing such a misdemeanor is put out of the Queen's protection. His lands, tenements, goods, and chattels are forfeited to the Queen, and he is to be imprisoned for life (perhaps, at the Queen's pleasure).

<sup>1</sup> 3 Inst. 126 ; 1 Russ. Cr. 900.

## CHAPTER VII

*AFFRAYS, UNLAWFUL ASSEMBLIES, ROUTS, RIOTS, TUMULTUOUS PETITIONING AND UNLAWFUL DRILLING*

## ARTICLE 72.

## SENDING CHALLENGES AND PROVOKING TO FIGHT.

EVERY one commits a misdemeanor who

(a.) <sup>1</sup> challenges any other person to fight a duel; or,

(b.) <sup>2</sup> endeavours by words, or by writings, to provoke any other person to challenge the offender or to commit a breach of the peace.

## ARTICLE 73.

## GOING ARMED SO AS TO CAUSE FEAR.

<sup>3</sup> Every one commits a misdemeanor who goes armed in public, without lawful occasion, in such a manner as to alarm the public.

## ARTICLE 74.

## AFFRAY.

<sup>4</sup> An affray is the fighting of two or more persons in a public place to the terror of Her Majesty's subjects. Every affray is a misdemeanor.

<sup>1</sup> 3 Inst. 158; 1 Russ. Cr. 396; Draft Code, s. 97.

<sup>2</sup> *R. v. Phillips*, 1805, 6 East, 464. It appears from the judgment in this case (pp. 470-5) that the offence defined in clause (b.) is only a special illustration of the general law as to incitement.

<sup>3</sup> 2 Edw. 3, c. 3, paraphrased with reference to the explanations given in 1 Hawk. P. C. 488-9.

<sup>4</sup> 3 Inst. 158; 1 Russ. Cr. 390; Draft Code, s. 96.

## ARTICLE 75.

## UNLAWFUL ASSEMBLY.

<sup>1</sup> An unlawful assembly is an assembly of three or more persons :—

(a.) with intent to commit a crime by open force ; or

(b.) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.

Every unlawful assembly is a misdemeanor.

*Illustrations.*

(a.) <sup>2</sup> Sixteen persons meet for the purpose of going out to commit the offence of being by night, unlawfully, upon land, armed in pursuit of game. This is an unlawful assembly.

(b.) <sup>3</sup> A, B, and C meet for the purpose of concerting an indictable fraud. This, though a conspiracy, is not an unlawful assembly.

(c.) <sup>4</sup> A, B, and C having met for a lawful purpose, quarrel and fight. This (though an affray) is not an unlawful assembly.

(d.) <sup>5</sup> A large number of persons hold a meeting to consider a petition to parliament lawful in itself ; but they assemble in such numbers, with such a show of force and organization, and when assembled make use of such language as to lead persons of ordinary firmness and courage in the neighbourhood to apprehend a breach of the peace. This is an unlawful assembly.

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<sup>1</sup> Brook's Abt. "Riot"; Viner's Abt. "Riot"; Lambarde, ch. v. 172-184; Dalton, pp. 310-14; 1 Hawk. P. C. 513-16. See also Report of Criminal Code Commission of 1879, p. 20, and Draft Code, ss. 84, 86.

<sup>2</sup> *R. v. Brodrigg*, 1816, 6 C. & P. 571. The meeting in this case was in a private house.

<sup>3</sup> (SUBMITTED.) Compare 1 Hawk. P. C. 515.

<sup>4</sup> 1 Hawk. P. C. p. 515.

<sup>5</sup> *Redford v. Birley*, 1822, 3 Starkie, N. P. 106-8; 1 St. Tr. N. S. 1217, 1218; *R. v. Vincent*, 1839, 9 C. & P. 91. 2 St. Tr. N. S. 1081, 1082.



## ARTICLE 76.

## ROUTS.

<sup>1</sup> A rout is an unlawful assembly which has made a motion towards the execution of the common purpose of the persons assembled.

## ARTICLE 77.

## RIOTS.

<sup>1</sup> A riot is an unlawful assembly which has actually begun to execute the purpose for which it assembled, by a breach of the peace, and to the terror of the public; or

<sup>2</sup> a lawful assembly may become a riot if the persons assembled form and proceed to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled.

<sup>3</sup> Every person convicted of riot is liable to be sentenced to hard labour.

*Illustration.*

A, B, and C met at A's house for the purpose of beating D, who lives a mile off. They then go together to D and there beat him. At A's house the meeting is an unlawful assembly, on the road it is a rout, and when the attack is made upon D, it is a riot.

## ARTICLE 78.

## PREVENTING READING PROCLAMATION AND CONTINUING TO RIOT AFTER PROCLAMATION.

<sup>4</sup> Whenever twelve persons or more are unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace,<sup>5</sup> it is the duty of the justices of the peace,

<sup>1</sup> See note to Article 75. Draft Code, ss. 85, 87.

<sup>2</sup> Founded on the language of Holt, C. J., in *R. v. Soley*, 1707, 11 Mod. 116.

<sup>3</sup> 3 Geo. 4, c. 114.

<sup>4</sup> 1 Geo. 1, st. 2, c. 5, ss. 1, 2, 3 (redrawn). Draft Code, ss. 88, 89.

<sup>5</sup> Actual riot is not necessary. *R. v. James*, 1831, 5 C. & P. 153.

and the sheriff and under-sheriff of the county, or of the mayor, bailiffs, or other head officers, or justices of the peace of a city or town corporate, to resort to the place where such assembly is, and among the rioters, or as near to them as the person making the proclamation can safely come, with a loud voice command or cause to be commanded silence to be, and then openly and with loud voice make or cause to be made a proclamation<sup>1</sup> in these words or like in effect:

"Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George for preventing tumultuous and riotous assemblies. God save the Queen."

All persons commit felony, and are liable to<sup>2</sup> penal servitude for life, who

(a.)<sup>3</sup> wilfully and knowingly oppose, obstruct, let, hinder or hurt, any person who begins to make, or goes to make the said proclamation, whereby such proclamation is not made, or

(b.)<sup>4</sup> who remain, or continue together unlawfully, riotously and tumultuously, for one hour, after the proclamation aforesaid was made; or if they know that its making was hindered, for one hour after it would have been made if it had not been hindered as aforesaid.

## ARTICLE 79.

### RIOTOUS DEMOLITION OF HOUSES, ETC.

<sup>5</sup> All persons are guilty of felony, and are liable to penal servitude for life, who, being riotously and tumultuously

<sup>1</sup> The omission of "God save the Queen" defeats the effect of the proclamation. *R. v. Child*, 1830, 4 C. & P. 442.

<sup>2</sup> Substituted for death by 7 Will. 4 & 1 Vict. c. 91, s. 1, and the Penal Servitude Acts. See too 5 & 6 Vict. c. 19 (S. L. R.).

<sup>3</sup> 1 Geo. 1, st. 2, c. 5, s. 5.

<sup>4</sup> *Ibid.*, ss. 1 and 5 (redrawn).

<sup>5</sup> 24 & 25 Vict. c. 97, s. 11 (redrawn). Draft Code, s. 90.

assembled together to the disturbance of the public peace, unlawfully and with force demolish, or pull down, or destroy, any<sup>1</sup> building, public building, machinery, or mining plant, as defined in the note hereto, or begin to do so.

#### ARTICLE 80.

##### RIOTOUS DAMAGE OF HOUSES, ETC.

<sup>2</sup> All persons are guilty of a misdemeanor, and liable to seven years penal servitude, who being so assembled as aforesaid unlawfully and with force injure or damage any of the things aforesaid: and any person indicted for the felony in Article 79 may be convicted for the misdemeanor in this Article.

#### ARTICLE 81.

##### PERSONS ASSEMBLED IN ORDER TO SMUGGLE.

<sup>3</sup> Every one commits a misdemeanor and is liable to a fine of not more than £500, and not less than £100, who with any

<sup>1</sup> "Building" means any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof.

"Public building" means any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish or place, or belonging to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution.

"Machinery" means "any machinery, whether fixed or movable, prepared for, or employed in, any manufacture, or in any branch thereof."

"Mining plant" means "any steam-engine, or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine."

<sup>2</sup> 24 & 25 Vict. c. 97, s. 12 (redrawn). Draft Code, s. 91.

<sup>3</sup> 42 & 43 Vict. c. 21, s. 10 and 39 & 40 Vict. c. 36, s. 139. The former section replaces s. 188 of the latter Act, by force of s. 14 of the former Act. As the sections stand they are still obscure in some points. I believe them to mean what is stated in the text. The first part of the article gives the effect of 42 & 43 Vict. c. 21, s. 10, with only a slight change in the order of the words. The second part is what I suppose to be the meaning of 39 & 40 Vict. c. 36, s. 139. That section begins by providing that every

two or more persons assembles for the purpose of unshipping, landing, running, carrying or concealing any spirits, tobacco or any prohibited, restricted or uncustomed goods, or who having so assembled unships, etc., such spirits, etc.

If any person engaged in any of the said offences is armed with firearms or other offensive weapons, or, whether so armed or not, is disguised in any way, or being so armed or disguised is found within five miles of the sea coast or of any tidal river with any goods liable to forfeiture under the 39 & 40 Vict. c. 36, or any other Act relating to the Customs, he must be imprisoned with or without hard labour for a term not exceeding three years.

Every one must be imprisoned for a term not exceeding twelve months who procures, or hires, or deposes, or authorizes any other person to procure or hire any person or persons to assemble for the purpose of being concerned in the landing

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one who procures or hires any person to assemble for the purposes specified in the 3rd paragraph of the Article in the text, is to be imprisoned for the term mentioned. It then proceeds to enact that if any person "*engaged in the commission of any of the above offences*" is armed, or disguised, &c., he is to be imprisoned for a term not exceeding three years. "The above offences" can hardly mean the offences mentioned in the earlier part of the section, as a man hiring another to run goods would hardly be likely to be armed or disguised, nor would it make matters worse if he were. I suppose, therefore, the "above offences" are the offences specified in 42 & 43 Vict. c. 21, s. 10, though the words may probably refer also to numerous revenue offences created by 39 & 40 Vict. c. 36, s. 189. This, however, raises new difficulties. Upon this view the latter part of s. 189 enacts that a person is to be imprisoned if, forming one of an assembly of three people for smuggling purposes, he is, (1) armed, (2) disguised, (3) armed and in possession of smuggled goods within five miles of the coast, &c., (4) disguised and in possession of smuggled goods, &c. It is impossible for any one to commit (3) or (4) unless he has already committed either (1) or (2). Why, then, should any special punishment be provided for him? It is like enacting that every man who steals a sheep shall be liable to penal servitude, and then enacting separately that if he steals it on a road or in a field he shall be liable to the same punishment. I rather think the intention must have been to provide for the case of a person found alone in possession of smuggled goods near the coast, and armed or disguised, and that by a slip in the drafting some such words as "or if any person whatever" were left out before the words "so armed or disguised." A comparison of this provision with s. 250 of the repealed Act strengthens this conjecture. In that enactment an assembly of five persons for the purposes mentioned formed one offence, and an assembly of two persons formed another. There must be some mistake in the drafting, as there is no nominative case to the verb "shall be imprisoned."

or unshipping, or carrying, conveying, or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured.

#### ARTICLE 82.

##### THREE PERSONS ARMED IN PURSUIT OF GAME BY NIGHT.

<sup>1</sup> Every one commits a misdemeanor, and is liable, upon conviction thereof, to fourteen years penal servitude or three years imprisonment with but not without hard labour, who, with two or more other persons together, between the end of the first hour after sunset and the beginning of the last hour before sunrise, unlawfully enters or is on any land, whether open or enclosed, for the purpose of taking or destroying hares, pheasants, partridges, grouse, heath or moor game, black game, bustards, or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or other offensive weapon.

#### ARTICLE 83.

##### RIOTOUSLY PREVENTING THE SAILING OF SHIP.

<sup>2</sup> All <sup>3</sup> persons are guilty of misdemeanor, and are liable upon conviction thereof to twelve months and a minimum term of six months imprisonment with, but not without hard labour, who being riotously assembled together to the number of three or more, unlawfully and with force prevent, hinder, or obstruct the loading or unloading, or the sailing or navi-

<sup>1</sup> 9 Geo. 4, c. 69, s. 9. The words "night" and "game," which occur in the section, are explained to the effect given in the text by ss. 12 and 13. The statute appears to be intended rather to prevent the murderous conflicts which are the frequent and natural results of the offence punished than to protect game. I have accordingly introduced it here. By 7 & 8 Vict. c. 29, s. 1, some of the provisions of the 9 Geo. 4, c. 69, were made applicable to "any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land open or enclosed." I do not think, however, that this applies to the provision in the text. Draft Code, s. 94.

<sup>2</sup> 33 Geo. 3, c. 67.

<sup>3</sup> "Seaman, keelman, caster, ship carpenter, or other person."

gation of any <sup>1</sup> vessel, or unlawfully and with force board any <sup>1</sup> vessel with intent to do so.

Every person who commits any of the offences aforesaid after a previous conviction for any such offence is guilty of felony, and is liable upon conviction thereof to fourteen years penal servitude.

#### ARTICLE 84.

##### FORCIBLE ENTRY AND DETAINER.

<sup>2</sup> Every one commits a misdemeanor called a forcible entry who, in order to take possession thereof, enters upon any lands or tenements in a violent manner, whether such violence consists in actual force applied to any other person or in threats of personal violence, or in breaking open any house, or in collecting together an unusual number of persons for the purpose of making such entry.

It is immaterial whether the person making such an entry had or had not a right to enter, provided that a person who enters upon land or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry.

Every one commits the misdemeanor called a forcible detainer who, having wrongfully entered upon any lands or tenements, detains such lands and tenements in a manner which would render an entry upon them for the purpose of taking possession forcible.

#### ARTICLE 85.

##### POLITICAL MEETINGS IN WESTMINSTER.

<sup>3</sup> Every meeting is an unlawful assembly which consists of more than fifty persons, and is held in any street, square, or

<sup>1</sup> "Ship, keel, or other vessel."

<sup>2</sup> 1 Russ. Cr. 404-417; 1 Hawk. P. C. 495-512. There are many statutes in force on the subject, viz. 5 Ric. 2, st. 1, c. 7 (8 in common editions); 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Ja. 1, c. 15. These statutes give no definition of the offence, but provide a mode of procedure for giving possession to the party forcibly dispossessed. See on forcible entry, *Lown v. Telford*, 1876, 1 App. Cas. 414. Draft Code, s. 95.

<sup>3</sup> 57 Geo. 3, c. 19, s. 23.

open place in the city or liberties of Westminster, or county of Middlesex, within a mile from the gate of Westminster Hall, and out of the parish of St. Paul's, Covent Garden, for the purpose, or on the pretext, of considering or preparing any petition or address to the Queen, or to both Houses or either House of Parliament, for alteration of matters in Church or State, on any day on which either House of Parliament meets, sits, or is summoned or adjourned, or prorogued to meet or sit, or on which the <sup>1</sup> High Court of Justice, or any division or judge thereof, sits at Westminster Hall: Provided that this does not extend to any meeting held for the election of members of parliament, or to persons attending upon the business of either House of Parliament, or the said Court, or any of its divisions or judges.

Every person who convenes or calls together, or gives any notice for convening or calling together any such meeting commits a misdemeanor.

#### ARTICLE 86.

##### PROCURING SIGNATURES TO PETITION WITHOUT AUTHORITY AND TUMULTUOUS PETITIONING.

<sup>2</sup> Every one commits a misdemeanor, and is liable, upon conviction thereof, to a penalty not exceeding the sum of £100 in money, and three months imprisonment,

(a.) who solicits, labours, or procures the getting of hands or other consent of more than twenty persons to any petition or address to the Queen, or to either House or both Houses of Parliament, for alteration of matters established by law in Church or State, unless the matter of the petition or address has been first consented to and ordered by three or more justices of the county where the matter arises, or by the major part of the grand jury at the assizes or quarter sessions, or in London by the lord mayor, aldermen, and commons, in common council assembled; or

<sup>1</sup> "His Majesty's Courts of Chancery, King's Bench, Common Pleas and Exchequer, or any of them, or any judge of any of them," &c. These words seem now to be inoperative.

<sup>2</sup> 13 Car. 2, c. 5.

(b.) who repairs to the Queen or either House of Parliament upon pretence of presenting any petition or address accompanied by more than ten persons at any one time.

## ARTICLE 87.

## UNLAWFUL DRILLING.

<sup>1</sup> All assemblies are unlawful which are held in order that the persons assembled may train or drill themselves, or be trained or drilled to the use of arms, or for the purpose of practising military movements or evolutions without lawful authority.

Every person commits felony, and is liable upon conviction thereof to seven years penal servitude, who

(a.) is present at, or attends any such assembly, for the purpose of training or drilling any other person to the use of arms, or the practice of military exercise, movements, or evolutions, or

(b.) who trains or drills any other person to the use of arms, or the practice of military exercise, movements, or evolutions, or

(c.) who aids or assists therein.

Every person commits a misdemeanor, and is liable upon conviction thereof to two years imprisonment (without hard labour) and fine, who attends or is present at any such assembly for the purpose of being, or who at any such assembly is, trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions.

<sup>1</sup> 60 Geo. 3 and 1 Geo. 4, c. 1, s. 1 (redrawn). Draft Code, ss. 92, 3.



## CHAPTER VIII

*OFFENCES AGAINST INTERNAL TRANQUILLITY BY UNLAWFUL ENGAGEMENTS AND COMBINATIONS AND CONFEDERACIES*

## ARTICLE 88.

## UNLAWFUL OATHS. OATHS TO COMMIT MURDER OR TREASON.

<sup>1</sup> EVERY one is guilty of felony, and liable to penal servitude for life, who

(a.) administers, or causes to be administered, or aids or assists at the administering of any oath, engagement, or obligation in the nature of an oath, purporting, or intending to bind the person taking the same to commit treason or murder, or any felony which on the 9th of July, 1812, was punishable with death; or

(b.) takes any such oath or engagement, not being compelled thereto.

## ARTICLE 89.

## OTHER UNLAWFUL OATHS.

<sup>2</sup> Every one is guilty of felony, and is liable, upon conviction, to penal servitude not exceeding seven years, who

(a.) administers, or causes to be administered, or is aiding and assisting at, or present at and consenting to the administering or taking of any oath, or engagement or obligation in the nature of an oath, purporting or intending to bind the person taking the same—

(i.) to engage in any mutinous or seditious purpose;

(ii.) to disturb the public peace;

<sup>1</sup> 52 Geo. 3, c. 104, ss. 1, 6 (redrawn). As to punishment see in case (a.) 7 Wm. 4 & 1 Vict. c. 91. See 2 Hist. Cr. Law, 294-7, and Draft Code, s. 99.

<sup>2</sup> 37 Geo. 3, c. 123, ss. 1, 5 (redrawn).

(iii.) to be of any association, society, or confederacy formed for any such purpose ;

(iv.) to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose ;

(v.) not to inform or give evidence against any associate, confederate, or other person ;

(vi.) not to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done ; or any illegal oath or engagement which may have been administered or tendered to, or taken by<sup>1</sup> any person, or the import of any such oath or engagement ; or who

(b.) takes any such oath or engagement, not being compelled thereto.

#### ARTICLE 90.

##### COMPULSION, HOW FAR A DEFENCE.

<sup>2</sup> No person who takes any oath or engagement referred to in Article 88 or Article 89, under compulsion, shall be justified or excused thereby, unless within fourteen days after the taking thereof in the case of oaths referred to in Article 88, or within four days after the taking thereof in the case of oaths referred to in Article 89, if not prevented by actual force or sickness, and then within four days after the cessation of the hindrance produced by such force or sickness, he declares the same, and the whole of what he knows touching the same, and the persons by whom, and in whose presence, and when and where such oath or engagement was administered or taken, by information on oath before one of Her Majesty's justices of the peace, or one of Her Majesty's principal Secretaries of State, or Her Majesty's Privy Council or if he is in actual service in Her Majesty's forces by sea or land, either by such information on oath as aforesaid, or by information to his commanding officer.

<sup>1</sup> "Such person or persons, or to or by any other person or persons."

<sup>2</sup> 52 Geo. 3, c. 104, s. 2 ; 37 Geo. 3, c. 123, s. 2 (consolidated). Cf. Draft Code, s. 23.

## ARTICLE 91.

## UNLAWFUL CLUBS AND SOCIETIES.

<sup>1</sup> Every club or society is an unlawful combination and confederacy :

(a.) if its members according to its rules, or according to any provision or agreement for that purpose, are required, or permitted to, or do take any unlawful oath or undertaking as defined in Articles 88 and 89, or any oath not required or authorized by law ; or

(b.) take or in any manner bind themselves by any such oath or agreement on becoming or in consequence of being members of any such society ; or

(c.) <sup>2</sup> take, subscribe, or assent to any test or declaration not required or authorized by law or allowed in the manner mentioned in the note hereto, whether by words, signs, or otherwise, either in order to become or in consequence of being a member of such society or club ; or

(d.) if the names of the members, or any of them, are kept secret from the society at large ; or

(e.) <sup>3</sup> if there is any committee or select body so chosen or appointed that the members constituting the same are not

<sup>1</sup> (a.) to (h.) inclusive, 39 Geo. 3, c. 79, s. 2 ; (c.) is repeated in and extended by 57 Geo. 3, c. 19, s. 25 ; (i.) 57 Geo. 3, c. 19, s. 25. The preamble of 39 Geo. 3, c. 79, recites the existence of a treasonable conspiracy carried on both in Great Britain and Ireland in order to overturn the government, and that in pursuance of this design societies have been instituted "inconsistent with the existence of regular government," and in particular, societies of United Englishmen, United Irishmen, and United Scotsmen, United Britons, and the London Corresponding Societies. It then describes the proceedings of these societies ; and section 1 enacts that they shall be "utterly suppressed and prohibited" as "unlawful combinations and confederacies." Section 2 contains the provisions embodied in the text. Section 1 can hardly be regarded as creating a distinct offence, as the societies which are suppressed no longer exist. It would however make it penal to revive those societies or similar ones.

<sup>2</sup> The form of the test must be approved and subscribed by two or more justices of the peace of the county, and registered with the clerk of the peace. Such approbation is valid only till the next general session for the county, unless on application made by the parties concerned it is then confirmed by the majority of the justices present. Sect. 3.

<sup>3</sup> In the Act the words are "or which shall have any committee," &c., such "that the members constituting the same shall not be known," &c.

known by the society at large to be members of such committee or select body ; or

(*f.*) if there is any president, secretary, delegate, or other officer so chosen or appointed that his election or appointment to such office is not known to the society at large ; or

(*g.*) if the names of all the members, and of all committees or select bodies of members, and of all presidents, treasurers, secretaries, delegates, and other officers, are not entered in a book or books, to be kept for that purpose, and to be open to the inspection of all the members of such society ; or

(*h.*) if the society is composed of different divisions or branches, or of different parts acting in any manner separately or distinct from each other, or of which any part has any separate or distinct president, secretary, treasurer, delegate, or other officer elected or appointed by or for such part, or to act as an officer for such part ; or

(*i.*) if the society elects, appoints, nominates, or employs any committee, delegate, representative, or missionary to meet or communicate with any other society or club, or with any committee, delegate, representative, or missionary of any other society or club, or to induce or persuade any person to become a member thereof.

## ARTICLE 92.

### QUAKERS AND RELIGIOUS AND CHARITABLE SOCIETIES EXCEPTED.

<sup>1</sup>The provisions of Article 91 do not extend to any meeting or society of Quakers, or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, in which no other matter or business

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I suppose the two "shalls" are put in for the sake of the grammar only, but the second "shall" may possibly indicate that an intention to conceal the names is required as well as the mere fact of concealment.

<sup>1</sup> 37 Geo. 3, c. 19, ss. 26, 27 ; 39 Geo. 3, c. 79, s. 5.

is treated of or discussed, or to any lodge of Freemasons, two members of which certify on oath in the manner prescribed in 39 Geo. 3, c. 79, s. 6.

#### ARTICLE 93.

##### PUNISHMENT OF MEMBERS.

<sup>1</sup> Every member of any such society and every person who acts as a member thereof, or directly or indirectly maintains correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, treasurer, secretary, delegate, or other officer or member thereof as such, or aids, abets, or supports any such society by contribution of money or otherwise, is liable to seven years penal servitude.

#### ARTICLE 94.

##### PERMITTING MEETINGS OF UNLAWFUL CLUBS.

<sup>2</sup> Whoever knowingly permits any meeting of any club or society, or any division, committee, or branch of a club or society declared by Article 91 to be unlawful, to be held in any house or place belonging to him or in his occupation, is liable to a penalty of £5 for the first offence, and for every subsequent offence is deemed to be guilty of an unlawful combination and confederacy, and is liable to the penalties specified in Article 93.

#### ARTICLE 95.

##### JESUITS AND MONKS.

<sup>3</sup> Every Jesuit, and every member of any other religious order, community, or society of the Church of Rome bound by monastic or religious vows who comes into this realm,

<sup>1</sup> 39 Geo. 3, c. 79, ss. 2, 8, 9; 57 Geo. 3, c. 19, s. 25 (consolidated). This offence is also punishable summarily.

<sup>2</sup> 57 Geo. 3, c. 19, s. 28; 39 Geo. 3, c. 79, s. 13.

<sup>3</sup> 10 Geo. 4, c. 7, ss. 28, 29.

commits a misdemeanor, and is liable upon conviction thereof to be banished from the United Kingdom for the term of his natural life,

<sup>1</sup> provided that the Secretary of State, being a Protestant, may grant a licence to any such person to come into the United Kingdom and to remain there for a period not exceeding six months; and any Secretary of State may revoke such licence before the expiration of the time mentioned therein. If the licensee does not depart from the United Kingdom within twenty days after the time mentioned in the licence, or after notice of revocation thereof, he commits a misdemeanor, and is liable to be banished from the United Kingdom for life.

<sup>2</sup> Every such person commits a misdemeanor who, within any part of the United Kingdom, admits any person to become a regular ecclesiastic, or brother or member of any such religious order, community, or society, or aids or consents thereto, or administers or causes to be administered, or aids or assists in administering, any vow or engagement purporting or intended to bind the persons taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society.

<sup>3</sup> Every person commits a misdemeanor and must be banished from the United Kingdom for life who within any part of the United Kingdom is admitted or becomes a Jesuit or brother or member of any other such religious order or community aforesaid.

<sup>4</sup> Every person ordered to be banished who does not depart from the United Kingdom within thirty days may be removed to such place as Her Majesty, by the advice of her Privy Council, directs.

<sup>5</sup> Every person ordered to be banished who is found at large in the United Kingdom after three months from such order is liable to penal servitude for life.

<sup>1</sup> 10 Geo. 4, c. 7, s. 31.

<sup>2</sup> Ibid. s. 33.

<sup>3</sup> Ibid. s. 34.

<sup>4</sup> Ibid. s. 35.

<sup>5</sup> Ibid. s. 36.

<sup>1</sup> Nothing in this Article contained affects any religious order, community, or establishment consisting of females bound by religious or monastic vows.

#### ARTICLE 96.

##### SEDITIONOUS WORDS AND LIBELS.

<sup>2</sup> Every one commits a misdemeanor who with a seditious intention speaks any words or publishes anything capable of being a libel. If the matter published consists of words spoken, the offence is called the speaking of seditious words. If the matter so published is contained in anything capable of being a libel, the offence is called the publication of a seditious libel.

The word "publish" in this Article is used in the same sense as in Article 294, and the word "libel" in the second of the two senses specified in Article 291.

#### ARTICLE 97.

##### SEDITIONOUS CONSPIRACY.

<sup>3</sup> Every one commits a misdemeanor who agrees with any other person or persons to do any act for the furtherance of any seditious intention common to both or all of them. Such an offence is called a seditious conspiracy.

#### ARTICLE 98.

##### SEDITIONOUS INTENTION DEFINED.

<sup>4</sup> A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of,

<sup>1</sup> 10 Geo. 4, c. 7, s. 37.

<sup>2</sup> 1 Hawk. P. C. 66, 486; 4 Steph. Com. 170; 3 Russ. Cr. 197-202, and see 2 Hist. Cr. Law, ch. xxiv. pp. 298-396. Draft Code, s. 102.

<sup>3</sup> See Wright on the Law of Conspiracy, 28-31. Draft Code, s. 102.

<sup>4</sup> 60 Geo. 3 and 1 Geo. 4, c. 8; and *O'Connell v. R.*, 1844, 11 Cl. & F. 155, 234. St. Tr. N.S. Draft Code, s. 102.

Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established,<sup>1</sup> or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

<sup>2</sup> An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention.

## ARTICLE 99.

### PRESUMPTION AS TO INTENTION.

<sup>3</sup> In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

<sup>1</sup> These words were not in the earlier editions of this work. I do not think they enlarge the sense, but they make it more explicit. They were intended to meet such cases as those of Most and Mertens, tried in 1881 and 1882 for publishing articles in the *Freiheit* applauding the assassination of the Emperor of Russia and that of Lord Frederick Cavendish and Mr. Burke at Dublin. See too the case of *R. v. Collins*, 1839, 9 C. & P. 456, and judgment of Littledale, J., 460.

<sup>2</sup> *R. v. Lambert and Perry*, 1810, 2 Camp. 398; *R. v. Vincent*, 1839, 9 C. & P. 91.

<sup>3</sup> *R. v. Burdett*, 1820, 1 St. Tr. N.S. 1, 4 B. & Ald. 95; *R. v. Harvey*, 1823, 2 B. & C. 257.



## CHAPTER IX

OFFENCES AGAINST EXTERNAL PUBLIC TRANQUILLITY  
OFFENCES AGAINST FOREIGN NATIONS

## ARTICLE 100.

## VIOLATION OF AMBASSADORS' PRIVILEGES.

<sup>1</sup> EVERY one is guilty of a misdemeanor who, by force or personal restraint, violates any privilege conferred upon the diplomatic representatives of foreign countries by the law of nations, as collected by Her Majesty's Courts from the practice of different nations, and the authority of writers thereon.

## ARTICLE 101.

## ARREST OF AMBASSADOR.

<sup>2</sup> Every one commits a misdemeanor who sets forth or prosecutes or executes any writ or process whereby is arrested or imprisoned the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by Her Majesty, or any domestic servant of any such ambassador or minister, registered as such in the office of a principal secretary of state, or in the office of the sheriff of London and Middlesex.

## ARTICLE 102.

## PUNISHMENT.

<sup>2</sup> Every person who commits the offence defined in Article 101 is liable to such pains, penalties, and corporal punish-

<sup>1</sup> *Triquet and Others v. Bath*, 1764, 3 Burr. 1478. As to what constitutes authority on a question of international law, see *R. v. Keyn*, 1876, 2 Ex. D. 63.

<sup>2</sup> 7 Anne, c. 12, ss. 3, 4, 6.

ment as the Lord Chancellor, the Lord Chief Justice of England, and the Lord Chief Justice of the Common Pleas, or any two of them, shall judge fit to be imposed and inflicted.

## ARTICLE 103.

## LIBELS ON FOREIGN POWERS.

<sup>1</sup> Every one is guilty of a misdemeanor who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary, with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs.

The word "publish" is used here in the same sense as in Article 294, and the word "libel" in the second of the two senses specified in Article 291.

(SUBMITTED.) Nothing is an offence against this Article which is a fair criticism on a matter of public interest as defined in Article 298.

## ARTICLE 104.

## INTERFERENCE IN FOREIGN HOSTILITIES.

<sup>2</sup> Every person commits a misdemeanor, and is liable upon conviction thereof to fine and imprisonment with hard labour, or either of such punishments, at the discretion of the Court, who does any of the following acts<sup>3</sup> without the licence of Her Majesty under her sign manual, or signified by Order in Council, or by proclamation, that is to say—

<sup>1</sup> *R. v. D'Eon*, 1764, 1 Blac. 510; *R. v. Lord G. Gordon*, 1787, 22 St. Tr. 213. (This was the case of a libel on Marie Antoinette seven years after the defendant's acquittal for high treason.) *R. v. Vint* (1801); Vint wrote of the Emperor Paul, "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency;" Starkie (by Folkard), 724. *R. v. Peltier*, 1803, 28 State Trials, 589; 6th Rep. C. L. C. art. 50, p. 34. Draft Code, s. 104.

<sup>2</sup> 33 & 34 Vict. c. 90 (redrawn). As to the history of this offence, see 3 Hist. Cr. Law, 257-62.

<sup>3</sup> Sect. 15.

(a.) <sup>1</sup> who, within the limits of Her Majesty's dominions, prepares or fits out any naval or military expedition to proceed against the dominions of any <sup>2</sup> friendly state, or is engaged in such preparation or fitting-out, or assists therein, or is employed in any capacity in such expedition ; or

(b.) <sup>3</sup> who, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state, or, whether a British subject or not, within Her Majesty's dominions induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid ; or

(c.) <sup>4</sup> who, being a British subject quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent ; or

(d.) <sup>5</sup> who, being the master or owner of any ship, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any illegally enlisted person ; as defined in Article 105 ; or

(e.) <sup>6</sup> who, within Her Majesty's dominions, with intent or knowledge, or having reasonable cause to believe, that the same will be employed in the military or naval service of any foreign state at war with any friendly state,

builds, agrees to build, causes to be built, equips, despatches, or causes or allows to be despatched, any ship, or issues or delivers any commission for any ship.

Provided that a person building, causing to be built, or

<sup>1</sup> 33 & 34 Vict. c. 90, s. 11 ; see *R. v. Sandoval*, 1887, 56 L. T. 526.

<sup>2</sup> "Friendly state" means "any foreign state at peace with Her Majesty" (sect 4).

<sup>3</sup> Sect. 4.

<sup>4</sup> Sect. 5.

<sup>5</sup> Sect. 7.

<sup>6</sup> Sect 8 (redrawn).

equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, is not liable to any of the penalties specified in this Article in respect of such building or equipping—

(i.) if forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State; . and

(ii) if he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the licence of Her Majesty until the termination of such war as aforesaid.

#### ARTICLE 105.

SHIPS, ETC., REFERRED TO IN ARTICLE 104 TO BE FORFEITED.

<sup>1</sup> All ships and their equipments used in or forming part of any such expedition as is mentioned in Article 104 (*a.*), or in respect of which is committed any of the offences defined in Article 104 (*e.*), and all arms and munitions of war used in forming part of any such expedition as is mentioned in Article 104 (*a.*), are forfeited to Her Majesty.

The expression “illegally enlisted persons” in Article 104 (*a.*) means—

(i.) any person who, being a British subject, within or without the dominions of Her Majesty, has, without the licence of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state;

(ii.) any person being a British subject, who, without the licence of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in

<sup>1</sup> See section referred to in the Articles mentioned.

the military or naval service of any foreign state at war with a friendly state ;

(iii.) any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state.

Every ship referred to in Article 104 (*d.*) is to be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace ; and

All illegally enlisted persons must, immediately on the discovery of the offence, be taken on shore, and must not be allowed to return to the ship.

#### ARTICLE 106.

##### INCREASING FORCE OF SHIPS FOR FOREIGN BELLIGERENTS AND PROCURING ENLISTMENT BY MISREPRESENTATION.

Every person is guilty of a misdemeanor, and is liable upon conviction thereof to the punishment specified in Article 104, who

(a)<sup>1</sup> within the dominions of Her Majesty, and without such licence as is mentioned in Article 104, by adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting, the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign state at war with any friendly state ; or

<sup>1</sup> 33 & 34 Vict. c. 90, s. 10.

(b.)<sup>1</sup> who induces any other person to quit Her Majesty's dominions, or to embark on any ship within Her Majesty's dominions, under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state.

#### ARTICLE 107.

##### PRESUMPTION OF KNOWLEDGE OF PURPOSE FOR WHICH SHIP IS BUILT.

<sup>2</sup> Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship must, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state lies on the builder of such ship.

<sup>1</sup> 33 & 24 Vict. c. 90, s. 6.

<sup>2</sup> Sect. 9.

## CHAPTER X

OFFENCES AGAINST PERSONS ON THE HIGH SEAS—  
PIRACY—SLAVE-TRADING

## ARTICLE 108.

## PIRACY.

<sup>1</sup> 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 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

<sup>1</sup> The definition is founded on one given by Sir Charles Hedges, in *R. v. Dawson*, 1696, 13 St. Tr. 454, and recognised by the Judicial Committee of the Privy Council in *A. G. of Hong Kong v. Kwok-a-sing*, 1873, L. R. 5 P. C. 179, 199; see, too, 7th Rep. C. L. C. p. 70. As to the punishment, the text gives what I suppose is the result of 28 Hen. 8, c. 15, ss. 2 & 3; 39 Geo. 3, c. 37, s. 1; 1 Geo. 4, c. 90, s. 1; 7 & 8 Geo. 4, c. 28, s. 12. The doubt expressed at the end of the Article is founded on the absence of any express authority for the affirmative of the proposition, and on the absurdity of the negative. If a Queen's ship were to fall in with an armed vessel belonging to no state, and obviously cruising for piratical purposes, would the commanding officer hesitate to seize that vessel because it had not actually taken a prize? It seems equally difficult to suppose that the vessel would be permitted to escape, or that it could lawfully be arrested if the crew were not pirates. The language of several of the statutes given in Articles 112, 113, and 114, seems to imply that a pirate is the name of a known class of persons, like a soldier or sailor, and that a man may be a pirate though he has never actually robbed, as he may be a soldier though he has not actually fought. By 13 & 14 Vict. c. 26 the Admiralty Courts are empowered when any of Her Majesty's ships attack or are engaged with any persons alleged to be pirates afloat or ashore, to "take cognizance of and determine whether the persons or any of them so attacked or engaged were pirates." The object of the Act was to determine the amount of certain rewards to be paid to the captors; no definition of pirates is given. See 2 Hist. Cr. Law, pp. 27-8, and Draft Code, s. 105.

(it seems) to the same punishment as if the act constituting piracy had been committed within the body of an English county.

It is doubtful whether persons cruising in armed vessels with intent to commit piracies, are pirates or not.

#### ARTICLE 109.

##### PIRACY WITH VIOLENCE.

<sup>1</sup> Every one commits felony and must upon conviction thereof be sentenced to <sup>2</sup> death who, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, assaults with intent to murder any person on board of or belonging to such ship or vessel, or stabs, cuts, or wounds any such person, or unlawfully does any act by which the life of such person may be endangered.

#### ARTICLE 110.

##### COMMITTING ACTS OF HOSTILITY UNDER FOREIGN COMMISSION.

<sup>3</sup> Every one is deemed to be a pirate who, being a natural-born subject of Her Majesty, or denizen of this kingdom, commits any piracy, robbery, or act of hostility against others Her Majesty's subjects on the sea under colour of any commission from any foreign prince or state, or pretence of authority from any person whatever.

#### ARTICLE 111.

##### ADHERING ON THE SEA TO THE QUEEN'S ENEMIES.

<sup>4</sup> Every one is deemed to be a pirate who, being a natural-born subject or denizen of Her Majesty, during any war

<sup>1</sup> 7 Will. 4 & 1 Vict. c. 88, s. 2. Draft Code, s. 106.

<sup>2</sup> The Act 31 Vict. c. 24, as to executions taking place within the walls of a prison, does not apply to this offence; see ss. 2 and 16.

<sup>3</sup> 11 & 12 Will. 3, c. 7, s. 7. For this and the four following Articles, see Draft Code, ss. 107-109.

<sup>4</sup> 18 Geo. 2, c. 30.



commits any hostility against Her Majesty's subjects upon the sea, or in any haven, river, creek, or place where the admiral has power or jurisdiction, by virtue or under colour of any commission from any of Her Majesty's enemies, or is any way adherent or gives aid or comfort to Her Majesty's enemies upon the sea or in any other such place as aforesaid.

#### ARTICLE 112.

##### BOARDING SHIPS AND THROWING CARGO OVERBOARD.

<sup>1</sup> Every one is deemed to be a pirate who, belonging to any ship or vessel whatever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek, forcibly boards and enters into such ship or vessel, and though he does not seize or carry off such ship or vessel, throws overboard or destroys any part of the goods or merchandises belonging to such ship or vessel.

#### ARTICLE 113.

##### MASTERS AND SEAMEN FAVOURING PIRATES.

<sup>2</sup> Every one is deemed to be a pirate who, being the commander or master of any ship, or a seaman or mariner in any place where the admiral has jurisdiction, betrays his trust, and turns pirate, enemy, or rebel, and piratically and feloniously runs away with his ship, or any barge, boat, ordnance, ammunition, goods, or merchandise ; or

yields them up voluntarily to any pirate ; or

brings any seducing message from any pirate, enemy, or rebel ; or

consults, combines, or confederates with or attempts to corrupt any commander, master, officer, or mariner to yield up or run away with any ship, goods, or merchandise or turn pirate or go over to pirates ; or

<sup>1</sup> 8 Geo. 1, c. 24, s. 1 (last part).

<sup>2</sup> 11 & 12 Will. 3, c. 7, s. 8. Section 9 enacts in substance that accessories to piracy shall be punished as pirates.

lays violent hands on his commander whereby to hinder him from fighting in defence of his ship and goods committed to his trust; or

confines his master, or makes or endeavours to make a revolt in the ship [<sup>1</sup> even if the object of such revolt is to redress real grievances].

#### ARTICLE 114.

##### TRADING WITH PIRATES AND CONSPIRING WITH THEM.

<sup>2</sup> Every one is deemed to be a pirate who in any wise trades with any pirate by truck, barter, exchange, or in any other manner, or furnishes any pirate, felon, or robber upon the seas with any ammunition, provision, or stores of any kind; or

fits out any ship or vessel knowingly and with a design to trade with, or supply, or correspond with any pirate, felon, or robber on the seas; or

in any way consults, combines, confederates, or corresponds with any pirate, felon, or robber on the seas knowing him to be guilty of any such piracy, felony, or robbery.

#### ARTICLE 115.

##### PUNISHMENT FOR STATUTORY PIRACIES.

<sup>3</sup> Every one who commits any of the offences defined in Articles 110–114, both inclusive, is liable upon conviction of such act to penal servitude for life.

#### ARTICLE 116.

##### NOT FIGHTING PIRATES.

<sup>4</sup> Every one commits a misdemeanor, and must, on conviction thereof, be imprisoned for six months, who being a

<sup>1</sup> The words bracketed give the effect of *R. v. Hastings*, 1825, 1 Moody, 82; *R. v. M'Gregor*, 1844, 1 C. & K. 429. As to "confines," see *R. v. Jones*, 1870, 11 Cox, C. C. 393.

<sup>2</sup> 8 Geo. 1, c. 24, s. 1 (first part).

<sup>3</sup> 7 Will. 4 & 1 Vict. c. 88, s. 3, S.

<sup>4</sup> 8 Geo. 1, c. 24, s. 6. Draft Code, s. 110.

commander, master, or any officer or seaman, or mariner of any merchant ship which carries guns and arms, does not when attacked by any pirate, or by any ship on which any pirate is on board, fight and endeavour to defend himself and his vessel from being taken by such pirate, or who utters any words to discourage the other mariners from defending the ship, so that the ship falls into the hands of such pirate.

## ARTICLE 117.

### SLAVE-TRADING DEFINED.

<sup>1</sup> Each of the following acts and every contract to do any one of them is an act of slave-trading:—

(a.) To deal or trade in, purchase, sell, barter, or transfer slaves or persons intended to be dealt with as slaves.

(b.) To carry away or remove slaves or other persons as or in order to their being dealt with as slaves.

(c.) To import or bring into any place whatsoever slaves or other persons as or in order to their being dealt with as slaves.

(d.) To ship, tranship, embark, receive, detain, or confine on board any <sup>2</sup> vessel slaves or other persons—

for the purpose of their being carried away or removed as or in order to their being dealt with as slaves; or

for the purpose of their being imported into any place whatever as or in order to their being dealt with as slaves.

(e.) To fit out, man, navigate, equip, despatch, use, employ, let, or take to freight, or on hire, any <sup>2</sup> vessel, in order to do any act of slave-trading before mentioned.

(f.) To lend or advance, or become security for the loan or advance of money, goods or effects, employed or to be employed in any act of slave-trading before mentioned.

(g.) To become guarantee or security for agents employed,

<sup>1</sup> 5 Geo. 4, c. 113, s. 2. The language of this Act is very elaborate, and I have not noticed every deviation from it. I believe that this and the next Article give its effect quite correctly, though in a very different shape. For the history of the Acts, see 3 Hist. Cr. Law, 255-6.

<sup>2</sup> "Ship, vessel, or boat."

or to be employed in any act of slave-trading before mentioned.

(*h.*) To engage in any other manner in any act of slave-trading before mentioned, directly or indirectly, as a partner, agent, or otherwise.

(*i.*) To ship, tranship, lade, receive, or put on board of any <sup>1</sup> vessel money, goods, or effects, to be employed in any act of slave-trading before mentioned.

(*j.*) To take the charge or command of, or to navigate, or enter and embark on board any <sup>1</sup> vessel in <sup>2</sup> any capacity, knowing that such <sup>1</sup> vessel is employed in any act of slave-trading before mentioned, or is intended to be so employed upon the voyage or upon the occasion in which the embarkation takes place.

(*k.*) To insure slaves or property employed or intended to be employed in slave-trading.

## ARTICLE 118.

### PIRATICAL SLAVE-TRADING.

<sup>3</sup> Every subject of Her Majesty, and every person resident or being in any of Her Majesty's dominions <sup>4</sup> commits piracy felony, and robbery, and is liable, upon conviction thereof, to penal servitude for life who upon the high seas, or in any place where the admiral has jurisdiction, knowingly and wilfully does or assists in doing any of the following things, that is to say :

(*a.*) Who carries away, conveys, or removes any person as a slave ; or

for the purpose of his being imported or brought as a slave into any <sup>5</sup> place whatsoever ; or

<sup>1</sup> "Ship, vessel, or boat."

<sup>2</sup> "As captain, master, mate, petty officer, surgeon, supercargo, seaman, marine, or servant, or in any other capacity."

<sup>3</sup> 5 Geo. 4, c. 113, s. 9 (redrawn). The punishment in the text is substituted for the punishment of death by 1 Vict. c. 81, s. 1 (now repealed), and the penal servitude Acts.

<sup>4</sup> "Dominions, forts, settlements, factories, or territories now or hereafter belonging to Her Majesty, or being in Her Majesty's occupation or possession."

<sup>5</sup> "Island, colony, country, territory, or place."

for the purpose of his being used, transferred, sold, or dealt with as a slave; or

(b.) Who ships, embarks, receives, detains, or confines any person on board any vessel for the purpose of his being carried away, conveyed, or removed as a slave; or

for the purpose of his being imported or brought as a slave into any <sup>1</sup> place whatsoever; or

for the purpose of his being sold, transferred, used, or dealt with as a slave.

## ARTICLE 119.

### PUNISHMENT OF SLAVE-TRADING.

<sup>2</sup> Every one [<sup>3</sup> owing allegiance to Her Majesty] commits felony, and is liable upon conviction thereof to be kept in penal servitude for fourteen years, or to be imprisoned with hard labour for a term of five years who [<sup>3</sup> in any part of the world] does any of the acts of slave-trading specified in Article 117, clauses (a.), (b.), (c.), (d.), (e.); or

knowingly and wilfully does any of the acts of slave-trading specified in Article 117, clauses (f.), (g.), (h.), (i.), or (k.).

## ARTICLE 120.

### SERVING ON A SLAVE-SHIP, FELONY.

<sup>4</sup> Every one commits the same offence, and is liable to the same punishment as is specified in the last Article, who takes charge or command [of], or navigates, or embarks on board any vessel as captain, master, mate, surgeon, or supercargo, or contracts to do so, knowing that such vessel is actually employed, or is on that voyage or occasion intended to be employed in any act of slave-trading.

<sup>1</sup> "Island, colony, country, territory, or place."

<sup>2</sup> 5 Geo. 4, c. 113, s. 10 (redrawn).

<sup>3</sup> These words are inserted to give the effect of *R. v. Zulueta*, 1843, 1 C. & K. 215, 226-7. See, however, *Santos v. Illidge*, 1860, 8 C. B. (N.S.) 861, in which the Court of Exchequer Chamber was equally divided upon a very similar, though not identical point.

<sup>4</sup> 5 Geo. 4, c. 113, s. 10.

## ARTICLE 121.

## SERVING ON A SLAVE-SHIP, MISDEMEANOR.

<sup>1</sup> Every one commits a misdemeanor, and is liable to two years imprisonment, who with the knowledge mentioned in the last Article, does any of the things mentioned in that Article, as petty officer, seaman, marine, or servant or in any other capacity not specifically mentioned therein.

## ARTICLE 122.

## KIDNAPPING PACIFIC ISLANDERS.

<sup>2</sup> Every one commits felony and is liable upon conviction thereof to the highest punishment other than capital punishment, or to any less punishment awarded to any felony by the law of the colony in which he is tried, who

(i.) decoys a native of any of the islands in the Pacific Ocean, not being in Her Majesty's dominions nor within the jurisdiction of any civilised power, for the purpose of importing or removing such native into any island or place other than that in which he was at the time of the commission of such offence; or carries away, confines, or detains any such native for the purpose aforesaid without his consent, proof of which consent lies on the party accused: or

(ii.) ships, embarks, receives, detains, or confines, or assists

<sup>1</sup> 5 Geo. 4, c. 113, s. 11.

<sup>2</sup> 35 & 36 Vict. c. 19, ss. 9 and 10, and see preamble, for a definition of Pacific Islanders. Sect. 9 provides that offenders may be tried and punished for such felony in any supreme Court of Justice in any of the "Australian colonies," i.e. (see s. 2) New South Wales, New Zealand, Queensland, South Australia, Tasmania, Victoria, and Western Australia. To these Fiji was added by 38 & 39 Vict. c. 51, which also empowered Her Majesty to erect a court at Fiji for the trial of offences committed in the Pacific Ocean, or the islands thereof. The Acts do not seem to contemplate the trial in England of such offences. There are however no words to exclude the jurisdiction of the English Courts, though the provisions as to punishment depend upon the laws of the colonies. It may be that if such an offence were tried in England, 7 & 8 Geo. 4, c. 28, ss. 8 and 9, would apply (see Article 18, *supra*). See as to this subject, 2 Hist. Cr. Law, p. 58-9.

in shipping, embarking, receiving, detaining, or confining, for the purpose aforesaid, a native of any of the aforesaid islands, on board any vessel either on the high seas or elsewhere without the consent of such native, proof of which consent lies on the party accused: or

(iii.) contracts for the shipping, embarking, receiving, detaining, or confining on board any vessel for the purpose aforesaid any such native without his consent, proof of which consent lies on the party accused:

(iv.) fits out, mans, navigates, equips, uses, employs, lets or takes on freight or hire any vessel, or commands or serves or is on board any such vessel with intent to commit, or that any one on board such vessel should commit, any of the offences above enumerated: or

(v.) ships, lades, receives, or puts on board, or contracts for the shipping, lading, receiving, or putting on board of any vessel money, goods, or other articles with the intent that they should be employed, or knowing that they will be employed in the commission of any of the offences above enumerated.

Any person who aids, abets, counsels or procures the commission of any of the said offences, is liable to be tried and punished as a principal offender.

## PART III

### ABUSES AND OBSTRUCTIONS OF PUBLIC AUTHORITY<sup>1</sup>

CHAP. XI.—ABUSES OF AUTHORITY—OPPRESSION—EXTORTION—  
—FRAUD—NEGLECT OF DUTY—  
OFFENCES BY SOLDIERS, POST  
OFFICE OFFICIALS, SHERIFFS, COR-  
ONERS, AND OFFICERS OF INLAND  
REVENUE—REFUSAL TO ACT.

CHAP. XII.—DISOBEDIENCE TO  
LAWFUL ORDERS.

CHAP. XIII.—BRIBERY AND COR-  
RUPTION—OFFENCES AT ELE-  
CTIONS—SALE OF OFFICES.

CHAP. XIV.—MISLEADING JUSTICE  
—PERJURY—FALSE SWEARING—  
SUBORNATION—MAINTENANCE—  
INTIMIDATING WITNESS

CHAP. XV.—ESCAPE—RESCUE—  
PRISON BREACH—MISPRISONS—  
COMPOUNDING OFFENCES.

### CHAPTER XI.

*ABUSES OF AUTHORITY, OPPRESSION, EXTORTION, FRAUD,  
NEGLECT OF DUTY, OFFENCES BY SOLDIERS, POST  
OFFICE OFFICIALS, SHERIFFS, CORONERS, AND  
OFFICERS OF INLAND REVENUE, REFUSAL TO ACT*

#### ARTICLE 123.

#### “PUBLIC OFFICER” DEFINED.

<sup>2</sup> THE expression “public officer,” in this chapter, means a person invested with authority to execute any public duty, and legally bound to do so, but does not include any member of either House of Parliament as such, or any ecclesiastical, naval, or military officer acting in the discharge of duties for the due discharge of which he can be made accountable only by an ecclesiastical, naval or military court.

<sup>1</sup> It has not been thought necessary to include in this Part a variety of offences of a very special kind, such as falsification of medical certificates and registers under 15 & 16 Vict. c. 56, ss. 15, 16; 21 & 22 Vict. c. 90, s. 38; 31 & 32 Vict. c. 121, s. 14, offences under the Dentists’ Act, 1878, 41 & 42 Vict. c. 33, s. 34, offences as to testing chain cables under 27 & 28 Vict. c. 27, s. 12, or under the Corn Returns Act, 45 & 46 Vict. c. 37, s. 12.

<sup>2</sup> See 7 Rep. C. L. C. ch. iv. p. 153, and cf. 5 Rep. C. L. C. p. 40. It would be foreign to the purpose of this work to discuss the question of the limits of the jurisdiction of the Courts of Common Law, and Ecclesiastical and Military Courts.



## ARTICLE 124.

## EXTORTION AND OPPRESSION BY PUBLIC OFFICERS.

<sup>1</sup> Every public officer commits a misdemeanor who, in the exercise, or under colour of exercising the duties of his office, does any legal 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 within this Article.

If the illegal act consists in taking under colour of office from any person any money or valuable thing which is not due from him at the time when it is taken, the offence is called "extortion."

If it consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not being extortion, the offence is called "oppression."

*Illustrations.*

(1.) <sup>2</sup> The Lord Chief Justice of England passes upon B and C sentences for similar offences so disproportionate as to show partiality. He commits oppression.

(2.) <sup>3</sup> The Governor-General of India wrongfully compels a

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<sup>1</sup> *R. v. Wyatt*, 1703, 1 Salk. 380; *R. v. Bembridge*, 1783, 3 Doug. 327, and 22 St. Tr. 1-159; Bacon, Abridgment, tit. "Office and Officer," N.; *R. v. Borron*, 1820, 3 B. & Ald. 432; and see cases referred to in the Illustrations.

<sup>2</sup> 4th Article of impeachment against Scroggs, C.J., 1680, 8 St. Tr. 199.

<sup>3</sup> This was the gist of the Cheyte Singh charge in the impeachment of Warren Hastings. It is remarkable that neither in Debrett's History of the Trial, nor in Mr. Mill's History of India, nor in Lord Macaulay's elaborate Essay on Warren Hastings, nor in Marshman's History of India, are the charges against Hastings distinctly stated. It seems to a lawyer natural to give at least an abstract of the indictment in order to render an account of a trial intelligible, but historians are apt to take a different view. Lord Macaulay in particular is so much interested in Burke's rhetoric that he omits to say what it was all about. In Mr. Massey's

native prince to pay sums of money to the Indian Government. He commits extortion.

(3.)<sup>1</sup> A and B, justices of the peace, refuse licences to the keepers of public houses, because they refuse to vote as the justices wish. A and B commit oppression.

(4.)<sup>2</sup> A, a justice of the peace, sends his servant to the house of correction for being saucy and giving too much corn to his horses. A commits oppression.

(5.)<sup>3</sup> A, a justice, acting as such, orders B to be whipped, without such proof or information as the law requires. A commits oppression.

(6.)<sup>4</sup> A, a constable, having B in custody on a warrant for an assault, obtains money from B upon colour and pretence that A will procure the warrant to be discharged. A commits extortion.

(7.)<sup>5</sup> A, a justice, commits B, a pauper, to prison for refusing to answer questions which A had a right to put as to B's settlement, believing in good faith that A had a legal right to commit B. A does not commit a misdemeanor.

(8.)<sup>6</sup> A, a justice, illegally refuses to accept bail for a person entitled to be bailed, under an opinion, hastily adopted in a crisis of real danger, that it was right to do so. A does not commit a misdemeanor.

## ARTICLE 125.

### ILLEGALLY IMPRISONING SUBJECTS BEYOND THE SEAS.

<sup>7</sup> Every one commits a misdemeanor who knowingly frames, contrives, writes, seals, or countersigns any warrant for the commitment, detainer, or transportation of any subject of this

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History of George III., vol. iii. p. 337, Burke's summary of the ten charges which he opened is given, but Mr. Massey observes that only one of the ten was distinct and substantive. The transactions with Cheyte Singh are described in Mill's *British India*, iv. 321, &c., in Lord Macaulay's *Essays*, p. 620 (ed. of 1850), and in Marshman's *History*, i. 424.

<sup>1</sup> *R. v. Williams*, 1762, 3 Burr. 1317.

<sup>2</sup> *R. v. Okey*, 1722, 8 Mod. 46. According to *R. v. Morfit*, 1816, R. & R. 307, decided long afterwards, A might have committed his servant for theft.

<sup>3</sup> See precedent of indictment, 2 Chit. Crim. Law, 236.

<sup>4</sup> Precedent of indictment, 2 Chit. Crim. Law, 292.

<sup>5</sup> *R. v. Jackson*, 1787, 1 T. R. 653.

<sup>6</sup> *R. v. Badger*, 1843, 4 Q. B. 468.

<sup>7</sup> 31 Car. 2, c. 2, s. 11, the Habeas Corpus Act. The penalty is *præmunire*, as explained by Coke, 1 Inst. 130 a. 7th Rep. C. L. C. p. 37.

realm resident in England, Wales, or Berwick, as a prisoner in or to Scotland, Ireland, Jersey, Guernsey, or any other place beyond the sea, with or without the Queen's dominions or who so commits, detains, imprisons, or transports any person.

Whoever commits any such misdemeanor is put out of the Queen's protection. His lands, tenements, goods, and chattels are forfeited to the Queen, and he is to be imprisoned for life (or perhaps at the Queen's pleasure).

#### ARTICLE 126.

##### FRAUDS AND BREACHES OF TRUST BY OFFICERS.

<sup>1</sup> Every public officer commits a misdemeanor who, in the discharge of the duties of his office commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.

##### *Illustrations.*

(1.) <sup>2</sup> A, an accountant in the office of the Paymaster-General, fraudulently omits 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 to himself after the time when they ought to have been paid to the Crown. A commits a misdemeanor.

(2.) <sup>3</sup> A, a commissary-general of stores in the West Indies, makes contracts with B to supply stores, on the condition that B should divide the profits with A. A commits a misdemeanor.

#### ARTICLE 127.

##### NEGLECT OF OFFICIAL DUTY.

<sup>4</sup> Every public officer commits a misdemeanor who wilfully neglects to perform any duty which he is bound either by

<sup>1</sup> See cases in Illustrations.

<sup>2</sup> *R. v. Bembridge*, 1783, 3 Doug. 327; 22 St. Tr. 1-160. This would now be an offence in the case of a private person under 38 & 39 Vict. c. 24, s. 12. See *post*, Art. 381.

<sup>3</sup> *R. v. Valentine Jones*, 1809, 31 St. Tr. 251.

<sup>4</sup> *R. v. Wyatt*, 1702, 1 Salk. 381; *R. v. Bembridge*, *ante*; Comyn's Digest, tit. Indictment, D.; 4 Steph. Com. 272.

common law or by statute to perform, provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.

### *Illustrations.*

(1.)<sup>1</sup> A, the mayor of B, neglects to perform various acts which it was in his power to do, and which a man of ordinary prudence, firmness, and activity, might have been expected to do, in order to suppress riots in B. A is guilty of a misdemeanor.

(2.)<sup>2</sup> A, the Lord Mayor of London, refrains from making the proclamation in the Riot Act, and from ordering soldiers to disperse a mob, because he is afraid to do so, in circumstances in which a man of ordinary courage would not have been afraid. A commits a misdemeanor.

(3.)<sup>3</sup> A, a sheriff, refuses to execute a criminal condemned to death. A commits a misdemeanor.

(4.)<sup>4</sup> A, a coroner, refuses to take an inquest on a body, after notice that it is lying dead in his jurisdiction. A commits a misdemeanor.

(5.)<sup>5</sup> A, a constable, wilfully refuses to arrest a person who commits a felony in his presence. A commits a misdemeanor.

(6.)<sup>6</sup> A, a clergyman of the Church of England, refuses to solemnise marriage between persons who might lawfully be married and who tender themselves for that purpose. He commits a misdemeanor.

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<sup>1</sup> *R. v. Pinney*, 1832, 5 C. & P. 254, and 3 B. & Ad. 947, 3 St. Tr. N. S. 1. This is the case of the Bristol riots. Mr. Pinney was, in fact, acquitted; but the case involves the principle of the illustration.

<sup>2</sup> *R. v. Kennet*, 1781 (Lord Mayor in 1780), printed in 5 C. & P. 282, as a note to *R. v. Pinney*.

<sup>3</sup> *R. v. Antrobus*, 1835, 2 A. & E. 788.

<sup>4</sup> 2 Hale, P. C. 57; and see precedent of indictment, 2 Chit. Crim. Law, 255.

<sup>5</sup> Hawk, P. C. p. 129; cf. p. 115.

<sup>6</sup> *R. v. James*, 1850, 2 Den. 1. The conviction in this case was quashed on the narrow ground that the parties did not sufficiently tender themselves for marriage. The objection that the offence was only an ecclesiastical one was taken, but no judgment was delivered on it. A refusal to bury would probably stand on the same footing. By 1 Edw. 6, c. 1, it is enacted that a minister "shall not without lawful cause deny" (the Sacrament) "to any person that will devoutly and humbly desire it." An indictment for such a denial would be incongruous and indecent, but it is difficult to find any definite legal ground for saying that it would not lie. See *Jenkins v. Cook*, 1876, L. R. 1 P. D. 80.

## ARTICLE 128.

## OFFENCES BY SOLDIERS.

<sup>1</sup> Every officer who quarters or causes to be billeted any officer, soldier or horse upon any person otherwise than is allowed by this Act is guilty of a misdemeanor.

<sup>2</sup> Every person who negotiates, acts as agent for or otherwise aids or connives at, the sale of a commission, payment for promotion, retirement, or employment or an unlawful exchange, is liable on conviction on indictment to a fine of £100, or imprisonment for six months.

## ARTICLE 129.

## OFFENCES BY POST-OFFICE OFFICIALS.

<sup>3</sup> Every person having official duties connected with the Post Office or acting on behalf of the Postmaster-General is guilty of a misdemeanor, who contrary to his duty discloses, or in any way makes known, or intercepts, the contents, or any part of the contents, of any telegraphic messages or any message intrusted to the Postmaster-General for the purposes of transmission.

<sup>4</sup> Every person in the employment of a <sup>5</sup> telegraph company is guilty of a misdemeanor and is liable to imprisonment with hard labour or to a fine of £200 who improperly divulges to any person the purport of any <sup>6</sup> telegram.

<sup>1</sup> 44 & 45 Vict. c. 58, s. 111.

<sup>2</sup> Ibid. s. 155.

<sup>3</sup> 32 & 33 Vict. c. 73, s. 20.

<sup>4</sup> 47 & 48 Vict. c. 76, s. 11. This offence is also punishable summarily; see Oke's Synopsis, p. 632.

<sup>5</sup> "Any company, corporation, or persons carrying on the business of sending telegrams for the public under whatever authority or in whatever manner, such company, corporation, or persons may act or be constituted."

<sup>6</sup> "A written or printed message or communication, sent to or delivered at, a post-office, or the office of a telegraph company, for transmission by telegraph, or delivered by the Post Office or a telegraph company as a message or communication transmitted by telegraph."

## ARTICLE 130.

## OFFENCES BY A SHERIFF, &amp;C.

<sup>1</sup> Any person being a sheriff, under-sheriff, bailiff or officer of a sheriff, whether within a franchise or without is guilty of a misdemeanor and liable to imprisonment not exceeding one year, and to pay a fine or if he has not wherewith to pay, to imprisonment for not exceeding three years, who

(a.) refuses to arrest any felon in his bailiwick ; or

(b.) is guilty of an offence against or breach of, the provisions of the Sheriffs' Act, 1887.

## ARTICLE 131.

## OFFENCES BY A CORONER.

<sup>2</sup> A coroner is guilty of misdemeanor, and in addition to any other punishment may be removed from his office, unless it is annexed to any other office, who is guilty of extortion, or of corruption, or of wilful neglect, or <sup>3</sup> misbehaviour in the discharge of his duty.

## ARTICLE 132.

## OFFENCES BY INLAND REVENUE OFFICERS, &amp;C.

<sup>4</sup> Any person is guilty of a misdemeanor and on conviction forfeits his office or employment, and is incapable of ever holding any office or employment in or relating to the Excise, who

being a collector, or any person appointed to be an officer and employed in relation to duties of excise deals or

<sup>1</sup> 50 & 51 Vict. c. 55, s. 29, (1) and see Art. Escape, *post*.

<sup>2</sup> 50 & 51 Vict. c. 71, s. 8.

<sup>3</sup> A coroner who by himself or his partner acts for or against any person tried on inquisition or indictment for an offence for which the person is charged on an inquisition taken before him, or a coroner who does not comply with a written requisition of his jury to summon a medical practitioner as a witness or to direct a post-mortem examination to be taken, is guilty of misbehaviour in discharge of his duty ; *Ibid.* ss. 10, 21 (3).

<sup>4</sup> 53 & 54 Vict. c. 21, s. 7.

trades in any goods subject to any such duty, or carries on or is concerned in any trade or business subject to any law of excise.

<sup>1</sup> Any person is guilty of a misdemeanor and on conviction is incapable of ever holding any office under the Crown who

being a collector or other person intrusted with the collection, receipt, or custody of inland revenue, neglects or omits to keep and render accounts in the prescribed manner and form of all sums of money collected or received by him or intrusted to his care.

### ARTICLE 133.

#### REFUSAL TO SERVE AN OFFICE.

<sup>2</sup> 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.

#### *Illustration.*

A person may be indicted for refusing to exercise the office of overseer of the poor or parish constable.

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<sup>1</sup> 53 & 54 Vict. c. 21, s. 14.

<sup>2</sup> *R. v. Bower*, 1823, 1 B. & C. 585; and see 5th Report, C. L. C. 41, where many authorities are cited. Also 1 Russ. Cr. 307—308.

## CHAPTER XII

## DISOBEDIENCE TO LAWFUL ORDERS

## ARTICLE 134.

## DISOBEDIENCE TO A STATUTE.

<sup>1</sup> EVERY one commits a misdemeanor who wilfully 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.

## ARTICLE 135.

## DISOBEDIENCE TO LAWFUL ORDERS OF COURT, &amp;c.

<sup>2</sup> Every one commits a misdemeanor who disobeys 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 any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience.

*Illustrations.*

(1.) <sup>3</sup> A refuses to assist a constable in the execution of his duty when lawfully called upon by the constable to do so. A commits a misdemeanor.

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<sup>1</sup> *R. v. Wright*, 1758, 1 Burr. 543; *R. v. Harris*, 1791, 4 T. R. 202; 5th Report, C. L. C. 43.; 2 Hawk. P. C. 289. Draft Code, s. 114.

<sup>2</sup> 5th Report, C. L. C. 43; *Jones's Case*, 1840, 2 Moo. 171; *R. v. Dale*, 1852, D. & P. 37, Draft Code, s. 115.

<sup>3</sup> *R. v. Sherlock*, 1866, 1 C. C. R. 20, and *R. v. Brown*, 1841, Car. and M. 314. In the latter case it was laid down that in order to



(2.)<sup>1</sup> A refuses to pay money for the support of his bastard child which he has been ordered to pay by the Quarter Sessions. A commits a misdemeanor.

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constitute this offence it is necessary that the constable should see a breach of the peace committed, that there should be a reasonable necessity for his calling upon other persons for assistance, and that the person called on should be suffering from no physical impossibility to obey, and should have no lawful excuse for disobedience : see too *R. v. Phelps*, 1841, Car. & M. 180.

<sup>1</sup> *R. v. Ferrall*, 1850, 2 Den. 51. In this case Pollock, C.B., asked how it would be if the man could not pay? and whether a refusal to pay a fine is indictable. The answer would seem to be that it is. Imprisonment on such an indictment would only be a roundabout way of doing what is commonly done in cases of fine, viz. inflicting an alternative term of imprisonment. Whether a man is sentenced to be fined £100 and to be imprisoned in default of payment, or to be imprisoned because he has not obeyed the order of the Court to pay a fine of £100, is rather a matter of form than anything else.

## CHAPTER XIII

## BRIBERY AND CORRUPTION—SALE OF OFFICES

## ARTICLE 136.

## JUDICIAL CORRUPTION.

<sup>1</sup> EVERY one who gives or offers to any person holding any judicial office, and every person holding any judicial office who accepts any bribe, commits a misdemeanor.

Every gift or payment made in respect of or in relation to any business having been, being, or about to be transacted before any such person in his office is a bribe, whether it is given in order to influence the judicial officer in something to be done, or to reward him for something already done, and whether the thing done or to be done is itself proper or improper.

## ARTICLE 137.

## CORRUPTION OF OTHER PUBLIC OFFICERS.

<sup>2</sup> Every one commits a misdemeanor who by any means endeavours to force, persuade, or induce any public officer not being a judicial officer to do or omit to do any act which the offender knows to be a violation of such officer's official duty.

<sup>1</sup> 3 Inst. 144-8; 1 Hawk. P. C. 414-15; 5th Rep. C. L. C. p. 20-1. See, too, Spedding's *Life of Bacon*, vii. 209-78. The crime is so rare that the definition is very imperfect and more or less conjectural. See 3 Hist. Cr. Law, 250-5; Draft Code, s. 111.

<sup>2</sup> 5th Report, C. L. C. "offences against the Executive Power" art. 35, p. 47. Many authorities are cited, and in particular the chapters of the 3rd Inst. and Hawkins referred to in the last note; also *R. v. Vaughan*, 1769, Burr. 2494, see especially 2501, and see *R. v. Lancaster*, 1890, 16 Cox, 737.

## ARTICLE 138.

## CORRUPTION OF PUBLIC BODIES.

<sup>1</sup> Every one is guilty of a misdemeanor and is liable to the penalties mentioned below, who, by himself, or in conjunction with another person—

(a.) corruptly solicits or receives, or agrees to receive, for himself or for any other person, any <sup>2</sup> reward as an inducement to, or reward for, or otherwise on account of, any member, officer, or servant of a <sup>3</sup> public body, doing or forbearing to do anything in respect of any matter or transaction actual or proposed in which the <sup>3</sup> public body is concerned; or

(b.) corruptly gives, promises, or offers any <sup>2</sup> reward to any person, whether for the benefit of that person or another person, as an inducement to, or reward for, or otherwise on account of, any member, officer, or servant of any <sup>3</sup> public body, doing or forbearing to do anything in respect of any matter or transaction, actual or proposed in which the <sup>3</sup> public body is concerned.

<sup>4</sup> Such person is liable

(a.) to imprisonment with hard labour for two years, or a fine not exceeding £500, or to both fine and imprisonment; and,

(b.) to be ordered to pay to such body and in such manner as the Court directs the amount or value of any <sup>5</sup> reward received by him or any part thereof; and,

(c.) to be adjudged incapable of being elected or appointed to any <sup>3</sup> public office for seven years from, and to forfeit any such office held by him at, the date of the conviction; and

(d.) on a second conviction for a like offence, in addition to the foregoing penalties to be adjudged to be for ever incapable of holding any <sup>3</sup> public office and to be incapable for seven

<sup>1</sup> 52 & 53 Vict. c. 69, s. 1.

<sup>2</sup> "gift, loan, fee, reward, or advantage."

<sup>3</sup> See note <sup>1</sup> on p. 99.

<sup>4</sup> Ibid. s. 2.

<sup>5</sup> As in Note 2 excluding advantage.

years of being registered as an elector, or voting at an election either of members to serve in Parliament or of members of any<sup>1</sup> public body; and

(e.) if he is an officer or servant in the employ of any<sup>1</sup> public body, at the discretion of the Court to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.

A person is not exempt from punishment under this Act by reason of the invalidity of the appointment or election of a person to a public office.

## ARTICLE 139.

### EMBRACERY.

<sup>2</sup> Every one commits the misdemeanor called embracery who by any means whatever except the production of evidence and argument in open court attempts to influence or instruct any jurymen, or to incline him to be more favourable to the one side than to the other in any judicial proceeding whether any verdict is given or not, and whether such verdict, if given, is true or false.

<sup>1</sup> "The expression 'public body' means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under, and for the purposes of, any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom." "The expression 'public office' means any office or employment of a person as a member, officer, or servant of such public body." See the Act as to the meaning of "advantage." Ibid. s. 7.

<sup>2</sup> 1 Hawk. P. C. 466; 1 Russ. Cr. 360. It is provided by the Jury Act of 1825, 6 Geo. 4, c. 50, s. 61, that "notwithstanding anything herein contained every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto," shall be liable to be proceeded against, and punished as before the Act. I do not know what was the reason for this section. See Draft Code, s. 129.

## ARTICLE 140.

## DEFINITION OF BRIBERY OF VOTERS.

<sup>1</sup> Every one is guilty of bribery

(a.) Who directly or indirectly by himself or by any other person on his behalf,

<sup>2</sup> in order to induce any voter to vote or refrain from voting at any election ;

<sup>3</sup> or corruptly on account of such voter's having voted or refrained from voting at any election ;

<sup>4</sup> or in order to induce any person to procure or endeavour to procure the return of any person at any election, or the vote of any voter at any election,

(i.) <sup>5</sup> Gives, lends, or agrees to give or lend, or offers or promises, or promises to procure or to endeavour to procure any money or valuable consideration to or for <sup>6</sup> any person whatever :

(ii.) <sup>7</sup> Gives or procures, or agrees to give or procure, or offers or promises, or promises to procure or to endeavour to procure any office, place, or employment to or for any person whatever ; or

(b.) <sup>8</sup> Who in consequence of any such gift, loan, offer, promise, procurement, or engagement, procures or engages, promises or endeavours to procure the return of any person in any election or the vote of any voter at any election ; or

(c.) <sup>9</sup> Who advances or pays or causes to be paid any money to, or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repay-

<sup>1</sup> 17 & 18 Vict. c. 102, s. 2.

<sup>2</sup> Ibid. 2 (1), (2).

<sup>3</sup> Ibid. (1), (2).

<sup>4</sup> Ibid. (3).

<sup>5</sup> Ibid. (1), (2).

<sup>6</sup> Any person = "any voter, or to or for any person on behalf of any voter, or to or for any other person."

<sup>7</sup> 17 & 18 Vict. c. 102, s. 2 (1), (2).

<sup>8</sup> Sect. 2 (4).

<sup>9</sup> Sect. 2 (5).

ment of any money wholly or in part expended in bribery at any election;<sup>1</sup> or

(d.)<sup>2</sup> Who being a voter before or during any election directly or indirectly by himself or by any other person on his behalf receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place, or employment for himself or for any other person for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election; or

(e.)<sup>3</sup> Who after any election directly or indirectly by himself or by any other person on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or to refrain from voting; or

(f.)<sup>4</sup> Who, either directly or indirectly, corruptly pays any rate on behalf of any ratepayer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election; or

(g.) Any candidate or other person who, either directly or indirectly, pays any rate on behalf of any voter for the purpose of inducing him to vote or refrain from voting; or

(h.) Any person on whose behalf and with whose privity any such payment as in clauses (f.) and (g.) is mentioned is made.

## ARTICLE 141.

### DEFINITION OF UNDUE INFLUENCE.

<sup>5</sup> Every one commits the offence of undue influence

(a.) who directly or indirectly by himself or by any other person on his behalf makes use of or threatens to make use

<sup>1</sup> This clause does not "extend to any money paid or agreed to be paid for or on account of any legal expenses *bond fide* incurred in, at, or concerning any election."

<sup>2</sup> 17 & 18 Vict. c. 102, s. 3 (1).

<sup>3</sup> Ibid. s. 3 (2).

<sup>4</sup> 30 & 31 Vict. c. 102, s. 49. The words of the proviso at the end of 17 & 18 Vict. c. 102, s. 2 (see Note 1) seem to be applicable only to s. 2 (5).

<sup>5</sup> 46 & 47 Vict. c. 51, s. 2.

of any force, violence, or restraint, or inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm, or loss, upon or against any person in order to induce or compel him to vote or refrain from voting, or on account of his having voted or refrained from voting at any election ; or

(b.) who by abduction, duress, or any fraudulent device or contrivance impedes, or prevents the free exercise of the franchise of any elector, or thereby compels, induces, or prevails upon any voter either to give or refrain from giving his vote at any election.

#### ARTICLE 142.

##### DEFINITION OF TREATING.

<sup>1</sup> Every person is guilty of treating

(a.) who corruptly by himself or by any other person, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any meat drink entertainment or provision to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting at such election ; or

(b.) who being an elector corruptly accepts or takes any such meat drink entertainment or provision.

#### ARTICLE 143.

##### PUNISHMENT OF BRIBERY AT CERTAIN ELECTIONS.

<sup>2</sup> Every person is guilty of a misdemeanor, and is liable upon conviction thereof to one year's imprisonment and

<sup>1</sup> 46 & 47 Vict. c. 51, s. 1.

<sup>2</sup> 17 & 18 Vict. c. 102, ss. 2, 3, 5 ; 45 & 46 Vict. c. 50, s. 78 ; 46 & 47 Vict. c. 51, s. 6. Personation is also a corrupt practice, and is punishable as felony ; see Art. 407.

hard labour, or to be fined any sum not exceeding £200. who

commits bribery, undue influence, or treating at or in respect of any election of any member to serve in Parliament, or any municipal election.

#### ARTICLE 144.

##### OFFENCES AT ELECTIONS.

<sup>1</sup> Every one is guilty of a misdemeanor, and is liable to imprisonment with hard labour for two years, if he is a returning officer or an officer or clerk in attendance at a polling station, or for six months if he is any other person, who

(a.) without due authority supplies any ballot paper to any person ; or

(b.) fraudulently puts into any ballot box any paper other than the ballot paper which he is authorized by law to put in ; or

(c.) fraudulently takes out of the polling station any ballot paper ; or

(d.) without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election.

#### ARTICLE 145.

##### DEFINITION OF OFFICE.

The word " office " in Articles 146 and 147 includes

<sup>2</sup> Every office in the gift of the Crown or of any officer appointed by the Crown, and all commissions, civil, naval, and military, and all places or employments in any public department or office whatever in any part of her Majesty's dominions whatever, and all deputations to any such office and every participation in the profits of any such office or deputation.

<sup>1</sup> 35 & 36 Vict. c. 33, s. 3 ; as to forging ballot papers, &c., see *post*, Art. 394.

<sup>2</sup> 5 & 6 Edw. 6, c. 16 ; 49 Geo. 3, c. 126, s. 1.



## ARTICLE 146.

## SELLING OFFICES.

<sup>1</sup> Every one commits a misdemeanor who does any of the following things in respect of any office, or any appointment to or resignation of any office, or any consent to any such appointment or resignation, that is to say, every one who directly or indirectly

(a.) sells the same, or receives any reward or profit from the sale thereof, or agrees to do so :

(b.) purchases, or gives any reward or profit for the purchase thereof, or agrees or promises to do so.

<sup>2</sup> Whoever commits either of these misdemeanors upon its commission forfeits to the Queen any right which he may have in the office, and is disabled to hold it for life, and it is not lawful for the Queen to dispense him from such disability.

## ARTICLE 147.

## MAKING INTEREST FOR OFFICES FOR REWARD.

<sup>3</sup> Every one commits a misdemeanor who does any of the following things directly or indirectly :

(a.) Receives or agrees to receive any reward or profit for any interest, request, or negotiation about any office, or under pretence of using any such interest, making any such request, or being concerned in any such negotiation :

(b.) Gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward for any such request or negotiation as aforesaid :

<sup>1</sup> 49 Geo. 3, c. 126, s. 3, greatly condensed.

<sup>2</sup> 5 & 6 Edw. 6, c. 16, s. 1 ; 49 Geo. 3, c. 126, s. 2 ; *Ingram's Case*, 1604, 3 Inst. 154. The 5 & 6 Edw. 6, c. 16, s. 1, is repealed as to offices in the Customs, by 6 Geo. 4, c. 105, s. 10. It was, however, extended to offices in the Customs as well as to many others, by 49 Geo. 3, c. 126. I do not quite understand the result of this. The present Customs Act, 39 & 40 Vict. c. 36, throws no light on the subject.

<sup>3</sup> 49 Geo. 3, c. 126, s. 4.

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(c.) Solicits, recommends, or negotiates in any manner as to any appointment to or resignation of any office in expectation of any reward or profit :

(d.) <sup>1</sup> Keeps any office or place for transacting or negotiating any business relating to vacancies in or the sale or purchase of or appointment to or resignation of offices.

<sup>1</sup> 49 Geo. 3, c. 126, s. 5.

CHAPTER XIV<sup>1</sup>*MISLEADING JUSTICE—PERJURY—FALSE SWEARING—  
SUBORNATION*

## ARTICLE 148

<sup>2</sup> PERJURY DEFINED.

<sup>3</sup> PERJURY is an assertion upon an oath duly administered in a judicial proceeding, before a competent Court, of the truth of some matter of fact, material to the question depending in that proceeding, which assertion the assertor does not believe to be true when he makes it, or on which he knows himself to be ignorant.

<sup>4</sup> In this definition, the word "oath" includes every affirmation which any class of persons are by law permitted to make in place of an oath.

<sup>5</sup> The expression "duly administered" means administered

<sup>1</sup> Many cases of offences resembling, or punishable as, perjury, are to be found in the statutes which are not mentioned in this chapter. An Act not otherwise connected with criminal law may make some form of false declaration, &c. an offence, and though such offences are numerous they are not important, and are therefore omitted from the text. A great many of them would have been merged into the Perjury Bill of 1894 had that measure become law. Its effect in that direction would no doubt have been useful. It may be added that the repealing Schedule of the Bill referred to nearly 140 enactments, and was not then quite exhaustive. It is probable that a similar Bill will soon be passed, when some of the above chapter will become obsolete.

<sup>2</sup> See 3 Hist. Cr. Law, pp. 240-50.

<sup>3</sup> 3rd Inst. 164-167; 1 Hawk. P. C. 429-435; 3 Russ. Cr. 1, &c., and see note, 5th Report, C. L. C. p. 23. Draft Code, s. 119.

<sup>4</sup> Many statutes to this effect have been passed. See in particular 5 & 6 Will. 4 c. 62, s. 21; 51 & 52 Vict. c. 46 and 52 & 53 Vict. c. 63, s. 3, and see statutes as to particular religious bodies collected in 3 Russ. Cr. 26-9.

<sup>5</sup> 14 & 15 Vict. c. 99, s. 16, passed to remove doubts in the question by whom an oath might be administered, 3 Russ. Cr. 3. As to Commissioners see 52 Vict. c. 10, s. 7, as to arbitrators, 52 & 53 Vict. c. 49, s. 22. As to using a form binding on the witness's conscience see 1 & 2 Vict. c. 105; *Omichund v. Barker*, 1744, 1 Atk. 21.

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.

<sup>1</sup> 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.

<sup>2</sup> The expression "judicial proceeding" means a proceeding which takes place in or under the authority of any Court of justice, or which relates in any way to the administration of justice, or which legally ascertains any right or liability.

<sup>3</sup> A proceeding may be judicial although the person accused in it was brought before the Court by which the proceeding is held by an irregular warrant.

<sup>4</sup> The word "fact" includes the fact that the witness holds any opinion or belief.

<sup>5</sup> The word "material" means of such a nature as to affect in any way, directly or indirectly, the probability of anything to be determined by the proceeding, or the credit of any witness, and a fact may be material although evidence of its existence was improperly admitted.

### *Illustrations.*

(1.) A swears that certain goods are of a certain value.

<sup>6</sup> A is entirely ignorant upon the subject. A is guilty of perjury whether the goods are of that value or not.

The goods are not of that value, and A knows it. A has committed perjury.

<sup>7</sup> The goods are of that value, but A believes that they are not. A has committed perjury.

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<sup>1</sup> *Sells v. Hoare*, 1822, 3 B. & B. 232.

<sup>2</sup> Illustrations (2), (3), (4).

<sup>3</sup> *R. v. Hughes*, 1879, 4 Q. B. D. 614.

<sup>4</sup> Illustration (5).

<sup>5</sup> Illustrations (6), (7).

<sup>6</sup> *R. v. Mawbey*, 1796, 6 T. R. at p. 637.

<sup>7</sup> *Gurney's Case*, 1611, 3 Inst. 166.

The goods are not of that value, but A believes that they are. A has not committed perjury.

(2.) <sup>1</sup> A proceeding before a local marine board sitting under the Merchant Shipping Act 1854, and having power to suspend or cancel the certificates of the masters and mates of ships, is a judicial proceeding.

(3.) <sup>2</sup> An inquiry before a sheriff as to the amount of damages is a judicial proceeding.

(4.) <sup>3</sup> An inquiry before a justice of the peace as to making a man find sureties for the peace is a judicial proceeding.

(5.) <sup>4</sup> A swears that he thinks that certain words are in his handwriting. The jury find that he did not think so. A commits perjury.

(6.) <sup>5</sup> A, a witness under cross-examination, denies an imputation which goes to his credit only. B is improperly permitted to contradict A. B swears falsely. B commits perjury on a material fact.

(7.) <sup>6</sup> A falsely swears that he has examined a paper, alleged to be a copy, with an original will, in order to make the copy admissible. The paper is not put in evidence, and it would not have been admissible if it had been tendered. A commits perjury on a material fact.

## ARTICLE 149.

### SUBORNATION OF PERJURY.

<sup>7</sup> Subornation of perjury is procuring a person to commit a perjury, which he actually commits in consequence of such procurement.

<sup>1</sup> *R. v. Tomlinson*, 1866, 1 C. C. R. 49.

<sup>2</sup> 1 Hawk. P. C. 430.

<sup>3</sup> Ibid.

<sup>4</sup> *R. v. Schlesinger*, 1847, 10 Q. B. 670.

<sup>5</sup> *R. v. Gibbon*, 1861, L. & C. 109. In the later case of *R. v. Tyson*, 1869, 1 C. C. R. 107, *R. v. Gibbon* was followed, but the facts are not so strong. See, too, *R. v. Mullany*, 1865, L. & C. 593.

<sup>6</sup> *Philpott's Case*, 1851, 2 Den. C. C. 302.

<sup>7</sup> If the perjury is not committed, the crime is incitement: see Article 48. See also 1 Hawk. P. C. 435, c. 27, s. 10. Draft Code, s. 119.

## ARTICLE 150.

## PUNISHMENT OF PERJURY AND SUBORNATION.

<sup>1</sup> Perjury and subornation of perjury are misdemeanors, and every one who commits either is liable, upon conviction, to any term of penal servitude, or imprisonment with or without hard labour, not exceeding seven years.

## ARTICLE 151.

## FALSE SWEARING.

<sup>2</sup> Every one commits a misdemeanor who swears falsely before any person authorized to administer an oath upon a matter of public concern, under such circumstances that the false swearing if committed in a judicial proceeding would have amounted to perjury.

*Illustrations.*

(1.) <sup>3</sup> A takes a false oath before a surrogate in order to obtain a marriage licence. A commits a misdemeanor.

(2.) <sup>4</sup> A takes a false oath before commissioners appointed by the king to inquire into cases in which a royal grant was required to confirm title to lands. A commits a misdemeanor.

(3.) <sup>5</sup> A swears a false affidavit under the Bills of Sale Act (17 & 18 Vict. c. 36). A commits a misdemeanor.

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<sup>1</sup> The punishment at common law was whipping, imprisonment, fine, and pillory. By 2 Geo. 2, c. 25, s. 2, seven years transportation or imprisonment with hard labour was added. By 3 Geo. 4, c. 114, hard labour was again authorized, I know not why. By 7 Will. 4 & 1 Vict. c. 23, the pillory was abolished. Whipping is obsolete. Fines fall under Article 23. Thus the text represents the result. Cf. Draft Code, ss. 120, 1.

<sup>2</sup> See Cases in Illustrations. Draft Code, s. 122.

<sup>3</sup> *Chapman's Case*, 1849, 1 Den. C. C. 432.

<sup>4</sup> *Spier v. Read*, 1715, Hobart, 62. This case is given by Hawkins, 1 P. C. 430, as an instance of perjury in a proceeding not judicial; but this, I think, is a misconception.

<sup>5</sup> *R. v. Hodgkiss*, 1869, 1 C. C. R. 212.

## ARTICLE 152.

FORGING INSTRUMENTS OF EVIDENCE AND TENDERING THEM  
IN PROOF.

Every one commits felony and is liable, upon conviction thereof, to seven years penal servitude, who does any of the following things (that is to say),

(a.) <sup>1</sup> forges the seal, stamp, or signature of any such certificate, official, or public document, or document or proceeding of any corporation or joint stock or other company as is mentioned or referred to in the preamble to 8 & 9 Vict. c. 113, or of any document referred to in 14 & 15 Vict. c. 99, or any certified copy of any document, bye-law, entry in any register, or other book or other proceeding in the first-mentioned Act referred to ; or

(b.) tenders in evidence any such document knowing the same to be false and counterfeit ; or

(c.) forges the signature of any judge of the Supreme Court attached or appended to any decree, order, certificate, or other judicial or official document ; or

(d.) tenders in evidence any such document knowing the same to be false or counterfeit ; or

(e.) prints any copy of any private Act or of the journals of either House of Parliament, falsely purporting to have been printed by the printers to the Crown, or to either House of Parliament ; or

(f.) tenders in evidence any such copy, knowing it not to have been printed by the person by whom it purports to have been printed ; or

(g.) <sup>2</sup> tenders in evidence, or otherwise uses, any affidavit having any seal or signature of any person authorized by or under the Commissioner for Oaths Act 1889 (52 Vict. c. 10), to administer an oath, forged or counterfeited or fraudulently altered knowing the same to be forged, counterfeited, or fraudulently altered.

<sup>1</sup> 8 & 9 Vict. c. 113, s. 4, and see my Digest of the Law of Evidence, Art. 79. See Draft Code, s. 125.

<sup>2</sup> 52 Vict. c. 10, s. 8.

## ARTICLE 153.

## OFFICERS GIVING FALSE CERTIFICATES.

<sup>1</sup> Every one commits a misdemeanor, and is liable, upon conviction thereof, to eighteen months imprisonment, who

Being an officer, required or authorized, by 14 & 15 Vict. c. 99, to furnish any certified copy under that Act, wilfully certifies any document as being a true copy or extract knowing that the same is not a true copy or extract.

## ARTICLE 154.

## FALSE ENTRIES AS TO COPYRIGHT.

<sup>2</sup> Every one is guilty of a misdemeanor who wilfully produces or causes to be tendered in evidence any paper falsely purporting to be a copy of any entry in the registry book of the Stationers' Company.

## ARTICLE 155.

FALSE DECLARATION, PERSONATION, ETC., TO OBTAIN A  
PENSION UNDER THE POLICE ACT.

<sup>3</sup> Every one who obtains or attempts to obtain for himself or for any other person any pension, gratuity, or allowance under the Police Act 1890, or any payment on account of any such pension, gratuity, or allowance, by means of any false declaration, false certificate, false representation, false evidence, or personation, or by malingering or feigning disease or infirmity, or by maiming or injuring himself or causing himself to be maimed or injured or otherwise producing disease or infirmity, or by any other fraudulent conduct, is liable on conviction by a jury to imprisonment with hard labour for two years, and to forfeit any pension, gratuity, or allowance so obtained.

<sup>1</sup> 14 & 15 Vict. c. 99, s. 15.

<sup>2</sup> 5 & 6 Vict. c. 45, s. 12.

<sup>3</sup> 53 & 54 Vict. c. 45, s. 9.



## ARTICLE 156.

MAINTENANCE.<sup>1</sup>

<sup>2</sup> Maintenance is the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he acts from any improper motive.

Champerty is maintenance in which the motive of the maintainor is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject-matter of the suit shall be divided between the plaintiff and the maintainor.

A common barrator is one who habitually moves, excites, or maintains suits or quarrels, either at law or otherwise.

Whoever commits maintenance, or champerty, or is a common barrator, is guilty of a misdemeanor.

<sup>3</sup> Every person who practises as a solicitor or agent in any suit or action, after having been convicted of forgery, perjury, or common barratry, is liable to seven years penal servitude upon an order to be made by the judge or judges of the Court in which the suit or action was brought, who must upon complaint or information examine the matter in a summary way in open court.

<sup>4</sup> Every one who sues any person in the name of a ficti-

<sup>1</sup> In the earlier editions of this work I included under this head the offence of selling pretended titles. The whole matter is so indefinite, and partakes so much more of the nature of a civil penalty than of a crime, that I have left it out. The law upon the subject will be found in 32 Hen. 8, c. 9. See *Jenkins v. Jones*, 1882, 9 Q. B. D. 128, on the effect of 8 & 9 Vict. c. 106 upon 32 Hen. 8, c. 9, and *Kennedy v. Lyall*, 1885, 15 Q. B. D. 491, on the meaning of a "pretended title."

<sup>2</sup> All the authorities on the subject are fully examined in *Bradlaugh v. Newdegate*, 1883, 11 Q. B. D. 1. They are numerous, but all come to the same thing; see, too, 1 Russ. Cr. 351-359. As to barratry, *id.* 362-3. See also 1 Hawk. P. C. 454-466, and Note III. in Appendix. See also 3 Hist. Cr. Law, 234-40. The old Statute of Conspirators, 33 Edw. 1, and many other ancient statutes (3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 1 Edw. 3, st. 2, c. 14; 1 Ric. 2, c. 4; 32 Hen. 8, c. 9; 4 Edw. 3, c. 11) refer to these offences, but do not throw much light on their nature.

<sup>3</sup> 12 Geo. 1, c. 29, s. 4.

<sup>4</sup> 18 Eliz. c. 5, s. 4 (redrawn and modernised).

tious plaintiff, or in the name of a real person, but without his authority, commits a misdemeanor, and must, upon conviction thereof, be imprisoned for six months.

## ARTICLE 157.

CONSPIRACY TO DEFEAT JUSTICE—DISSUADING WITNESSES  
FROM TESTIFYING.

Every one commits a misdemeanor who

(a.) <sup>1</sup> conspires with any other person to accuse any person falsely of any crime, or to do anything to obstruct, prevent, pervert, or defeat the course of justice; or

(b.) <sup>2</sup> in order to obstruct the due course of justice, dissuades, hinders, or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or

(c.) <sup>3</sup> obstructs or in any way interferes with, or knowingly prevents the execution of any legal process, civil or criminal.

## ARTICLE 158.

## INTIMIDATION OF WITNESSES BEFORE A ROYAL COMMISSION.

<sup>4</sup> Every one is guilty of a misdemeanor and is liable to a penalty not exceeding £100 or imprisonment for three months who

threatens or in any way punishes, damnifies or injures any person for having given evidence, or on account of the evidence which he has given, upon any inquiry, unless the evidence was given in bad faith; or attempts to do so.

<sup>5</sup> The Court may order a person convicted of this offence

<sup>1</sup> Every person convicted of an offence against clause (a.) is liable to be sentenced to hard labour. Wright on Conspiracies, 30; 14 & 15 Vict. c. 100, s. 29; cf. Draft Code, ss. 126, 7, 8.

<sup>2</sup> 1 Hawk. P. C. 64; *R. v. Lady Lawley*, 1721, Strange, 904; and see 5th Rep. C. L. C. p. 50, Art. 57.

<sup>3</sup> Cases collected in 1 Russ. Cr. 558-561.

<sup>4</sup> 55 & 56 Vict. c. 65, s. 3.

<sup>5</sup> *Ibid.* s. 4.

to pay the whole or any part of the costs of the prosecution and conviction; and on the application of the complainant award compensation for loss of situation, wages, status, or other damnification or injury, through or by means of the offence; of which the amount is to be determined by the jury;<sup>1</sup> and which may be recovered by the person entitled from the person convicted.

<sup>2</sup> In this Article "inquiry" means any inquiry held under the authority of any Royal Commission or by any Committee of either House of Parliament, or pursuant to any statutory authority whether the evidence at such inquiry is or is not given on oath, but does not include any inquiry by any Court of Justice.

<sup>1</sup> 55 & 56 Vict. c. 65, s. 5.

<sup>2</sup> *Ibid.* s. 1.

## CHAPTER XV.

*ESCAPE—RESCUE—PRISON-BREACH—MISPRISONS—  
COMPOUNDING OFFENCES*

## ARTICLE 159.

VOLUNTARY PERMISSION BY OFFICERS OF ESCAPES BY  
PRISONERS.

<sup>1</sup> EVERY one who knowingly, and with an intent to save him from trial or execution, permits any person in his lawful custody to regain his liberty, otherwise than in due course of law, commits the offence of voluntary escape; and

is guilty of high treason if the escaped prisoner was in his custody for and was guilty of high treason;

becomes an accessory after the fact to the felony of which the escaped prisoner was guilty, if he was in his custody for and was guilty of felony; and

is guilty of a misdemeanor if the escaped prisoner was in his custody for and was guilty of a misdemeanor.

## ARTICLE 160.

NEGLIGENT PERMISSION BY OFFICERS OF ESCAPES BY  
PRISONERS.

<sup>2</sup> Every one is guilty of the misdemeanor called negligent escape who, by the 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.

<sup>1</sup> 2 Hawk. P. C. 192, 196, 197; 1 Russ. Cr. 569. It does not appear what is the effect of voluntarily permitting the escape of a man lawfully charged, but innocent in fact. Draft Code, s. 138.

<sup>2</sup> 1 Hale, P. C. 600-602; 2 Hawk. P. C. 194 (speaks doubtfully as to the second paragraph). Cf. Draft Code, s. 140.

The person escaping is deemed to have regained his liberty as soon as he gets out of sight of the person from whom he escapes, and not before.

#### ARTICLE 161.

##### SHERIFF PROCURING CONCEALMENT OR PERMITTING ESCAPE.

<sup>1</sup>Any person being a sheriff, under-sheriff, bailiff, or officer of a sheriff, whether within a franchise or without, is guilty of a misdemeanor and liable to imprisonment for not exceeding one year and to pay a fine, and if he has not wherewith to pay a fine, to imprisonment for three years, who—

- (a) conceals or procures the concealment of any felon ;
- (b) lets go at large a prisoner who is not bailable.

#### ARTICLE 162.

##### RESCUE DEFINED.

<sup>2</sup>Rescue is the act of forcibly freeing a person from custody against the will of those who have him in custody. If the person rescued is in the custody of a private person, the offender must have notice of the fact that the person rescued is in such custody.

#### ARTICLE 163.

##### QUALITY OF OFFENCE OF RESCUE.

<sup>3</sup>Every one commits high treason, felony, or misdemeanor who rescues a prisoner imprisoned on a charge of, or under sentence for, high treason, felony, or misdemeanor respectively. <sup>4</sup>Any offender convicted of such a misdemeanor is liable to be sentenced to hard labour.

<sup>1</sup> 50 & 51 Vict. c. 55, s. 29.

<sup>2</sup> 1 Russ. Cr. 582 ; 2 Hawk. P. C. 201.

<sup>3</sup> Hale, P. C. 606 ; 1 Russ. Cr. 582-584. Draft Code, s. 136.

<sup>4</sup> 14 & 15 Vict. c. 100, s. 29.

## ARTICLE 164.

## FELONIOUS RESCUES.

<sup>1</sup> Whoever feloniously rescues any prisoner is liable to seven years penal servitude, or to imprisonment with hard labour for three years.

## ARTICLE 165.

## RESCUING MURDERERS.

<sup>2</sup> Every one commits felony and is liable, upon conviction thereof, to penal servitude for life, who by force sets at liberty, rescues, or attempts to rescue, or set at liberty any person out of prison, committed for or found guilty of murder, or rescues or attempts to rescue any person convicted of murder, going to execution or during execution.

## ARTICLE 166.

## ASSISTING ESCAPE OF PRISONERS OF WAR.

<sup>3</sup> Every one commits felony and is liable, upon conviction thereof, to penal servitude for life, who

(a) <sup>4</sup> assists any alien enemy of Her Majesty, being a prisoner of war in Her Majesty's dominions, whether such prisoner is confined as a prisoner of war in any prison or other place of confinement, or is suffered to be at large on his parole in Her Majesty's dominions or in any part thereof, to escape from such prison or place of confinement, or from Her Majesty's dominions, if at large on his <sup>5</sup> parole; or

(b) <sup>6</sup> who (owing allegiance to Her Majesty) after any

<sup>1</sup> 1 & 2 Geo. 4, c. 88, s. 1. The offence was formerly a clergyable felony, so that this enactment increased the punishment.

<sup>2</sup> 25 Geo. 2, c. 37, s. 9. As to punishment, 7 Will. 4 & 1 Vict. c. 91. Cf. Draft Code, s. 135.

<sup>3</sup> 52 Geo. 3, c. 156. Draft Code, s. 131.

<sup>4</sup> *Ibid.*, s. 1.

<sup>5</sup> *Ibid.*, s. 2.

<sup>6</sup> *Ibid.*, s. 3.

such prisoner as aforesaid has quitted the coast of any part of Her Majesty's dominions in such his escape, knowingly and wilfully upon the high seas aids or assists such prisoner in his escape towards any other dominions or place.

#### ARTICLE 167.

##### ASSISTING ESCAPE FROM A CONSTABLE OR PEACE OFFICER.

<sup>1</sup> Every person who aids or assists any prisoner to attempt to make his escape from the custody of any constable or other officer or person who then has the lawful charge of him in order to carry him to gaol by virtue of a warrant of commitment for treason or any felony (except petty larceny) expressed in such warrant is guilty of felony and liable to seven years penal servitude.

#### ARTICLE 168.

##### HELPING TO ESCAPE FROM PRISON.

<sup>2</sup> Every one commits felony and is liable upon conviction to be sentenced to imprisonment with hard labour for two years, who aids any prisoner in escaping or attempting to escape from any <sup>3</sup> prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison, any mask, dress, or other disguise, or any letter, or any other article or thing.

<sup>1</sup> 16 Geo. 2, c. 31, s. 3. This section also contains the punishment for the rescuing of prisoners from transport vessels, now obsolete.

<sup>2</sup> 28 & 29 Vict. c. 126, s. 37. The word "thing" at the end of the section is not confined to things *ejusdem generis*. It includes a crowbar: *R. v. Payne*, 1866, 1 C. C. R. 27. Draft Code, s. 137.

<sup>3</sup> "Prison" means "gaol, house of correction, bridewell, or penitentiary." It also includes "the airing-grounds or other grounds or buildings occupied by prison officers for the use of the prison, or contiguous thereto," 28 & 29 Vict. c. 176, s. 4.

## ARTICLE 169.

## ESCAPE BY PERSONS IN CUSTODY.

<sup>1</sup> Every one commits a misdemeanor,<sup>2</sup> and is liable upon conviction thereof, to imprisonment with hard labour, who, being lawfully in custody for any criminal offence, escapes from that custody.

## ARTICLE 170.

## BREAKING PRISON.

<sup>3</sup> Every one commits felony who, being lawfully detained on a charge of, or under sentence for, treason or felony, breaks out of the place in which he is so detained, against the will of the person by whom he is detained.

If the offender is detained under a charge of misdemeanor the offence of breaking out of the place of confinement is a misdemeanor,<sup>2</sup> and is liable on conviction to be sentenced to hard labour.

The expression "breaks out" means an actual breaking of the place in which the party is confined, whether intentional or not.

*Illustrations.*

(1.) <sup>4</sup> A, lawfully confined in prison under a charge of felony, climbs over the prison wall and escapes. A has not committed an offence within this Article (though he has within Article 169).

(2.) <sup>4</sup> On the top of the prison wall loose bricks are arranged so as to fall if disturbed. In climbing over the wall A accidentally disturbs and throws down one of them. A has committed an offence within this Article.

<sup>1</sup> 2 Hawk. P. C. 183. Draft Code, ss. 133, 4.

<sup>2</sup> 14 & 15 Vict. c. 100, s. 29.

<sup>3</sup> 2 Hawk. P. C. 183-189; 1 Russ. Cr. 577-581. There is a good deal of learning on the subject founded on 1 Edw. 2, st. 2, "De frangentibus prisonam," but it is mostly practically obsolete. This statute is not mentioned in the Revised Statutes or in the Chronological Table of Statutes. Draft Code, s. 132.

<sup>4</sup> *R. v. Hancell*, 1821, R. & R. 458.



## ARTICLE 171.

## ESCAPING FROM CERTAIN PRISONS.

<sup>1</sup> Every convict confined in Pentonville and every offender ordered to be confined in Parkhurst Prison is liable to the consequences hereinafter mentioned who

at any time during the term of his imprisonment breaks prison ; or

who, while being conveyed to such prison, escapes from any person having the lawful custody of him ; or

who (being ordered to be confined in Parkhurst Prison) escapes from the place of his confinement, or from any lands belonging to the prison.

Every such offender may for his first offence be punished by an addition to the term of his imprisonment, not exceeding three years in the case of prisoners confined in Pentonville Prison, and two years in the case of prisoners under sentence of imprisonment in Parkhurst Prison. Offenders under sentence of penal servitude in Parkhurst Prison are liable to be punished in the same manner as other persons under sentence of penal servitude escaping from their place of confinement.

If any offender punished by such addition as aforesaid to his term of imprisonment is afterwards convicted of a second escape or breach of prison he is guilty of felony.

Every person confined in either of the said prisons is liable to be punished by an addition not exceeding twelve months to the term of his imprisonment who attempts to break prison (or in the case of Parkhurst Prison to escape from the place of his confinement), or forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom.

<sup>1</sup> As to Parkhurst Prison, 1 & 2 Vict. c. 82, s. 12 ; Pentonville, 5 & 6 Vict. c. 29, s. 24. This Article formerly applied to Millbank Prison now pulled down ; see 6 & 7 Vict. 626 now repealed.

## ARTICLE 172.

## POUNDBREACH.

<sup>1</sup> Every one is guilty of a misdemeanor who forcibly rescues goods distrained, or rescues cattle by breach of the pound where they have been placed.

## ARTICLE 173.

TRANSPORTS OR PERSONS SENTENCED TO PENAL SERVITUDE  
BEING AT LARGE.

<sup>2</sup> Every one commits felony and is liable, upon conviction thereof, to be kept in penal servitude for life

(a.) who, having been sentenced to be kept in penal servitude, either for life or for any number of years, is afterwards at large within any part of Her Majesty's dominions, without some lawful cause, before the expiration of the term for which he was ordered to be kept in penal servitude; or

(b.) <sup>3</sup> who aids, abets, counsels, or procures the commission of the offence defined in clause (a.).

## ARTICLE 174.

## MISPRISION OF TREASON.

<sup>4</sup> Every one who knows that any other person has committed high treason, and does not within a reasonable time give information thereof to a judge of assize, or a justice of the peace, is guilty of misprision of treason, and must upon

<sup>1</sup> See 1 Russell Cr. 560, 2 Chitty's Crim. Law, p. 203, and the authorities quoted in Note (a.) p. 205. It is doubtful whether poundbreach is an offence when it is unaccompanied by a breach of the peace.

<sup>2</sup> 5 Geo. 4, c. 84, s. 22. Punishment altered by 4 & 5 Will. 4, c. 67. Draft Code, s. 130.

<sup>3</sup> 4 & 5 Will. 4, c. 67.

<sup>4</sup> 1 Hawkins, P. C. 60. As to punishment, ii. 630; 1 Hale, P. C. 371-4. See Note IV. Cf. Draft Code, s. 18.

conviction thereof be sentenced to imprisonment for life, and to forfeit to the Queen all his goods and the profits of his lands during his life.

#### ARTICLE 175.

##### MISPRISION OF FELONY.

<sup>1</sup> Every one who knows that any other person has committed felony and conceals or procures the concealment thereof, is guilty of misprision of felony, which, though formerly a felony is now a misdemeanor.

As to the punishment see *ante*, Art. 18.<sup>2</sup>

#### ARTICLE 176.

##### AGREEMENT NOT TO PROSECUTE.

<sup>3</sup> Every one commits a misdemeanor who, in respect of any valuable consideration, enters into an agreement not to prosecute any person for felony, or to show favour to any person in any such prosecution.

#### ARTICLE 177.

##### COMPOUNDING PENAL ACTIONS.

<sup>4</sup> Every one commits a misdemeanor, who, having brought, or under colour of bringing, an action against any person under any penal statute in order to obtain from him any penalty, compounds the said action without order or consent of the Court [<sup>5</sup> whether any offence has in fact been committed or not].

<sup>1</sup> 1 Hawkins, P. C. 73. See Note IV.

<sup>2</sup> The punishment was formerly provided by 3 Edw. 1, c. 9; but this Statute was repealed by 50 & 51 Vict. c. 55, s. 39.

<sup>3</sup> 1 Hale, P. C. 619. Precedents of indictment, 2 Chitt. Crim. Law, 219. It is not necessary to allege that the defendant did actually desist from prosecuting. *R. v. Burgess*, 1885, 16 Q. B. D. 141.

<sup>4</sup> 18 Eliz. c. 5, ss. 4, 5 (very much compressed). The punishment was the pillory, but see 56 Geo. 3, c. 138, s. 2 now repealed. See also *R. v. Southerton*, 1805, 6 Ea. 126; *R. v. Golley*, 1805, Russ. & Ry. 84.

<sup>5</sup> *R. v. Best*, 1840, 2 Moo. C. C. 124.

## PART IV

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### ACTS INJURIOUS TO THE PUBLIC IN GENERAL.

CHAP. XVI.—UNDEFINED MISDEMEANORS.

CHAP. XVII.—OFFENCES AGAINST RELIGION.

CHAP. XVIII.—OFFENCES AGAINST MORALITY.

CHAP. XIX.—COMMON NUISANCES —DISORDERLY HOUSES.

CHAP. XX.—VAGRANCY.

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## CHAPTER XVI

### UNDEFINED MISDEMEANORS

#### ARTICLE 178.

#### ACTS INVOLVING PUBLIC MISCHIEF.

<sup>1</sup>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 other acts which had been

<sup>1</sup> See 3 Hist. Cr. Law, 351-60, and 2 Hist. Cr. Law, 197-9; see the whole of chapter i. of Sir W. Erle's work on Trade Unions, pp. 1-54, particularly pp. 48-53; also his account of *R. v. Rowlands* and *R. v. Duffield*, *Ibid.* 81-7. Wright on the Laws of Conspiracy should be studied, and contrasted with this. As to offences relating to the administration of justice, see 5th Rep. C. L. C. *passim*, but particularly p. 29, &c., p. 50, &c., and *R. v. Opie*, 1670, 1 Saund. 301; *R. v. Ring*, 1800, 8 T. R. 585, and other cases there cited. As to public officers, *R. v. Bembridge*, 1783, 22 St. Tr. 1. After quoting the judgment of Willes, J. (the colleague of Lord Mansfield), in *Millar v. Taylor*, 4 Burr. at p. 2312, to the effect that "justice, moral fitness, and public convenience, when applied to a new subject, make common law without a precedent," Pollock, C.B., said, "I entirely agree with the spirit of this passage so far as it regards the repressing what is a public evil and preventing what would become a general mischief; but I think there is a wide difference between protecting the community against a new source of danger and creating a new right. I think the Common Law is quite competent to pronounce anything to be illegal which is manifestly against the public

held to be misdemeanors, although such first mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them.

This has been done especially in the case of agreements between more persons than one to carry out purposes which the judges regarded as injurious to the public, in which case such acts have been held to amount to the offence of conspiracy,

or when they have been done by a public officer in relation to his official duty,

or when they tended in any way to pervert the administration of justice, or to disturb the public peace,

or when the proceeding has been by parliamentary impeachment.

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good; but I think the Common Law cannot create new rights," &c., *Jefferys v. Boosey*, 1854, 4 H. L. C. at p. 936. As to cheats affecting the public, see 2 East, P. C. 818-822, and see *R. v. Vreones* 1891, 1 Q. B. 360; where an attempt to mislead a judicial tribunal which might be called into existence, by the manufacture of false evidence, was held to be a misdemeanor.

## CHAPTER XVII

<sup>1</sup> OFFENCES AGAINST RELIGION

## ARTICLE 179.

## BLASPHEMY DEFINED—ALTERNATIVE DEFINITIONS.

<sup>2</sup> EVERY publication is said to be blasphemous which contains

Matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the church by law established, or to promote immorality.

Publications intended in good faith to propagate opinions on religious subjects, which the person who publishes them regards as

(a.) A denial of the truth of Christianity in general, or of the existence of God, whether the terms of such publication are decent or otherwise.

(b.) Any contemptuous reviling or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established, whatever may be the occasion of the publication thereof,

<sup>1</sup> See 2 Hist. Cr. Law, ch. xxiv. 298-396, and Draft Code, Part XII.

<sup>2</sup> There is authority for each of these views, as may be seen from a collection of all the cases on the subject in Folkard's Edition of Starkie on Libel, 613-625. Most of the cases are old, and I do not think that, in fact, any one has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity. Mr. Starkie many years ago wrote, "A wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt." This is the language of a man who means, but is reluctant to say plainly, "You may deny Christianity to be true, but you must do it in a decent way, and with regard to the feelings of others." Lord Coleridge allows me to say that the left-hand side of the page correctly states the law laid down in the last trial which took place for blasphemy, *R. v. Pooley*, tried

true, are not blasphemous (within the meaning of this definition) merely because their publication is likely to wound the feelings of those who believe such opinions to be false, or because their general adoption might tend by lawful means to alterations in the constitution of the church by law established.

Everyone who publishes any blasphemous document is guilty of the misdemeanor of publishing a blasphemous libel.

Every one who speaks blasphemous words is guilty of the misdemeanor of blasphemy.

#### ARTICLE 180.

##### HERESIES.

<sup>1</sup> Every person who is guilty of atheism, blasphemy, heresy, schism, or any other damnable doctrine or opinion (<sup>2</sup> not punishable at common law), may, upon conviction thereof before competent ecclesiastical Court, be directed

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at the Bodmin Summer Assizes, in 1857, before Coleridge, J. Lord Coleridge was counsel in that case. For the reasons given in the chapter on offences against religion in my *History of the Criminal Law*, Vol. II. p. 474, I am now unable to agree with the milder view of the law. See Draft Code, s. 141. In *R. v. Ramsey and ors*, 1883; 1 Cab. & Ell. 126, a case of blasphemous libel tried before Lord Coleridge, he directed the jury according to the doctrine stated in the left-hand column. His summing-up was published by Stevens and Sons in 1883. I wrote an article on the subject maintaining my own view in the *Fortnightly Review* for March, 1884, and Mr. Aspland afterwards published an able pamphlet on the other side of the question. It did not convince me. It has been often suggested, and would, I think, be highly desirable, that the question should be settled by Parliament.

<sup>1</sup> 29 Car. 2, c. 9; 53 Geo. 3, c. 127, ss. 1, 2, 3; and see Phillimore, *Eccles. Law*, 1075-7. The excommunication and term of imprisonment is signified to the Queen in Chancery, whereupon a writ issues "de excommunicato capiendo."

<sup>2</sup> *Phillimore v. Machon*, 1876, 1 P. D. 481; Co. Litt. 96 b.

to recant the same and to do penance therefor, and to be excommunicated and imprisoned for such term, not exceeding six months, as the Court pronouncing the sentence of excommunication may direct.

#### ARTICLE 181.

##### DENYING TRUTH OF CHRISTIANITY, &c.

<sup>1</sup> Every one commits a misdemeanor and upon conviction thereof is liable to the punishments hereinafter mentioned, who having been educated in, or at any time having made profession of, the Christian religion within this realm, by writing, printing, teaching, or advised speaking, denies the Christian religion to be true, or the holy scriptures of the Old and New Testament to be of Divine authority.

For the first offence the offender must be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or employment, ecclesiastical, civil or military, or any part in them, or any profit or advantage appertaining to them, and if at the time of his conviction the person convicted enjoys or possesses any office, place, or employment, such office, place, or employment becomes <sup>2</sup> void.

Upon a second conviction for all or any of the said crimes the offender is from thenceforth disabled to sue, prosecute, plead, or use any action or information in any Court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever within this realm, and must also suffer imprisonment for the space of three years from the time of such conviction.

Provided that any person convicted of any of the aforesaid crimes for the first time shall be discharged from all penal-

<sup>1</sup> 9 Will. 3, c. 35, as altered in favour of persons denying the doctrine of the Holy Trinity by 53 Geo. 3, c. 160, which was afterwards repealed, but its effect remains, see 36 & 37 Vict. c. 91.

<sup>2</sup> "Shall be and is hereby declared void."



ties and disabilities incurred by such conviction, upon his acknowledgment or renunciation of such offence or erroneous opinions in the same court where he was convicted within four months after his conviction.

## ARTICLE 182.

### DEPRAVING THE LORD'S SUPPER.

<sup>1</sup> Every one commits a misdemeanor who depraves, despises, or contemns the sacrament of the supper and table of the Lord, in contempt thereof by any contemptuous words, or by any words of depraving, despising, or reviling, or by advisedly in any other wise contemning, despising or reviling the said sacrament.

## ARTICLE 183.

### DEPRAVING THE BOOK OF COMMON PRAYER.

<sup>2</sup> Every one commits a misdemeanor and is liable upon conviction thereof to the punishments hereinafter mentioned, who does any of the following things: that is to say,

(a.) who, in any interlude, play, song, rhymes, or other open words, declares or speaks anything in derogation, depraving, or despising of the Book of Common Prayer, or of anything therein contained, or any part thereof: or

(b.) who by open fact, deed, or open threatenings, compels, causes, or otherwise procures or maintains any parson, vicar,

<sup>1</sup> 1 Edw. 6, c. 1, s. 1, applied to the present Book of Common Prayer by 14 Car. 2, c. 4, s. 20. I have retained these and the following provisions because, though they are practically obsolete, they relate to acts which might still be done. But I have not thought it worth while to encumber the book with the statutes of *præmunire*, which, with hardly an exception, are only historical monuments of bygone political and religious conflicts, imposing penalties on acts which it is barely conceivable that any one should do in the present state of society. The subject is treated fully in the 7th Report of the Criminal Law Commissioners, pp. 37-45. The offences are appealing to Rome from any of the Queen's Courts (24 Hen. 8, c. 12); asserting that Parliament has a legislative authority without the Crown (13 Car. 2, c. 1); and some others.

<sup>2</sup> 1 Eliz. c. 2, s. 3, applied to the present Book of Common Prayer by 14 Car. 2, c. 4, s. 20.

or other minister, in any cathedral or parish church or chapel, or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise or in any other manner or form than is mentioned in the said book ;

(c.) who by any of the said means unlawfully interrupts and lets any parson, vicar, or other minister in any cathedral or parish church, or chapel, in singing or saying common or open prayer, or ministering the sacraments, or any of them, in the manner mentioned in the said book.

For the first offence the offender must be fined one hundred marks, and in default of payment within six weeks after his conviction must be imprisoned for six months.

For the second offence the offender must be fined four hundred marks, and in default of payment as aforesaid must be imprisoned for twelve months.

For the third offence the offender must forfeit to the Queen all his goods and chattels and be imprisoned for life.

#### ARTICLE 184.

##### CLERGYMEN REFUSING TO USE THE BOOK OF COMMON PRAYER.

<sup>1</sup> Every one commits a misdemeanor and is liable upon conviction thereof to the punishments hereinafter mentioned, who, being a parson, vicar, or other minister whatsoever, that ought or should sing or say common prayer according to the Book of Common Prayer,

(a.) refuses to use the said common prayer, or to minister the sacrament, in such cathedral or parish church, or other place, as he should use or minister the same ; or

(b.) uses, wilfully and obstinately standing in the same, any other rite, ceremony, order, or form of mass, openly or privily, or matins, evensong, administration of the sacrament, or other <sup>2</sup> open prayer than is mentioned and set forth in the said book ; or

<sup>1</sup> 2 & 3 Edw. 6, c. 1 ; 14 Car. 2, c. 4, s. 20, and see 1 Eliz. c. 2, s. 2, which slightly varies the penalty on one point.

<sup>2</sup> By open prayer "is meant that prayer which is for others to come unto or hear, either in common churches, or private chapels, or oratories, commonly called the Service of the Church." 2 & 3 Edw. 6, c. 1.

(c.) preaches, declares, or speaks anything in derogation or depraving of the said book, or anything therein contained, or of any part thereof.

For the first offence the offender must forfeit to the Queen one year's profit of such of his benefices as Her Majesty appoints, and be imprisoned for six months, whether he has any benefice or not.

For the second offence the offender must be deprived *ipso facto* of all his spiritual promotions, and be imprisoned for a year, and if he has no promotion he must be imprisoned for life.

For the third offence the offender must be imprisoned for life.

#### ARTICLE 185.

##### DISTURBING PUBLIC WORSHIP.

(a.) <sup>1</sup> Every one commits a misdemeanor and is liable, upon conviction thereof, to a fine of forty pounds, who wilfully and maliciously or contemptuously disquiets or disturbs any meeting, assembly, or congregation of persons, <sup>2</sup> lawfully assembled for religious worship, or in any way disturbs, molests, or misuses any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled.

(b.) <sup>3</sup> Every one who willingly and of purpose maliciously or contemptuously comes into any cathedral or parish church or other congregation <sup>4</sup> permitted by this Act and disquiets or disturbs the same or misuses any preacher or teacher may be required by one justice to find two sureties for fifty pounds, and in default may be committed to Quarter Sessions, and on conviction of the offence there may be fined twenty pounds.

<sup>1</sup> 52 Geo. 3, c. 155, s. 12. Draft Code, s. 143.

<sup>2</sup> This Act was originally confined to all Protestant Dissenters other than Quakers, but was extended to all persons lawfully assembled for religious worship by 9 & 10 Vict. c. 59, s. 4.

<sup>3</sup> 1 Will. & Mary, c. 18, s. 15.

<sup>4</sup> This Act originally exempted persons taking oaths under 1 Will. & Mary, c. 1, and 30 Car. 2, stat. 2, c. 1, from penalties for holding services, &c. ; this part is now repealed.

## CHAPTER XVIII

<sup>1</sup> OFFENCES AGAINST MORALITY

## ARTICLE 186.

## SODOMY.

<sup>2</sup> EVERY one commits the felony called sodomy, and is liable upon conviction thereof to penal servitude for life, who

(a.) carnally knows any animal; or,

(b.) being a male, carnally knows any man or any woman (per anum).

Any person above the age of fourteen years who permits himself or herself to be so carnally known as aforesaid is a principal in the first degree in the said felony.

## ARTICLE 187.

## ATTEMPT TO COMMIT SODOMY.

<sup>3</sup> Every one who attempts to commit sodomy is guilty of a misdemeanor, and is liable upon conviction thereof to ten years penal servitude.

## ARTICLE 188.

## OUTRAGES ON DECENCY.

<sup>4</sup> Any male person is guilty of a misdemeanor and is liable on conviction thereof to two years imprisonment and hard labour, who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person.

<sup>1</sup> As to rape and other offences of the same kind, see Chap. XXVIII., *post*, p. 207.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 61; see cases in 1 Russ. Cr. 879-82. See 2 Hist. Cr. Law, 429-30. As to carnal knowledge see Article 269, *post*. Draft Code, s. 144.

<sup>3</sup> 24 & 25 Vict. c. 100, s. 62. Draft Code, s. 145.

<sup>4</sup> 48 & 49 Vict. c. 69, s. 11.

## ARTICLE 189.

## ECCLESIASTICAL CENSURES FOR IMMORALITY.

<sup>1</sup> Every person who commits incest, adultery, fornication, or any other deadly sin (not punishable at common law), is liable upon conviction thereof in an ecclesiastical Court to be directed to do penance, and to be excommunicated, and to be imprisoned for such term not exceeding six months as the Court pronouncing the sentence of excommunication may direct.

## ARTICLE 190.

## PUBLIC INDECENCIES.

<sup>2</sup> Every one commits a misdemeanor who does any grossly indecent act in any open and public place in the presence of more persons than one; <sup>3</sup> but it is uncertain whether such conduct in a public place amounts to a misdemeanor if it is done when no one is present, or in the presence of one person only.

<sup>4</sup> A place is public within the meaning of this Article if it is so situated that what passes there can be seen by any considerable number of persons if they happen to look.

<sup>1</sup> 13 Edw. 1, "Circumspecte agatis"; 53 Geo. 3, c. 127, ss. 1-3; and see Phillimore's Eccl. Law, 1081, 1442; also *Phillimore v. Machon*, 1876, 1 P. D. 481; Co. Litt. 96 b. Incest, though not mentioned in the statute "Circumspecte agatis," is the only offence which in these days is ever prosecuted under the law here stated. Such a prosecution occurred in modern times in the Bishop of Chichester's Court. See 2 Hist. Cr. Law, 396-429.

<sup>2</sup> 1 Hawk, P. C. 358. The acts referred to are principally acts of open indecency, but an act scandalously profligate, though not in this sense openly indecent, might in some cases be a misdemeanour, as *e.g.*, selling a wife. See *per* Lord Mansfield in *R. v. Delaval*, 1762, 3 Burr. 1438. If the act done is a public and indecent exposure of the person the offender may on conviction be sentenced to hard labour. 14 & 15 Vict. c. 100, s. 29, and see Article 214 (*d.*), (*e.*). Draft Code, s. 146.

<sup>3</sup> *Elliot's Case*, 1861, L. & C. 103.

<sup>4</sup> *Webb's Case*, 1848, 1 Den. 338; *R. v. Holmex*, 1853, D. & P. 207; *R. v. Orchard*, 1848, 3 Cox, C. C. 248; *R. v. Rouverard*, stated by Parke, B., in *R. v. Webb*, *supra* at p. 344.

*Illustrations.*

The following are instances of public places :

- <sup>1</sup> The inside of an omnibus.
- <sup>2</sup> The roof of a house visible from the back windows of several houses.
- <sup>3</sup> The inside of a urinal open to the public, and by the side of a footpath in Hyde Park.
- <sup>4</sup> The inside of a booth on Epsom racecourse, which the public were invited to enter.
- <sup>5</sup> A place out of sight of the public footway where people had no legal right to go, but did habitually go without interference.

## ARTICLE 191.

## OBSCENE PUBLICATIONS.

<sup>6</sup> Every one commits a misdemeanor who without justification,

(a.) publicly sells, or exposes for public sale or to public view, any obscene book, print, picture, or other indecent exhibition; <sup>7</sup> or any publication recommending sexual immorality, even if the recommendation is made in good faith and for what the publisher considers to be the public good; or

(b.) publicly exhibits any disgusting object.

Any person convicted of the offence defined in clause (a.) may be sentenced to hard labour.

<sup>1</sup> *R. v. Holmes*, 1853, D. & P., 207.

<sup>2</sup> *Thallman's Case*, 1863, L. & C. 326.

<sup>3</sup> *R. v. Harris*, 1871, 1 C. C. R. 282.

<sup>4</sup> *R. v. Saunders*, 1875, 1 Q. B. D. 15.

<sup>5</sup> *R. v. Wellard*, 1884, 14 Q. B. D. 63.

<sup>6</sup> Note V. ; *Strange*, 790 ; and see 20 & 21 Vict. c. 83, s. 1 ; 14 & 15 Vict. c. 100, s. 29 ; *Starkie* (by Folkard), 630-637. Draft Code, s. 147.

<sup>7</sup> These words are added in reference to the case of *R. v. Bradlaugh*, tried before Cockburn, C.J., 18 June, 1877. I have not seen any report of the trial itself. Proceedings in error on the ground that the indictment was defective were taken in 1878 and are reported in *Bradlaugh v. R.*, 1878, 3 Q. B. D. 607. The jury found that the work prosecuted called the "Fruits of Philosophy" was published in good faith for the public good, and that it recommended immoral practices. It appeared in evidence that it was not obscene in the sense of being calculated or intended to excite passion.

(SUBMITTED.)—A person is justified in exhibiting disgusting objects, or publishing obscene books, papers, writings, prints, pictures, drawings, or other representations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published.

#### *Illustrations.*

(1.) <sup>1</sup> A exhibits for money, to all comers, an unnatural and monstrous birth. A commits a misdemeanor.

B exhibits a similar object to students of medicine only. B does not commit a misdemeanor.

(2.) <sup>2</sup> A, a bookseller, publishes the work of a casuist, which contains amongst other things obscene matter. The work is

<sup>1</sup> *Harring v. Walrond*, 1681, 1 Russ. Cr. 436.

<sup>2</sup> The second paragraph of this illustration is based upon *R. v. Hicklin*, 1868, L. R. 3 Q. B. 360; and see *Steele v. Brannan*, 1872, L. R. 7 C. P. 261. The first part is merely my suggestion as to what ought to be held to be the law if the question should arise, but the point cannot be called clear. Keating, J., referred in passing to the question in *Steele v. Brannan*, at pp. 269, 270, but expressed no opinion upon it. I confine this article to obscenity because I have found no authority for the proposition that the publication of a work immoral in the wider sense of the word is an offence. A man might with perfect decency of expression, and in complete good faith, maintain doctrines as to marriage, the relation of the sexes, the obligation of truthfulness, the nature and limits of the rights of property, &c., which would be regarded as highly immoral by most people, and yet (I think) commit no crime. Obscenity and immorality in this wide sense are entirely distinct from each other. The language used in reference to some of the cases might throw doubt on this, but I do not think any instance can be given of the punishment of a decent and *bona fide* expression of opinions commonly regarded as immoral. I leave this note unaltered, but since it was written the case cited above of *R. v. Bradlaugh* may be considered to have gone some way towards establishing a different principle, and to have invested juries to a certain extent with the powers of *ex post facto* censors of the press so far as such publications on the relations of the sexes are concerned. I think that juries ought to exercise such a power with the greatest caution when a man writes in good faith on a subject of great interest and open to much difference of opinion, and when no indecency of language is used, except such as is necessary to make the matter treated of intelligible.

published in Latin, and appears from the circumstances of its publication to be intended for *bona fide* students of casuistry only. A has not committed a misdemeanor.

B extracts the obscene matter from the work so published, translates it into English, and sells it as a pamphlet about the streets for the purpose of throwing odium upon casuists. B has committed a misdemeanor.

#### ARTICLE 191A.

##### SENDING INDECENT LETTERS.

<sup>1</sup> Every one is guilty of a misdemeanor and is liable to imprisonment with hard labour for twelve months who sends or attempts to send a postal packet which

(a.) incloses any indecent or obscene print, painting, photograph, lithograph, engraving, book or card, or any obscene article similar to the above or not; or

(b.) has on such packet or on the cover thereof any words, marks, or designs of an indecent, obscene or grossly offensive character.

#### ARTICLE 192.

##### PROCURING THE MARRIAGE OF PARENT OF A BASTARD.

<sup>2</sup> Every officer of a union, parish or place is guilty of a misdemeanor who endeavours to induce any person to contract a marriage by a threat or promise respecting any application to be made or any order to be enforced with respect to the maintenance of any bastard child.

#### ARTICLE 193.

##### <sup>3</sup> UNLAWFULLY DEFILING WOMEN.

<sup>4</sup> Every one commits a misdemeanor and is liable upon conviction thereof to two years imprisonment with hard labour who,

<sup>1</sup> 47 & 48 Vict. c. 76, s. 4.

<sup>2</sup> 7 & 8 Vict. c. 101, s. 8.

<sup>3</sup> 48 & 49 Vict. c. 69. (a.), (b.), (c.), (d.) represent s. 2; (e.), (f.) and (g.) s. 3.

Draft Code, s. 148.



(a.) procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connexion, either within or without the Queen's dominions, with any other person or persons; or

(b.) procures or attempts to procure any woman or girl to become, either within or without the Queen's dominions, a common prostitute; or

(c.) procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere; or

(d.) procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions; or

(e.) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(f.) by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(g.) applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl.

#### ARTICLE 194.

#### HOUSEHOLDERS PERMITTING DEFILEMENT OF GIRLS ON THEIR PREMISES.

<sup>1</sup> Every person, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control

<sup>1</sup> 48 & 49 Vict. c. 69, s. 6.

thereof, is guilty of felony, and is liable to penal servitude for life, who

induces or knowingly suffers any girl under the age of thirteen years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally.<sup>1</sup>

<sup>2</sup> Every such person as aforesaid who commits any such offence as aforesaid with respect to any girl of or above the age of thirteen and under the age of sixteen years, is guilty of a misdemeanor, and being convicted thereof is liable to be imprisoned for two years with hard labour.

It is a sufficient defence to any charge under this article if it is made to appear to the court or jury before whom the charge is brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

## ARTICLE 195.

### CONSPIRACY TO DEFILE.

<sup>3</sup> Every one commits the misdemeanor of conspiracy who agrees with any other person to induce any woman to commit adultery or fornication, or to take any woman from the lawful custody of her parents, in order to marry her to any person without their consent;

(SUBMITTED.) Provided, that an agreement between a man and a woman to commit fornication or adultery, or that the woman shall leave the lawful custody of her parents without their consent, in order to marry the man, is not a conspiracy.

<sup>1</sup> A father who allows his daughter living with him to act as a prostitute in his house is within this provision. *R. v. Webster*, 1885, 16 Q. B. D. 134.

<sup>2</sup> *R. v. Lord Grey of Werk*, 1682, 9 St. Tr. 127; 1 East, P. C. 460; *R. v. Mears*, 1851, 2 Den. 79; *R. v. Delaval*, 1762, 3 Burr. 434. Draft Code, s. 149.

<sup>3</sup> *Ibid.*

## ARTICLE 196.

PREVENTING THE BURIAL OF DEAD BODIES AND DISINTERRING THEM.<sup>1</sup>

<sup>2</sup> Every one commits a misdemeanor who prevents the burial of any dead body, or who, without authority, disinters a dead body, even from laudable motives; or

who, having the means, neglects to bury a dead body which he is legally bound to bury, provided that no one is legally bound to incur a debt for such a purpose; or

<sup>3</sup> who buries or otherwise disposes of any dead body on which an inquest ought to be taken, without giving notice to a coroner; or

who, being under a legal duty to do so, fails to give notice to a coroner that a body on which an inquest ought to be held is lying unburied, before such body has putrefied.

*Illustrations.*

(1.) <sup>4</sup> A digs up a dead body and sells it for purposes of dissection. This is a misdemeanor.

(2.) <sup>5</sup> A, without the consent of a dissenting congregation, to which a burial-ground belonged, or of trustees having the legal

<sup>1</sup> In *R. v. Price*, 1884, 12 Q. B. D. 247, I held that to burn a dead body instead of burying it was not in itself a misdemeanor, if it was so done as not to amount to a public nuisance. This decision is to a certain extent recognized in *R. v. Stephenson*, 1884, 13 Q. B. D. 331. There were no means of questioning it.

<sup>2</sup> *R. v. Vann*, 1851, 2 Den. 325. Inquests ought to be held when the coroner on reasonable grounds and in good faith believes that the deceased person's death was of such a nature as would, if true, justify the holding of an inquest; *R. v. Stephenson*, *supra*. A man is bound to bury his child's body, and, I suppose, his wife's. In *R. v. Vann*, Lord Campbell said, "A man is bound, if he has the means, to give his child Christian burial." This can hardly be a duty in the case of persons who are not Christians, but probably "Christian" means only decent. It appears from *R. v. Stewart*, 1840, 812 A. & E. 773, 778, that the person under whose roof another person dies is under a legal duty to carry the corpse, decently covered, to the place of burial if there is no one else who is bound to bury it. Draft Code, s. 158.

<sup>3</sup> 1 Russ. Cr. 620, 7th Rep. C. L. C. pp. 50, 51; and see *R. v. Stephenson*, *supra*.

<sup>4</sup> *R. v. Lynn*, 1788, 1 Lea, 497.

<sup>5</sup> *R. v. Sharpe*, 1857, D. & B. 160.

estate therein, but with the leave of the person in charge, digs up his mother's coffin in order to bury it in his father's grave in a churchyard some miles off. This is a misdemeanor.

(3.) <sup>1</sup> A, a gaoler, refuses to deliver up for burial the dead body of a prisoner who had died in gaol to the executors, on the ground that the deceased person owed him money. This is a misdemeanor.

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<sup>1</sup> *R. v. Scott*, 1842, 2 Q. B. 248 (in a note to *R. v. Fox*).

## CHAPTER XIX

## COMMON NUISANCES—DISORDERLY HOUSES

## ARTICLE 197.

## COMMON NUISANCE.

<sup>1</sup> A COMMON nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. It is immaterial whether the act complained of is convenient to a larger number of the public than it inconveniences, but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may show that it is not a nuisance to any of the public.

*Illustrations.*

(1.) <sup>2</sup> An electric telegraph company without legal authority erects a telegraphic pole in a permanent manner on the waste at the side of and forming part of a highway, leaving room enough for the use of the highway, and not affecting either the metalled road or the footpath, by the side of it. This is a public nuisance, because a small portion of space which the public had a legal right to use is obstructed.

(2.) <sup>3</sup> A tramway laid down on a high road in such a manner as to obstruct to some extent the use of the road by common carriages is a public nuisance, although it may be convenient to a large majority of those who use the road.

(3.) <sup>4</sup> The public have a right to use the Tyne as a highway

<sup>1</sup> 1 Hawk. P. C. 692. The question as to the public benefit of the act complained of may arise indirectly. Draft Code, s. 150.

<sup>2</sup> *R. v. United Kingdom Telegraph Co.*, 1862, 3 F. & F. 73.

<sup>3</sup> *R. v. Train*, 1862, 2 B. & S. 640.

<sup>4</sup> *R. v. Russell*, 1827, 6 B. & C. 566. I think this is the effect of the case, which deserves careful study. It is referred to in *R. v. Train*, but I doubt whether it is not misunderstood there. Lord Tenterden differed

and to anchor ships therein for a reasonable time to take in cargoes of coal. A erects staiths and spouts at which ships moored for the purpose can take in coal, but which prevent ships not lying at them from sailing over part of the waterway where they would otherwise be able to sail. The fact that the arrangement is on the whole convenient with regard to the public use of the river may be considered by the jury in deciding whether the staiths are a nuisance or not.

(4.) The non-repair of a public highway is a public nuisance.

(5.)<sup>1</sup> A railway company makes a railway within five yards of an ancient public highway in such a manner that the locomotives frighten the horses of persons using the highway as a carriage road. The railway is made and the locomotives used under Acts of Parliament, which do not require the railroad company to screen the line from the road. This is not a public nuisance because the act done is warranted by law.

#### ARTICLE 198.

##### COMMON NUISANCE A MISDEMEANOR.

<sup>2</sup> Every one who commits any common nuisance is guilty of a misdemeanor.

#### ARTICLE 199.

##### PUNISHMENT FOR KEEPING DISORDERLY HOUSES.

<sup>3</sup> Every one who keeps a disorderly house commits a common nuisance, and is liable upon conviction thereof to be

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in it from Bayley and Holroyd, JJ. Of the eight counsel engaged seven became judges. In *A. G. v. Terry*, 1874, L. R. 9 Ch. App. at p. 425, Jessel, M.R., disapproved of *R. v. Russell*, though he approved of the doctrine which I understand to be laid down in it. The turning point of the case, as I understand it, is that the ships anchored under the spouts had a right to anchor there for a reasonable time to receive cargo, and that the spouts being recognized by statute could not be regarded as in themselves illegal. The question on which the judges differed was whether Bayley, J., had influenced the jury by referring to the collateral advantage of cheapening coal in the London market. The effect of time in legalizing a nuisance is somewhat similar. It has not in itself that effect, but the fact that a given state of things is of very long standing may be evidence that it is not in fact a nuisance: see cases in 1 Russ. Cr. 418-444. The view taken by the Criminal Law Commissioners is rather different, see 7th Rep. p. 59.

<sup>1</sup> *R. v. Pease*, 1832, 4 B. & Ad. 30.

<sup>2</sup> Cf. Draft Code, ss. 151, 2.

<sup>3</sup> 3 Geo. 4, c. 114, s. 1. Draft Code, s. 154.

sentenced to imprisonment with (and not without) hard labour.

<sup>1</sup> Any person who appears, acts, or behaves as master or mistress, or as the person having the care, government, or management of any disorderly house, is to be deemed and taken to be the keeper thereof, and is liable to be prosecuted and punished as such, although, in fact, he is not the real owner or keeper thereof.

<sup>2</sup> But the owner of a house, conducted as a disorderly house by a person to whom he lets it as a weekly tenant, is not the keeper of the house merely because he knows the use to which it is put, and does not give his tenant notice to quit.

#### ARTICLE 200.

##### DISORDERLY HOUSES.

The following houses are disorderly houses, that is to say, common bawdy houses, common gaming houses, common betting houses, disorderly places of entertainment.

#### ARTICLE 201.

##### COMMON BAWDY HOUSES.

<sup>3</sup> A common bawdy house is a house or room, or set of rooms, in any house kept for purposes of prostitution. And it is immaterial whether indecent or disorderly conduct is or is not perceptible from the <sup>4</sup> outside.

<sup>1</sup> 25 Geo. 2, c. 36, s. 8; 21 Geo. 3, c. 49, s. 2.

<sup>2</sup> *R. v. Barrett*, 1862, L. & C. 263, and see *R. v. Stannard*, 1862, L. & C. 349, where the whole house was let in parts to different women as weekly tenants.

<sup>3</sup> 1 Russ. Cr. 427, see cases; *R. v. Pierson*, 1705, 2 Lord Raym. 1197; see also 2 Chitty's Crim. Law, 38. Draft Code, s. 155. Keeping a brothel is now an offence which may be punished summarily under 48 & 49 Vict. c. 69, s. 13, see Oke's Synopsis, p. 178.

<sup>4</sup> *R. v. Rice & Wilton*, 1866, 1 C. C. R. 21.

## ARTICLE 202.

## COMMON GAMING HOUSES.

<sup>1</sup> A common gaming house is any house, room, or place kept or used for the purpose of unlawful gaming therein by any considerable number of persons.

Gaming means playing at games either of chance, or of mixed chance and skill.

Unlawful gaming means gaming carried on in such a manner, or for such a length of time or for such stakes (regard being had to the circumstances of the players) that it is likely to be injurious to the morals of those who game.

All gaming is unlawful in which

(i.) a bank is kept by one or more of the players, exclusively of the others; or

(ii.) in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet.

## ARTICLE 203.

<sup>2</sup> COMMON BETTING HOUSES.

A common betting house is a house, office, room, or other place

(i.) Kept or used for the purpose of betting between persons resorting thereto and

the owner, occupier, or keeper thereof; or

any person using the same; or

any person procured or employed by, or acting for or on behalf of, any such person;<sup>3</sup> or

<sup>1</sup> This definition appears to me to be established by the interpretation put by *Jenks v. Turpin*, 1884, 13 Q. B. D. 505 on, *inter alia*, 17 & 18 Vict. c. 38, s. 4. The law is discussed at length in the judgments of Sir H. Hawkins and Smith, J.

<sup>2</sup> 16 & 17 Vict. c. 119, s. 1, preamble. Draft Code, s. 157.

<sup>3</sup> Any such person = "owner, occupier, or keeper, or person using the same."



sentenced to imprisonment with (and not without) hard labour.

<sup>1</sup> Any person who appears, acts, or behaves as master or mistress, or as the person having the care, government, or management of any disorderly house, is to be deemed and taken to be the keeper thereof, and is liable to be prosecuted and punished as such, although, in fact, he is not the real owner or keeper thereof.

<sup>2</sup> But the owner of a house, conducted as a disorderly house by a person to whom he lets it as a weekly tenant, is not the keeper of the house merely because he knows the use to which it is put, and does not give his tenant notice to quit.

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<sup>1</sup> This definition appears to me to be established by the interpretation put by *Jenks v. Turpin*, 1884, 13 Q. B. D. 505 on, *inter alia*, 17 & 18 Vict. c. 38, s. 4. The law is discussed at length in the judgments of Sir H. Hawkins and Smith, J.

<sup>2</sup> 16 & 17 Vict. c. 119, s. 1, preamble. Draft Code, s. 157.

<sup>3</sup> Any such person = "owner, occupier, or keeper, or person using the same."

any person having the care or management, or in any manner conducting the business thereof; or

(ii.) Kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration

for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport or exercise; or

as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency.

<sup>1</sup> Every common betting house is deemed to be a common gaming house.

#### ARTICLE 204.

##### EVIDENCE THAT A HOUSE IS A COMMON GAMING HOUSE.

The following circumstances are evidence (until the contrary is proved) that a house, room, or place is a common gaming house, and that the persons found therein were unlawfully playing therein; that is to say,

(i.)<sup>2</sup> where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game are found in any house, room, or place suspected to be used as a common gaming house, and entered under a warrant or order issued under 8 & 9 Vict. c. 109, or about the person of any of those found therein;

(ii.)<sup>3</sup> where any constable or officer authorised as aforesaid, to enter any house, room, or place, is wilfully prevented from, or obstructed, or delayed in entering the same or any part thereof, or where any external or internal door or means of access to any such house, room, or place so authorized to be entered is found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of

<sup>1</sup> 16 & 17 Vict. c. 119, s. 2.

<sup>2</sup> 8 & 9 Vict. c. 109, s. 8.

<sup>3</sup> 17 & 18 Vict. c. 38, s. 2.

preventing, delaying, or obstructing the entry into the house, or any part thereof, of any constable or officer authorized as aforesaid, or for giving alarm in case of such entry ; or

if any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or for concealing, removing, or destroying any instruments of gaming.

#### ARTICLE 205.

##### DISORDERLY PLACES OF ENTERTAINMENT.

The following places are disorderly places of entertainment, that is to say—

(a.) <sup>1</sup> Every house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind in the cities of London and Westminster, or within twenty miles thereof, without a licence granted in compliance with the provisions of 25 Geo. 2, c. 36.

<sup>2</sup> This definition does not include the Theatres Royal in Drury Lane and Covent Garden, or the King's Theatre in the Haymarket, or any performance or public entertainment carried on under letters patent, or licence from the Crown or the Lord Chamberlain.

(b.) <sup>3</sup> Every house, room, or other place opened or used for public entertainment or amusement, or for public debating on any subject whatsoever upon any part of the Lord's Day called Sunday, and to which persons are admitted by the payment of money, or by tickets sold for money.

The following places are deemed to be places to which persons are admitted by the payment of money, although money is not taken in the name of or for admittance, that is to say, any house, room, or place—

(i.) <sup>4</sup> at which persons are supplied with tea, coffee, or other refreshments of eating or drinking on the Lord's Day at any greater price than the common and usual prices

<sup>1</sup> 25 Geo. 2, c. 36, s. 2.

<sup>2</sup> Ibid. s. 4.

<sup>3</sup> 21 Geo. 3, c. 49, s. 1.

<sup>4</sup> Ibid. s. 2.

at which the like refreshments are commonly sold upon other days thereat, or at places where the same usually are sold ; or

(ii.) opened or used for any of the purposes aforesaid at the expense of any number of subscribers or contributors to the carrying on any such entertainment, or amusement, or debate, on the Lord's Day, to which persons are admitted by tickets to which the subscribers or contributors are entitled.

#### ARTICLE 206.

##### DISORDERLY INNS.

<sup>1</sup> A disorderly inn is an inn kept in a disorderly manner and suffered to be resorted to by persons of bad character for any improper purpose.

Every person who keeps a disorderly inn, or who, being an innkeeper, refuses, without reasonable grounds, to entertain any person ready and willing to pay for entertainment therein, commits a misdemeanor.

#### ARTICLE 207.

##### LOTTERIES.

<sup>2</sup> Every person commits a common nuisance who <sup>3</sup> keeps a lottery of any kind whatever without the authority of Parliament.

<sup>1</sup> Precedent of indictment, 3 Chit. Crim. Law, 672-3. As to refusing entertainment, see *R. v. Rymer*, 1877, 2 Q. B. D. 136.

<sup>2</sup> 10 Will. 3, c. 17, s. 1 ; 42 Geo. 3, c. 119, s. 2 ; and see *R. v. Crawshaw*, 1860, Bell, C. C. 303.

<sup>3</sup> "Keeps" = "publicly or privately keep any office or place to exercise, keep open, show, or expose, to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little go, or any other lottery whatsoever not authorized by Parliament," 42 Geo. 3, c. 119, s. 2.

## ARTICLE 208.

## NUISANCES TO HEALTH, LIFE, AND PROPERTY.

<sup>1</sup> Every person commits a common nuisance who does anything which endangers the health, life, or property of the public or any part of it.

<sup>2</sup> Publicly and wilfully exposing or causing to be exposed for sale articles of food unfit for consumption, and knowingly permitting servants to mix unwholesome ingredients in articles of food, are acts endangering the health or life of the public within the meaning of this article.

<sup>3</sup> Everything is deemed to endanger health, life, or property which either causes actual danger thereto, or which must do so in the absence of a degree of prudence and care the continual exercise of which cannot be reasonably expected.

*Illustrations.*

(1.) <sup>4</sup> A carries a child infected with the small-pox along a public highway in which persons are passing, and near to inhabited houses. A commits a common nuisance.

(2.) <sup>5</sup> A permits his house standing by the highway to become so ruinous as to be likely to fall down, and to injure passengers. A commits a common nuisance.

(3.) <sup>6</sup> A burns down his own house, it being in a situation

<sup>1</sup> See cases in Illustrations. The offences of being a common scold and of eavesdropping would fall under this head, but they may be regarded as practically obsolete.

<sup>2</sup> Draft Code, s. 153. Selling unwholesome food is now punishable summarily under the Public Health Acts 38 & 39 Vict. c. 98, s. 117, 53 & 54 Vict. c. 59, s. 28, see Oke's Synopsis, p. 556. Adulterating food or drugs for sale, or selling them when adulterated, after a previous conviction are misdemeanors punishable with imprisonment with hard labour for six months, 38 & 39 Vict. c. 63, ss. 3, 4, see Oke's Synopsis, pp. 152, 154.

<sup>3</sup> Illustration (5).

<sup>4</sup> *R. v. Vantaulillo*, 1815, 4 M. & S. 73. So of bringing a glandered horse to a fair, *R. v. Hanson*, 1852, Dear. 24. An infected person exposing himself would commit the same offence.

<sup>5</sup> *R. v. Watson*, 1705; 2 Lord Raym. 836.

<sup>6</sup> *R. v. Probert*, 1799, 2 Ea. P. C. 1030. If there were an intent to injure or defraud, this would be felony. See Article 419 (a).

which makes such burning dangerous to others. A commits a common nuisance.

(4.)<sup>1</sup> A, a baker, under contract to supply children at a military asylum with bread, delivers loaves into which his servant, to his knowledge, has introduced alum. A commits a common nuisance.

(5.)<sup>2</sup> A keeps in a warehouse in the City of London large quantities of a mixture of spirits of wine and wood naphtha, forming a substance more inflammable than gunpowder, and of such a nature that a fire lighted by it would be practically unquenchable. A commits a common nuisance, although he uses the most scrupulous care to avoid accidents.

## ARTICLE 209.

### NUISANCES BY OFFENSIVE TRADES.

<sup>3</sup> Every one commits a common nuisance who, for the purposes of trade or otherwise, makes loud noises or offensive or unwholesome smells in such places and under such circumstances as to annoy any considerable number of persons in the exercise of rights common to all Her Majesty's subjects.

## ARTICLE 210.

### NUISANCES TO HIGHWAYS.

Every one commits a common nuisance who obstructs any highway, by any permanent work or erection thereon or injury thereto, which renders the highway less commodious to the public than it would otherwise be; or who prevents them from having access to any part of it by an excessive and unreasonable temporary use thereof, or by so dealing with the land in the immediate neighbourhood of the highway as to prevent the public from using and enjoying it securely,<sup>4</sup> or who does not repair a highway which he is bound to repair.

<sup>1</sup> *R. v. Dixon*, 1814, 3 M. & S. 11. See, too, *R. v. Crawley*, 1862, 3 F. & F. 109; *R. v. Jarvis*, 1862, 3 F. & F. 108.

<sup>2</sup> *Lister's Case*, 1887, 1 D. & B. C. C. 209.

<sup>3</sup> 1 Russ. Cr. 438, &c., and see Oke's Synopsis, p. 554, as to the summary punishment for such a nuisance under the Public Health Act.

<sup>4</sup> 1 Russ. Cr. 477-511.

*Illustrations.*

Each of the following acts is a nuisance to a highway :

- (1.) <sup>1</sup> Digging a ditch, or making a hedge across it, or ploughing it up.
- (2.) <sup>2</sup> Allowing waggons to stand before a warehouse for an unreasonable time so as to occupy great part of the street for several hours by day and night.
- (3.) <sup>3</sup> Keeping up a hoarding in front of a house in a street for the purpose of repairs for an unreasonable time.
- (4.) <sup>4</sup> Excavating an area close to a footpath, and leaving it unfenced.
- (5.) <sup>5</sup> Blasting stone in a quarry so as to throw stones upon the houses and road.

## ARTICLE 211.

## NUISANCES TO BRIDGES.

<sup>6</sup> Every one is guilty of a common nuisance who, being bound by law to repair a bridge, leaves it unrepaired.

## ARTICLE 212.

## NUISANCES TO NAVIGABLE RIVERS.

<sup>7</sup> Every one is guilty of a common nuisance who wilfully diverts or obstructs the course of any navigable river <sup>8</sup> so as appreciably to diminish its convenience for purposes of navigation, even though the alteration may, upon the whole, be for the convenience of the public; <sup>9</sup> but the owner of a vessel wrecked in a navigable river is not guilty of a common nuisance because he does not remove it.

<sup>1</sup> 1 Russ. Cr. 469.

<sup>2</sup> *R. v. Russell*, 1805, 6 East, 427.

<sup>3</sup> *R. v. Jones*, 1812, 3 Camp. 230.

<sup>4</sup> *Barnes v. Ward*, 1850, 9 C. B. 392.

<sup>5</sup> *R. v. Mutters*, 1864; L. & C. 491.

<sup>6</sup> 1 Russ. Cr. 530-557, where the whole law as to the liability to repair different classes of bridges is discussed.

<sup>7</sup> 1 Russ. Cr. 521.

<sup>8</sup> *R. v. Randall*, 1842, C. & M. 496; *R. v. Russell*, 1854; 3 E. & B. 942.

<sup>9</sup> *R. v. Watts*, 1798, 2 Esp. 675; *White v. Crisp*, 1854, 10 Ex. at p. 321; *Brown v. Mallett*, 1848, 5 C. B. 599. *White v. Crisp* and *Brown v. Mallett* are not altogether consistent on the further question as to the duty of the owner to buoy his vessel, or otherwise provide against other vessels striking on it.



## ARTICLE 212A.

## NUISANCES IN THE POST OFFICE.

<sup>1</sup> Every person is guilty of a misdemeanor, and is liable to imprisonment with hard labour for twelve months, who

(1) places or attempts to place in or against any post office letter box, any fire, match, light, explosive, or dangerous substance, filth, noxious or deleterious substance, or any fluid, or commits a nuisance in or against a post office letter box, or does, or attempts to do anything likely to injure the box, appurtenances, or contents, or

(2) sends or attempts to send a postal packet which encloses any explosive or dangerous substance, filth, noxious or deleterious substance, sharp instrument not properly protected, any living creature which is noxious or any living creature or thing likely to injure other postal packets in course of conveyance, or an officer of the Post Office.

<sup>1</sup> 47 & 48 Vict. c. 76, ss. 3, 4.

## CHAPTER XX

<sup>1</sup> VAGRANCY

## ARTICLE 213.

## IDLE AND DISORDERLY PERSONS.

<sup>2</sup> AN idle and disorderly person is a person who

(a.) being able, wholly or in part, to maintain himself or his family by work or otherwise, wilfully refuses or neglects so to do, by which refusal or neglect he or any of his family whom he may be legally bound to maintain becomes chargeable to any parish, township, or place; or

(b.) who returns to, and becomes chargeable in any parish, township, or place whence he has been legally removed by order of two justices of the peace, unless he produces a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby acknowledging him to be settled in such other parish, township, or place; or

(c.) who, being a petty chapman or pedlar, wanders abroad and trades without being duly licensed or otherwise authorized by law; or

(d.) who, being a common prostitute, wanders in the public street or public highways or any place of public resort, and behaves in a riotous or indecent manner; or

(e.) who wanders abroad, or places himself in any public place, street, highway, court, or passage, <sup>3</sup> to beg or gather alms, or causes or procures any child so to do; or

<sup>1</sup> 3 Hist. Cr. Law, 266-275. As to the summary punishment of offences and for the decisions applicable to this chapter, see Oke's Synopsis, pp. 654-662.

<sup>2</sup> 5 Geo. 4, c. 83, s. 3.

<sup>3</sup> The wandering, &c., must be as a habit of life. Persons who go about collecting alms for a specific purpose, and not as a way of life, are not within the statute. *Pointon v. Hill*, 1884, 12 Q. B. D. 306.

- (f.) <sup>1</sup> who, being a pauper,  
 (i.) absconds or escapes from, or leaves any casual ward before he is entitled to discharge himself therefrom; or  
 (ii.) refuses to be removed to any workhouse or asylum under the provisions of the "Pauper Inmates Discharge and Regulation Act 1871" (34 & 35 Vict. c. 108); or  
 (iii.) absconds or escapes from, or leaves any workhouse or asylum during the period for which he may be detained therein; or  
 (iv.) refuses or neglects, whilst an inmate of any casual ward, workhouse, or asylum, to do the work or observe the regulations prescribed; or  
 (v.) wilfully gives a false name, or makes a false statement, for the purpose of obtaining relief.

## ARTICLE 214.

## ROGUES AND VAGABONDS.

A rogue and vagabond is a person who

- (a) commits any of the offences in the last Article mentioned, after having been convicted as an idle and disorderly person; or  
 (b.) pretends or professes to tell fortunes, or uses any subtle craft, means, or device, <sup>2</sup> by palmistry or otherwise, to deceive and impose on any of Her Majesty's subjects; or  
 (c.) wanders abroad and lodges in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself; or  
 (d.) <sup>4</sup> wilfully exposes to view in any street, road, highway, or public place, or in the window or other part of any shop,

<sup>1</sup> 34 & 35 Vict. c. 108, s. 7.

<sup>2</sup> 5 Geo. 4, c. 83, s. 4.

<sup>3</sup> *i.e.*, "by palmistry, or by contrivances to deceive other than palmistry, provided they are of the same general character as is indicated by the earlier words of the statute," *per* Pollock, B., in *Monck v. Hilton*, 1877, 2 Ex. Div. 268. In this case the person convicted called himself a "Spiritualist," and had a fixed residence.

<sup>4</sup> 1 & 2 Vict. c. 38, s. 2.

or other building situate therein, any obscene print, picture, or other indecent exhibition; or

(e.) wilfully, openly, lewdly, and obscenely exposes his person in any street, road, or public highway, or in the view thereof; or in any place of public resort, with intent to insult any female; or

(f.) wanders abroad and endeavours, by the exposure of wounds or deformities, to obtain or gather alms; or

(g.) goes about as a gatherer or collector of alms, or endeavours to procure charitable contributions of any nature or kind under any false or fraudulent pretence; or

(h.) runs away and leaves his wife and his or her child or children chargeable, or whereby she or they or any of them become chargeable to any parish, township, or place; or

(i.) <sup>1</sup> plays or bets \* in any street, road, highway, or other open and public place, † at or with any table or instrument of gaming, ‡ at any game or pretended game of chance; or

(j.) has in his custody or possession any picklock, key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coachhouse, stable, or outbuilding; or

(k.) is armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or has upon him any instrument with intent to commit any felonious act; or

(l.) is found in or upon any dwelling-house, warehouse, coachhouse, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose; or

(m.) is a suspected person or reputed thief <sup>2</sup> frequenting

<sup>1</sup> 36 & 37 Vict. c. 38, s. 3, re-enacts this provision, adding at \* "by way of wagering or gaming," at † "or in any open place to which the public have or are permitted to have access," and at ‡ "or any coin, cash, token, or other article used as an instrument of such wagering or gaming." See cases collected in Oke's Synopsis, 659.

<sup>2</sup> "A single visit to a place, or once passing through a street, can in no sense be said to be a 'frequenting that' place or street," Grove, J., in *Clark v. Reg.*, 1884, 14 Q. B. D. at p. 98. "The mere finding upon one occasion of a man in a public street under circumstances leading to the conclusion that he intended to commit a felony is not sufficient to satisfy the statute. What amounts to a 'frequenting' a street must depend upon the circumstances of each particular case; I only say one visit to it does not." Hawkins, J., in *ibid.* p. 102. See, too, cases in Oke's Synopsis, 661.

any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse, or any avenue leading thereto, or any street [<sup>1</sup> or any highway, or any place adjacent to a street or highway] with intent to commit felony ; <sup>1</sup> in proving which it is not necessary to show that the person suspected was guilty of any particular act tending to show his purpose or intent, and he may be convicted if, from the circumstances of the case, and from his known character as proved to the Court or justice before whom or which he is brought, it appears to such Court or justice that his intent was to commit a felony ; or

<sup>2</sup> (n.) being apprehended as an idle and disorderly person, violently resists any constable or other peace officer, so apprehending him, and is subsequently convicted of the offence for which he was so apprehended ; or

(o.) <sup>3</sup> who, being a pauper, wilfully destroys or injures his own clothes, or damages any of the property of the guardians.

#### ARTICLE 215.

##### INCORRIGIBLE ROGUES.

<sup>4</sup> An incorrigible rogue is a person who

(a.) breaks or escapes out of any place of legal confinement before the expiration of the term for which he is committed under Article 214 ; or

(b.) is convicted as a rogue and vagabond after being previously so convicted ; or

(c.) being apprehended as a rogue and vagabond, violently resists any constable or peace officer so apprehending him, and is subsequently convicted of the offence for which he was apprehended.

<sup>1</sup> 34 & 35 Vict. c. 112, s. 15.

<sup>2</sup> 5 Geo. 4, c. 83, s. 4.

<sup>3</sup> 34 & 35 Vict. c. 108, ss. 7, 10.

<sup>4</sup> 5 Geo. 4, c. 83, s. 5.

## ARTICLE 216.

## PUNISHMENT OF ROGUES, VAGABONDS, ETC.

<sup>1</sup> Every one convicted before a justice of the peace of being an idle and disorderly person may be imprisoned with hard labour for any term not exceeding one month ;

of being a rogue and vagabond may be imprisoned with hard labour for any term not exceeding three months ;

of being an incorrigible rogue must be committed to prison and kept to hard labour till the next general or quarter sessions of the peace ;

at the said sessions the justices may order such offender to be further committed to prison and to be there kept to hard labour for any term not exceeding one year, and if a male to be whipped.

<sup>1</sup> 5 Geo. 4, c. 83, ss. 3, 4, 5.

## \* PART V

OFFENCES AGAINST THE PERSON, THE CONJUGAL  
AND PARENTAL RIGHTS, AND THE REPUTA-  
TION OF INDIVIDUALS

CHAP. XXI.—CASES IN WHICH IN-  
FLICTION OF BODILY INJURY IS  
NOT CRIMINAL.

CHAP. XXII.—OF CULPABLE NEG-  
LIGENCE AND OF DUTIES TENDING  
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VATE PERSONS.

## CHAPTER XXI.

*CASES IN WHICH INFLICTION OF BODILY INJURY  
IS NOT CRIMINAL*

## ARTICLE 217.

## EXCEPTIONS TO REST OF PART V.

THE contents of Part V. are to be taken to be subject to  
the provisions contained in this chapter.

## ARTICLE 218.

## EXECUTION OF LAWFUL SENTENCES.

<sup>1</sup> The intentional infliction of death or bodily harm is not  
a crime when it is done in the execution, in the manner pre-

\* Note VII. See also 3 Hist. Cr. Law, ch. xxvi. and xxvii. pp. 1-120.

<sup>1</sup> 1 Hale, P. C. 497; Foster, 267; 1 Hawk. P. C. 80; 1 East, P. C.  
332-4. These authorities contain (*inter alia*) discussions as to varying the

scribed by law by a person whose duty it is to execute it, of a lawful sentence duly passed by a competent Court.

A Court which, but for some formal defect in its authority or in its proceedings, would have had jurisdiction to pass a sentence, is deemed for the purposes of this Article to be a competent Court; but a Court which has by law no jurisdiction at all over the case in which sentence is passed is not deemed to be a competent Court, and a mistaken belief on the part of the judge, or of the officer who executes the sentence, that it is competent, does not justify or excuse his act.

### *Illustrations.*

(1.)<sup>1</sup> A sits under a commission of gaol delivery. The officer forgets to adjourn the Court at the end of the first day's sitting. This determines the commission. On the following day A sits again, and sentences a felon to death, who is duly executed by B. Neither A nor B is guilty of murder or manslaughter, though the proceedings are irregular.

(2.)<sup>2</sup> A, lieutenant or other having commission of martial authority in time of peace, causes B to be hanged by C by colour of martial law. This is murder in both A and C.

## ARTICLE 219.

### SUPPRESSION OF RIOTS.

<sup>3</sup> The intentional infliction of death or bodily harm is not a crime when it is done either by justices of the peace, peace

form of punishment (as by substituting beheading for hanging) little likely to be of practical value. Draft Code, ss. 25 and 28.

<sup>1</sup> Per Lord Hale, 1 Hale, P. C. 498.

<sup>2</sup> Coke, 3rd Inst. 52; 1 Hale, P. C. 499, 500. The whole subject of martial law underwent full discussion in connection with the execution of Mr. Gordon by a court-martial in Jamaica in 1865. An elaborate history of the case has been published by Mr. Finlason, and the charge to the grand jury, delivered at the Central Criminal Court by the Lord Chief Justice of England, has been published in a separate form. I know not whether the charge to the grand jury of Middlesex, delivered by Lord (then Mr. Justice) Blackburn, has been published or not. Much information on the subject will be found in Forsyth's *Cases and opinions* on Constitutional Law, pp. 484-563. Mr. Forsyth prints, *inter alia*, an opinion given by the late Mr. Edward James, Q.C., and myself, in 1866, see pp. 551-563; and see *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1.

<sup>3</sup> See the charge of Tindal, C.J., to the grand jury of Bristol in 1832,



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.

## ARTICLE 220.

### PREVENTION OF THE COMMISSION OF CRIMES AND ARREST OF CRIMINALS.

The intentional infliction of death or bodily harm is not a crime when it is done by any person

<sup>1</sup> in order to prevent the commission of treason, murder, burglary, rape, robbery, arson, piracy, or any other felony in which the traitor, felon, or pirate so acts as to give the person who kills or wounds him reasonable ground to believe that he intends to accomplish his purpose by open force ;

<sup>2</sup> or, 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 ;

<sup>3</sup> or, when it is done by a constable, or other officer of

printed in a note to *R. v. Pinney*, 1832, 5 C. & P. 254, and quoted and approved in *Phillips v. Eyre*, *sup.* (Court of Exchequer Chamber). The proper course in such cases is for the civil magistrate to direct and control what is done, but this is not absolutely necessary. The Riot Act (1 Geo. 1, st. 2, c. 5, see Article 79) authorizes in express terms the dispersion of rioters who continue riotously assembled together for more than an hour after the proclamation made, and indemnifies the persons concerned if any of the rioters should be killed ; but this Act appears to be narrower than the common law as laid down by Tindal, C.J. See Draft Code, ss. 49, 50.

<sup>1</sup> 1 Coke, 3rd Inst. 55 ; 1 Hale, P. C. 486-7 ; Foster, 273 (more fully and satisfactorily) ; 1 Hawk. P. C. 82 (rather confusedly) ; 1 East, P. C. 271-4 (best and most fully stated) ; 1 Russ. Cr. 843-52 (taken substantially from East). Piracy is not mentioned by the authorities, but see 8 Geo. 1, c. 24, s. 6. Article 116. Draft Code, s. 54.

<sup>2</sup> Coke, 3rd Inst. 56 ; 1 Hale, P. C. 489 ; 1 Hawk. P. C. 81 ; Foster, 270-1 ; 1 East, P. C. 298-302. Draft Code, ss. 32-46.

<sup>3</sup> Coke, 3rd Inst. 55 ; 1 Hale, P. C. 490 ; 1 Hawk. P. C. 81 ; 1 East, P. C. 298-302. It must be observed that this Article is confined to the intentional infliction of death or bodily injury. If the death or injury is not an intended or probable consequence of the act, the case is provided for under Articles 231, 243.

justice, in order to execute a warrant of arrest for treason or felony, which cannot otherwise be executed, although the person named in the warrant offers no violence to any person ;

provided, in each of the said cases, that the object for which death or harm is inflicted cannot be otherwise accomplished.

#### ARTICLE 221.

##### <sup>1</sup> PRIVATE DEFENCE.

The intentional infliction of death or bodily harm is not a crime when it is inflicted by any person in order to defend himself or any other person from unlawful violence, provided that the person inflicting it observes the following rules as to avoiding its infliction, and inflicts no greater injury in any case than he in good faith, and on reasonable grounds, believes to be necessary when he inflicts it:—

(a.) <sup>2</sup> If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot, and may kill or wound the person by whom he is assaulted.

(b.) <sup>3</sup> If a person is unlawfully assaulted,

(i.) in his own house ;

(ii.) <sup>4</sup> in the execution of a duty imposed upon him by law ;

(iii.) <sup>4</sup> by way of resistance to the exercise of force which he has by law a right to employ against the person of another ;

he may defend himself on the spot, and may use a degree of

<sup>1</sup> See Draft Code, ss. 55-65.

<sup>2</sup> Code, 3rd Inst. 55 ; 1 Hale, P. C. 487 ; 1 Hawk. P. C. 82 ; Foster, 273-5 ; 1 Russ. Cr. 844. This case is so nearly coextensive with the first case mentioned in the last Article that East does not notice them separately. Cases, however, may be imagined in which a sudden and violent assault would be no crime, and yet might be resisted by killing the assailant : see Illustration (1).

<sup>3</sup> Staundforde, 14a ; Coke, 3rd Inst. 56 ; 1 Hale, P. C. 486, &c. ; 1 Hawk. P. C. 87 ; Foster, 275-6 ; 1 East, P. C. 287, 288.

<sup>4</sup> In addition to the authorities in the last note, see 1 East, P. C. 294-298, &c. ; 1 Hale, P. C. 489.

force for that purpose proportioned to the violence of the assault, and sufficient (in case iii.) to enable him not only to repel the attack made upon him, but to effect his original purpose; but a person using force in the execution of a duty imposed upon him by law, or in order to effect a purpose which he may by law effect in that manner, and not being assaulted, is not entitled to strike or hurt the person against whom he employs such force, merely because he is unable otherwise to execute such duty or fulfil such purpose, except in the cases provided for in Article 220.

(c.) <sup>1</sup> If a person is unlawfully assaulted by another without any fault of his own, and otherwise than in the cases provided for in clauses (a.) and (b.), but with a deadly weapon, it is his duty to abstain from the intentional infliction of death or grievous bodily harm on the person assaulting, until he (the person assaulted) has retreated as far as he can with safety to himself.

But any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm; and if the assault upon him is notwithstanding continued, he is in the position of

<sup>1</sup> See the authorities quoted for clauses (a.) and (b.), and especially 1 Hale, P. C. 479-481. The qualification at the end of this rule is founded on the doctrine that any one may lawfully prevent or suppress by force a breach of the peace or affray (1 Hawk. P. C. 489; *R. v. Osmer*, 1804, 5 East, 304), from which it would seem to follow that a man who is himself assaulted may resist his assailant, and on the doctrine that *son assault demesne* is a good defence to an indictment for assault (1 Hawk. P. C. 110). If this were not the law it would follow that any ruffian who chose to assault a quiet person in the street might impose upon him the legal duty of running away, even if he were the stronger man of the two. The passage of Hale appears to me to be applicable only to cases where deadly weapons are produced by way of bravado or intimidation, a cause which no doubt often occurred when people habitually carried arms and used them on very slight provocation. In such a case it might reasonably be regarded as the duty of the person assaulted to retreat rather than draw his own sword, but I cannot think that Hale meant to say that a man who in such a case closed with his assailant and took his sword from him would be acting illegally, or that if in doing so the assailant were thrown down and accidentally killed by the fall the person causing his death would be guilty of felony. The minuteness of the law contained in the authorities on which this Article is founded is a curious relic of a time when police was lax and brawls frequent, and when every gentleman wore arms and was supposed to be familiar with the use of them. It might, I think, be simplified in the present day with advantage.

a person assaulted in the employment of lawful force against the person of another.

(d.) <sup>1</sup> If two persons quarrel and fight neither is regarded as defending himself against the other until he has in good faith fled from the fight as far as he can; but if either party does in good faith flee from the fight as far as he can, and if, when he is prevented either by a natural obstacle or any other cause of the same nature, from flying further, the other party to the fight follows and again assaults him, the person who has so fled may defend himself, and may use a degree of violence for that purpose proportioned to the violence employed against him.

### *Illustrations.*

(1.) <sup>2</sup> A, a madman, violently attacks B in such a manner as to cause instant danger to B's life. B may kill A, though A is not committing any crime.

(2.) <sup>3</sup> A, an officer, has a warrant to arrest B on civil process. B flies. A overtakes him, and B assaults A. A may use any degree of violence to B necessary to repel his assault and to arrest him.

(3.) <sup>4</sup> A, a trespasser, enters B's house and refuses to leave it. B has a right to remove A by force, but not to strike him even if he cannot otherwise get him out of the house. If on the application of such force A assaults B, B may use any degree of force necessary to defend himself and to remove A from the house.

## ARTICLE 222

### LAWFUL FORCE

<sup>5</sup> It is not a crime to inflict bodily harm by way of lawful correction, or by any lawful application of force (other than

<sup>1</sup> See the authorities for clause (b.).

<sup>2</sup> This seems to follow directly from the authorities cited. So, if A were under a mistake of fact which B had no time to explain.

<sup>3</sup> 1 East, P. C. 307.

<sup>4</sup> 1 Hale, P. C. 486.

<sup>5</sup> It would be inconsistent with the plan of this work to try to enumerate all the cases in which force may be lawfully applied to the person of another. In 1 Russ. 767-770 cases will be found as to excessive violence in executing legal process; and see *R. v. Tranter*, 1721; Str. 499; 1 Russ. 822: as to pressing for sea service see 1 Russ. 768; as to the powers of

those hereinbefore mentioned) to the person of another; but if the harm inflicted on such an occasion is excessive the act which inflicts it is unlawful, and, even if there is no excess, it is the duty of every person applying the force to take reasonable precautions against the infliction of other or greater harm than the occasion requires.

### *Illustrations.*

(1.) <sup>1</sup> A, a schoolmaster, beats B, a scholar, for two hours with a thick stick. Such a beating is unlawful.

(2.) <sup>2</sup> A kicks B, a trespasser, out of his house, in order to force him to leave it. B is killed. The kick is an unlawful act.

(3.) (SUBMITTED.) A, the governor of a gaol, flogs B, a criminal, under the sentence of a court. It is A's duty to cause the surgeon of the gaol to be in attendance to see that no unintended injury is inflicted on B.

## ARTICLE 223.

### SUPERIOR ORDERS TO EMPLOY FORCE.

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 are responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior, but the fact that he did 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,<sup>3</sup> or which might justify his superior officer in giving such orders.

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captains in the merchant service see *R. v. Leggett*, 1838; 8 C. & P. 191; 1 Russ. 773; as to the correction of children and servants see 1 Russ. 773-778. See Draft Code, s. 66.

<sup>1</sup> *R. v. Hopley*, 1860, 1 Russ. Cr. 776; 2 F. & F. 202.

<sup>2</sup> *Wild's Case*, 1837, 1 Russ. Cr. 686; 2 Lewin, 214.

<sup>3</sup> As to this see 1 Hist. Cr. Law, 205.

*Illustrations.*

(1.)<sup>1</sup> A, a marine, is ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and has ammunition given him for that purpose. Boats persisting after repeated warnings in approaching the ship A fires at one and kills B. This is murder in A, although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship [though desirable for the maintenance of discipline].

(2.)<sup>2</sup> A, the driver of an engine, orders B, the stoker (whose duty it is to obey his orders), not to stop the engine. The train runs into another in consequence, and C is killed. B is justified by A's order.

(3.)<sup>3</sup> (SUBMITTED.) A, a civil magistrate, directs B, a military officer, to order his men to fire into a mob. B gives the order. It is obeyed, and C, a common soldier, shoots D dead. The question whether A, B, and C respectively committed any offence depends on the question whether each of them respectively had reasonable grounds to believe and did in fact believe in good faith either that what they did was necessary to suppress a dangerous riot, or in the case of B, that A, or in the case of C, that B, had reasonable grounds to believe and did believe that the order given was necessary to suppress a dangerous riot. A's direction to B, and B's order to C, would not necessarily justify B or C in what they did, but would be facts relevant to the question whether they believed upon reasonable grounds as aforesaid.

<sup>1</sup> *R. v. Thomas*, 1815, 1 Russ. Cr. 732; 4 M. & S. 442.

<sup>2</sup> *R. v. Trainer*, 1864, 4 F. & F. 105; 1 Russ. Cr. 837, 838. The language of Willes, J., in this case seems to be a little too wide, unless it is taken in connection with the particular facts.

<sup>3</sup> Whether C would commit a military offence if he refused to obey B's order because he rightly thought it unreasonable, is a question which would have to be decided by a court-martial. I should suppose that cases might be imagined in which even a court-martial would hold that a military inferior might and ought to disobey orders on the ground of their illegality. An officer, *e.g.*, who commanded his men to fire a volley down Fleet Street when there was no appearance of a disturbance, or to shoot a child of four years old running away during a riot, or to desert to the enemy, or to shoot a superior officer, ought to be disobeyed, and I suppose that a soldier who obeyed such an order might be punished by a court-martial. That such acts as shooting peaceable people wantonly, or a child of four years old intentionally, even in a riot, would be murder as well in the soldier as in the officer cannot be doubted. If so, it seems impossible to suggest any other principle as to the effect of superior orders than the one mentioned in the text. It is indeed essential to the maintenance of the supremacy of the common law over military force.

## ARTICLE 224.

## CONSENT TO BODILY INJURY.

The consent of a person killed or maimed to the infliction of death or bodily harm, affects the criminality of such infliction to the extent defined in Articles 225-230, both inclusive. In each of these Articles the word "Consent" means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents.

Consent is said to be given freely when it is not procured by force, fraud, or threats of whatever nature.

## ARTICLE 225.

## RIGHT TO CONSENT TO BODILY INJURY FOR SURGICAL PURPOSES.

<sup>1</sup> Every one has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself or upon any child under his care, and too young to exercise a reasonable discretion in such a matter, but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto.

## ARTICLE 226.

## SURGICAL OPERATION ON PERSON INCAPABLE OF ASSENT.

(SUBMITTED)—<sup>2</sup> If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent or in spite of his resistance.

<sup>1</sup> I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth.

<sup>2</sup> See the last note. Draft Code, s. 67.

*Illustrations.*

(1.) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(2.) If the accident made him mad, the amputation in spite of his resistance would be no offence.

(3.) B is drowning and insensible. A, in order to save his life, pulls B out of the water with a hook which injures him. This is no offence.

## ARTICLE 227.

## RIGHT TO CONSENT TO BODILY INJURY SHORT OF MAIM.

<sup>1</sup> Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim. A maim is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened, but a bodily injury is not a maim merely because it is a disfigurement.

*Illustration.*

(1.) It is a maim to strike out a front tooth. It is not a maim to cut off a man's nose. Castration is a maim.

## ARTICLE 228.

## NO RIGHT TO CONSENT TO INFLICTION OF DEATH.

<sup>2</sup> No one has a right to consent to the infliction upon himself of death, or of an injury likely to cause death, in any

<sup>1</sup> The positive part of this Article is proved thus :—Injuries short of maims are not criminal at common law unless they are assaults, but an assault is inconsistent with consent. As to the definition of a maim, see 1 Hawk. P. C. 107. He expressly mentions castration.

<sup>2</sup> Draft Code, s. 69.



case (other than those mentioned in Article 225), or to consent to the infliction upon himself of bodily harm amounting to a maim, for any purpose injurious to the public.

*Illustrations.*

(1.)<sup>1</sup> A and B agree to fight a duel together with deadly weapons. If either is killed or wounded his consent is immaterial.

(2.)<sup>2</sup> A gets B to cut off A's right hand, in order that A may avoid labour and be enabled to beg. Both A and B commit an offence.

ARTICLE 229.

NO RIGHT TO CONSENT TO INJURY CONSTITUTING A BREACH OF THE PEACE.

<sup>3</sup> No one has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize fight or other exhibition calculated to collect together disorderly persons.

ARTICLE 230.

CONSENT TO BE PUT IN DANGER.

<sup>4</sup> It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another.

<sup>1</sup> *R. v. Barronet*, 1852, D. & P. 51. The law has never, I believe, been disputed. It is also immaterial whether the duel is or is not what is called fair. See, too, authorities as to suicide, Article 248.

<sup>2</sup> 1 Inst. 107 a, b. I think the qualification in the Article, "for any purpose injurious to the public," must be supplied. It seems absurd to say that if A gets a dentist to pull out a front tooth of A's because it is unsightly, though not diseased, A and the dentist both commit a misdemeanor. When it was an essential part of a common soldier's drill to bite cartridges I believe that it was not an uncommon military offence to get the front teeth pulled out, and this would, I presume, be an offence at common law also.

<sup>3</sup> *Foster*, 260; 1 *East*, 270; *R. v. Billingham*, 1825, 2 C. & P. 234; *R. v. Perkins*, 1831, 4 C. & P. 537; *R. v. Coney*, 1882, 8 Q. B. D. 534.

<sup>4</sup> There is, so far as I know, no authority on this point, but the princi-

*Illustration.*

(1.) A, with B's consent, wheels B in a barrow along a tight rope at a great height from the ground. C hires A and B to do so, D, E, and F pay money to C to see the performance. B is killed.

*Quære*, are A, C, D, E, and F, or any and which of them, guilty of manslaughter?

## ARTICLE 231.

ACCIDENTAL INFLICTION OF BODILY INJURY BY LAWFUL ACT—  
WHAT ACTS ARE LAWFUL.

<sup>1</sup> It is not a crime to cause death or bodily harm accidentally by an act which is not unlawful, unless such act is accompanied by an omission, amounting to culpable negligence, as defined in Article 232, to perform a legal duty imposed either by law or by contract on the person who does the act.

An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.

The words "unlawful act" include—

- (i.) acts punishable as crimes [or involving penalties];
- (ii.) <sup>2</sup> acts constituting actionable wrongs;
- (iii.) <sup>3</sup> acts contrary to public policy or morality, or injurious to the public.

ciple on which prizefights have been held to be illegal might include such a case. Such an exhibition might also under circumstances be a public nuisance. To collect a large number of people to see a man put his life in jeopardy is a less coarse and boisterous proceeding than a prizefight, but is it less immoral?

<sup>1</sup> 1 Hale, 471, &c.; Foster, 258; 1 East, P. C. 260; 1 Russ. Cr. 844. I cannot give any precise authority as to acts involving penalties.

<sup>2</sup> 1 Russ. Cr. 812-21, for cases; see especially the summing up of Tindal, C.J., in Fenton's case, 1839, 1 Lew. 179; 1 Russ. Cr. 817. Hale, East, and Foster make a distinction between *mala in se* and *mala prohibita*, which I think can no longer be regarded as law.

<sup>3</sup> See authorities for Article 229.

Other acts are not unlawful within the meaning of this Article, though they may involve private immorality.

*Illustrations.*

(1.)<sup>1</sup> A, a schoolmaster, corrects a scholar in a manner not intended or likely to injure him, using due care. The scholar dies. Such a death is accidental.

(2.)<sup>2</sup> A turns B, a trespasser, out of his house, using no more force than is necessary for that purpose. B resists, but without striking A. They fall in the struggle and B is killed. Such a death is accidental.

(3.)<sup>3</sup> A, a workman, throws snow from a roof, giving proper warning. A passenger is nevertheless killed. Such a death is accidental.

(4.)<sup>3</sup> A takes up a gun, not knowing whether it is loaded or not, points it in sport at B and pulls the trigger. B is shot dead. Such a death is not accidental. If A had had reason to believe that the gun was not loaded, the death would have been accidental, although he had not used every possible precaution to ascertain whether the gun was loaded or not.

(5.)<sup>4</sup> A seduces B, who dies in her confinement. The seduction though an immoral, is not an unlawful act, within the meaning of this Article.

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<sup>1</sup> 1 Hale, 473. The same law of course applies to all cases of lawful correction. It would also, I think, apply to Illustration (2), and to all other cases in which force is lawfully applied by one person to the person of another. It is, of course, impossible in a work like this to attempt an enumeration of those cases.

<sup>2</sup> Founded on Foster, 262.

<sup>3</sup> Founded on Foster, 263. In one of the cases referred to in Foster, the prisoner was convicted of manslaughter, although he had tried the pistol with the rammer. Foster, with reason, thinks this "an extremely hard case." *Dixon v. Bell*, 1816, 5 M. & S. 198, may be taken as illustrating the line between negligence, for which a man is civilly, and negligence for which he is criminally responsible. A in this case had caused the priming to be taken from a loaded gun, and left it in a place where a little girl playing with it shot a little boy. The boy recovered damages against A, but if he had died I do not think A would have been guilty of felony. The case is just on the line.

<sup>4</sup> No one ever suggested that this would be manslaughter, but it exactly marks the distinction between illegality and immorality.

## CHAPTER XXII

OF CULPABLE NEGLIGENCE AND OF DUTIES TENDING  
TO THE PRESERVATION OF LIFE

## ARTICLE 232.

DEATH OR BODILY INJURY CAUSED BY OMISSION TO  
DISCHARGE A LEGAL DUTY.

<sup>1</sup> EVERY one upon whom the law imposes any duty,<sup>2</sup> or who has by contract or by any wrongful act taken upon himself any duty, tending to the preservation of life, and who neglects to perform that duty, and thereby causes the death of any person, commits the same offence as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty. '

Provided, that no one is deemed to have committed a crime only because he has caused the death of or bodily injury to another by negligence which is not culpable. (What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case.) An intentional omission to discharge legal duty always constitutes culpable negligence.

Provided, also, that no one is deemed to have committed

<sup>1</sup> The first part of this Article is illustrated by all the Illustrations of the other Articles in the chapter. The whole subject is treated at great length in Wharton on Homicide, chapter iv. s. 72, p. 166. Dr. Wharton classifies negligent homicide under the following heads (generalities apart) :

- |  |                              |
|--|------------------------------|
| 1. Use of dangerous things.              | 6. The care of children, &c. |
| 2. Dropping things on roads.             | 7. The care of medical men.  |
| 3. Management of railroads and steamers. | 8. Dangerous machinery.      |
| 4. Riding and driving.                   | 9. Athletic sports.          |
| 5. The care of dangerous animals.        | 10. Conclusion.              |

I have carefully gone through the whole chapter, and I think the whole of it is only a set of illustrations of the principles stated in this and in the concluding Articles of the preceding chapter. It should be observed that the word "negligence" excludes intention. The very slightest omission of caution in order to cause death, would constitute malice aforethought, if death were caused thereby.

<sup>2</sup> Draft Code, s. 164.

a crime by reason of the negligence of any servant or agent employed by him.

<sup>1</sup> Provided also that it must be shown that death not only follows but is also caused by the neglect of duty.

### *Illustrations.*

(1.) <sup>2</sup> It is A's duty, by contract, as the banksman of a colliery shaft, to put a stage on the mouth of the shaft in order to prevent loaded trucks from falling down it. A omits to do so either carelessly or intentionally. A truck falls down the shaft and kills B. A is in the same position as if he had pushed the truck down the shaft carelessly or intentionally.

(2.) <sup>3</sup> A slings a cask in a manner which is reasonably sufficient for public safety. The cask slips and kills B. A is not criminally responsible merely because he omitted to take further precautions.

(3.) <sup>4</sup> A leaves an unloaded gun leaning against a wall in a friend's room. In his absence B loads it and leaves it loaded where he found it. A points it in sport at C and pulls the trigger. The gun goes off and kills C. A is not criminally responsible merely because he did not examine the gun before he pulled the trigger.

(4.) <sup>5</sup> A, the captain of a steamer, sets B to keep a look-out. B fails to do so, whereby the steamer runs down a smack and drowns C. A is not criminally responsible for B's omission to look out.

(5.) <sup>6</sup> A, acting as a surgeon, physician, or midwife, causes the death of a patient by improper treatment, arising from ignorance or inattention. A is not criminally responsible, unless his ignorance, or inattention, or rashness is of such a nature that the jury regard it as culpable under all the circumstances of the case. It makes no difference whether A is or is not a properly qualified practitioner.

(6.) <sup>7</sup> A, by his servants, makes fireworks in his house con-

<sup>1</sup> Illustration (7).

<sup>2</sup> *R. v. Hughes*, 1857, D. & B. 248.

<sup>3</sup> *Rigmaidens Case*, 1833, 1 Lew. 180. Probably in such a case there would be a civil liability; see *Byrne v. Boadle*, 1863, 2 H. & C. 722.

<sup>4</sup> *Foster*, 265.

<sup>5</sup> *R. v. Allen*, 1835, 7 C. & P. 153; *R. v. Green*, 1835, 7 C. & P. 156.

<sup>6</sup> *R. v. Van Butchell*, 1829, 3 C. & P. 629; *R. v. St. John Long* (1st case), 1830, 4 C. & P. 398; (2nd case), 1831, 4 C. & P. 423; *R. v. Williamson*, 1807, 3 C. & P. 635, n.

<sup>7</sup> *R. v. Bennett*, 1858, Bell C. C. 1.

trary to the provisions of an Act of Parliament. The servants by culpable negligence cause an explosion which kills B. A is not criminally responsible for B's death.

(7.)<sup>1</sup> Being under a legal duty to supply medical aid for his son B, who has confluent small pox, refuses to do so from religious motives, and B dies. It must be shown that B's life would probably have been prolonged if medical aid had been provided, before A can be convicted of manslaughter.

#### ARTICLE 233.

##### CAUSING DEATH BY OMISSIONS OTHER THAN THOSE MENTIONED IN ARTICLE 232.

<sup>2</sup> It is not a crime to cause death or bodily injury, even intentionally, by an omission other than those referred to in the last Article.

##### *Illustration.*

(1.) A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may drown, and B is drowned. A has committed no offence.

#### ARTICLE 234.

##### DUTY TO PROVIDE NECESSARIES OF LIFE.

<sup>3</sup> 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 necessities of life for such other person, is criminally responsible if death is caused by the neglect of that duty, and 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.

<sup>1</sup> *R. v. Morby*, 1882, 8 Q. B. D. 571.

<sup>2</sup> *R. v. Smith*, 1826, 2 C. & P. 449. This subject is discussed in a striking manner by Lord Macaulay in his notes on the Indian Penal Code; see, too, Wharton on Homicide, § 72.

<sup>3</sup> See cases in Illustrations. Draft Code, ss. 159-61.

Some of the duties of masters towards apprentices and of parents towards children are defined in Articles 260 and 283-286.

*Illustrations.*

(1.) <sup>1</sup> A neglects to provide proper food and lodging for her servant, B (who is of weak mind, but twenty-three years old), B's life is shortened by such neglect. A is criminally responsible if B was in such an enfeebled state of body and mind as to be helpless and unable to take care of herself, or was under the dominion and restraint of A, and unable to withdraw herself from A's control; otherwise not.

(2.) <sup>2</sup> B, a girl of eighteen, comes from service to the house of her mother, A, and is there confined of a bastard child. A does not provide a midwife, in consequence of which B dies. A is not criminally responsible for this omission.

(3.) <sup>3</sup> A persuades B, an aged and infirm woman, to live in his house, and causes her death by neglecting to supply her properly with food and fire, she being incapable of providing for herself from age and infirmity. A is criminally responsible for his neglect.

ARTICLE 235.

DELEGATION OF DUTY DEFINED IN ARTICLE 234.

If a person delegates the discharge of the duty mentioned in the last Article to his wife or to a servant, and supplies such wife or servant with the means of discharging the duties so delegated, it is the legal duty of such wife or servant to discharge such duties, and it is the legal duty of the man who delegates them to use ordinary care to see that they are properly discharged.

*Illustration.*

<sup>4</sup> A, the sister of B's deceased wife, acts as B's housekeeper, and neglects to give to B's infant child food duly provided by B,

<sup>1</sup> *R. v. Charlotte Smith*, 1865, L. & C. 607; and see *R. v. Instan*, *infra*.

<sup>2</sup> *R. v. Shepherd*, 1862, L. & C. 147.

<sup>3</sup> *R. v. Marriott*, 1838, 8 C. & P. 425; *R. v. Instan*, 1893, 1 Q. B. 450.

<sup>4</sup> *R. v. Bubb*, and *R. v. Hook*, 1851, 4 Cox, C. C. 455, 1 Russ. Cr. 681, 2.

and so causes its death. A is criminally responsible for this neglect. If B knew of A's neglect, and permitted her to continue it, he is also responsible, but not otherwise.

#### ARTICLE 236.

##### WHEN DIRECT PERFORMANCE OF DUTY IMPOSSIBLE.

<sup>1</sup> It is the legal duty of a person who is unable to provide for any person necessities which he is legally bound to provide for him to make application to the proper authorities for parochial relief in cases in which such authorities are legally bound to furnish such relief.

#### ARTICLE 237.

##### DUTY OF CARE IN DOING DANGEROUS ACTS.

<sup>2</sup> It is the legal duty of every one who does any act which without ordinary precautions is, or may be, dangerous to human life, to employ those precautions in doing it.

##### *Illustrations.*

(1.) <sup>3</sup> It is the duty of persons having charge of dangerous things, animals or machinery, to take care of them.

(2.) <sup>3</sup> Workmen are employed to throw snow off the roof of a house. It is their duty to see whether people are passing, and to give warning before they throw it down.

(3.) <sup>3</sup> It is the duty of people riding, driving, or sailing, to be careful.

(4.) <sup>4</sup> A turns out a vicious horse to graze on a common on

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<sup>1</sup> *R. v. Mabbett*, 1851, 5 Cox, C. C. 339 ; 1 Russ. Cr. 683.

<sup>2</sup> How far can it be said to be a legal duty to abstain from doing such acts wantonly even with precautions? Suppose a man, merely for his own amusement or from caprice, took a dangerous wild beast into a public street, using all proper precautions, and suppose the wild beast notwithstanding broke loose and killed some one, would this be manslaughter? I know of no authority on the subject. See Draft Code, s. 162.

<sup>3</sup> Cases collected in Wharton on Homicide, §§ 87-93, 99, 125, 107-24 ; and see 1 Russ. Cr. 822-840.

<sup>4</sup> *R. v. Dant*, 1865, L. & C. 567.



which people are likely to pass. It is his duty to take proper precautions against its injuring passers-by.

(5.)<sup>1</sup> A, B, and C went to practise with a rifle which carried a mile. A handed a board to B, who in C's presence fixed it in a tree, and they all fired at it at a distance of 100 yards, taking no precautions to prevent mischief to persons in the neighbourhood. One of the shots killed a boy in a tree about 200 yards behind the target. All were held guilty of manslaughter.

#### ARTICLE 238.

##### DUTY OF PERSONS DOING ACTS REQUIRING SPECIAL SKILL OR KNOWLEDGE.

<sup>2</sup> It is the legal duty of every person who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act of a dangerous character, which requires special knowledge, skill, attention, or caution, to employ in doing it a common amount of such knowledge, skill, attention and caution.

<sup>1</sup> *R. v. Salmon & others*, 1880, 6 Q. B. D. 79. My judgment was nearly in the terms of Article 237, and the other judgments were to the same effect.

<sup>2</sup> *R. v. St. John Long*, 1830, 4 C. & P. at 404. (*Per* Garrow, B.) As to caution, see *R. v. St. John Long*, 2nd case, 4 C. & P. at 440; see other cases collected in 1 Russ. Cr. 672-6. Draft Code, s. 162.

## CHAPTER XXIII

## HOMICIDE

## ARTICLE 239.

## HOMICIDE DEFINED—WHEN A CHILD BECOMES A HUMAN BEING.

<sup>1</sup> HOMICIDE is the killing of a human being by a human being.

<sup>2</sup> A child becomes a human being within the meaning of this definition, when it has completely proceeded in a living state from the body of its mother, <sup>3</sup> whether it has or has not breathed, <sup>4</sup> and whether the navel string has or has not been divided, <sup>5</sup> and the killing of such a child is homicide, whether it is killed by injuries inflicted before, during, or after birth.

<sup>6</sup> A living child in its mother's womb, or a child in the act of birth, even though such child may have breathed, is not a human being within the meaning of this definition, and the killing of such a child is not homicide.

## ARTICLE 240.

## KILLING DEFINED.

<sup>7</sup> Killing is causing the death of a person by an act or omission but for which the person killed would not have

<sup>1</sup> Draft Code, ss. 165, 166.

<sup>2</sup> *R. v. Poulton*, 1832, 5 C. & P. 329.

<sup>3</sup> *R. v. Brain*, 1834, 6 C. & P. 349.

<sup>4</sup> *R. v. Trilloe*, 1842, Car. & Mar. 650.

<sup>5</sup> Authorities collected, 1 Russ. Cr. 646.

<sup>6</sup> *R. v. Enoch*, 1833, 5 C. & P. 539, and see note to the case; *R. v. Wright*, 1841, 9 C. & P. 754; *R. v. Seller*, 1837, 7 C. & P. 850.

<sup>7</sup> See Draft Code, ss. 167-173. Dr. Wharton's work on Homicide contains an interesting and elaborate chapter (ch. xii. §§ 358-389), entitled "Causal Connection," into which some discussion is introduced on the

died when he did, and which is directly and immediately connected with his death. The question whether a given act or omission is directly and immediately connected with the death of any person is a question of degree dependent upon the circumstances of each particular case.

(SUBMITTED.) But the conduct of one person is not deemed for the purposes of this Article to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other.

This Article is subject to the provisions contained in the next two Articles.

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distinction between causes and conditions ; a distinction of which Dr. Wharton maintains, and of which Mr. Mill (see his *Logic*, vol. i. p. 398, &c.) denies the solidity. For practical purposes, I think the Article in the text is sufficient. And if this were the proper place, I should be disposed to discuss some of Dr. Wharton's positions. The latter part of the Article and the Illustration (6) intended to explain it, must, I think, be law ; but I know of no direct authority on the subject. The maxim "*In jure non remota causa sed proxima spectatur*" has no doubt a bearing on the subject (see Bacon's *Maxims*, 35-9, and Broom's *Maxims*, 216-30), but it is very vague. Lord Bacon says it does not apply to "criminal acts except they have a full interruption." His illustration is,—A fires a pistol at B, and misses him, and runs away. B pursues A. A stabs B with a dagger. "If the law should consider the last impulsive cause, it should say it was in his own defence, but the law is otherwise, for it is but a pursuance and execution of the first murderous intent." Surely in this case the stab is the immediate cause of B's death ; A's state of mind is another matter, and is to be inferred from facts. The law as to accessories and incitement appears to show the limit to which participation in a crime can be carried. Unless the line is drawn there it is impossible to say how far it would extend. Illustration (6) is a prosaic version of *Othello*. Iago, however, in Act iv. sc. 1, says when asked to give poison, "Do it not with poison, strangle her in her bed." This would clearly make him an accessory. To take a humbler instance, the catastrophe of *Oliver Twist* might, perhaps, fall within illustration (6). In ch. xlvii. of that work, Fagin, after getting Sikes to say he would murder any one who should betray him, wakes up Noah Claypole and makes him tell Sikes that the girl Nancy had betrayed him, and, as Sikes rushes out in a passion, says, "You won't be too violent, Bill ; I mean not too violent for safety." I think that the whole conversation taken together would be evidence to go to a jury, that Fagin did 'counsel' or 'procure' the murder committed by Sikes, which would make him an accessory before the fact, but if he had confined himself to merely telling Sikes what Claypole said he had heard, it would not have been enough. After all there was only the uncorroborated testimony of an accomplice to prove what he said, and Claypole does not seem to have been by when the most damaging words were spoken.

*Illustrations.*

(1.) <sup>1</sup> A substitutes poison for medicine, which is to be administered to C by B. B innocently administers the poison to C, who dies of it. A has killed C.

(2.) <sup>2</sup> A gives a poisoned apple to his wife B, intending to poison her. B, in A's presence, and with his knowledge, gives the apple to C, their child, whom B did not intend to poison. A not interfering, C eats the apple and dies. A has killed C.

(3.) <sup>3</sup> A, an ironfounder, ordered to melt down a saluting cannon which had burst, repairs it with lead in a dangerous manner. Being fired with an ordinary charge, it bursts and kills B. A has killed B.

(4.) <sup>4</sup> A lived with and was maintained by B, her aunt, who was ill for ten days previous to her decease, during which time A took in the food supplied by tradesmen, but gave none of it to B, nor did she procure medical assistance or tell any one of the state of B, who died from exhaustion caused by gangrene, her death being accelerated by neglect, and want of food, nursing, and medical attendance. A has killed B.

(5.) <sup>5</sup> A, B, and C, road trustees under an Act of Parliament, and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and D passing along it is killed. A, B, and C have not killed B.

(6.) <sup>6</sup> A by his servants makes fireworks in a house in London contrary to the provisions of an Act of Parliament (9 & 10 Will. 3, c. 77). Through the negligence of his servants, and without any act of his, a rocket explodes and sets fire to another house whereby B is killed. A has not killed B.

(7.) A tells B facts about C in the hope that the knowledge of those facts will induce B to murder C, and in order that C may be murdered; but A does not advise B to murder C; B murders C accordingly. A has not caused C's death within the meaning of this Article.

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<sup>1</sup> *Donellan's Case*. See my Gen. View, Cr. L. 338.

<sup>2</sup> *Saunders' Case*, 1 Hale, P. C. 436.

<sup>3</sup> *R. v. Carr*, 1832, 8 C. & P. 163.

<sup>4</sup> *R. v. Instan*, 1893, 1 Q. B. 450.

<sup>5</sup> *R. v. Pocock*, 1851, 17 Q. B. 34.

<sup>6</sup> *R. v. Bennett*, 1858, Bell, C. C. 1.

## ARTICLE 241.

WHEN AN ACT IS THE REMOTE CAUSE OF DEATH OR ONE  
OF SEVERAL CAUSES.

A person is deemed to have committed homicide, although his act is not the immediate or not the sole cause of death in the following cases—

(a.) <sup>1</sup> If he inflicts a bodily injury on another which causes surgical or medical treatment, which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith, and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith, or was so employed without common knowledge or skill.

(b.) <sup>2</sup> If he inflicts a bodily injury on another, which would not have caused death if the injured person had submitted to proper surgical or medical treatment, or had observed proper precautions as to his mode of living.

(c.) <sup>3</sup> If by actual violence or threats of violence he causes a person to do some act which causes his own death, such act being a mode of avoiding such violence or threats, which under the circumstances would appear natural to the person injured.

(d.) <sup>4</sup> If by any act he hastens the death of a person suffering under any disease or injury which apart from such act would have caused death.

(e.) <sup>5</sup> If his act or omission would not have caused death unless it had been accompanied by the acts or omissions of the person killed or of other persons.

<sup>1</sup> 1 Hale, 428 ; Illustrations (1), (2). Draft Code, s. 173.

<sup>2</sup> Illustration (3). Draft Code, s. 172.

<sup>3</sup> Illustration (4). Draft Code, s. 167.

<sup>4</sup> 1 Hale, 428 ; Illustration (5). Draft Code, s. 171.

<sup>5</sup> See Illustrations (6) and (7). See also *R. v. Longbottom*, 1849, 3 Cox, C. C. 439 ; 1 Russ. Cr. 830. *R. v. Ledger*, 1862, 1 F. & F. 857, 1 Russ. Cr. 835, 6 ; and Mr. Greaves' note. This case is a very peculiar one.

*Illustrations.*

(1.) <sup>1</sup> A wounds B in a duel. Competent surgeons perform an operation which they in good faith regard as necessary. B dies of the operation, and it appears that the surgeons were mistaken as to the necessity for the operation. A has killed B.

(2.) <sup>2</sup> A gives B a wound. C, a surgeon, applies poison to the wound, either from bad faith or by negligence. B dies of the poison. C and not A has killed B.

(3.) <sup>3</sup> A injures B's finger. B is advised by a surgeon to allow it to be amputated, refuses to do so, and dies of lockjaw. A has killed B.

(4.) <sup>4</sup> A violently beats and kicks B, his wife, on the edge of a pond. She, to avoid his violence, throws herself into the pond and is drowned. A has killed B.

(5.) <sup>5</sup> A strikes B, who is at the time so ill that she could not possibly have lived more than six weeks if she had not been struck. B dies earlier than she would otherwise have died in consequence. A has killed B.

(6.) <sup>6</sup> A and B, the drivers of two carts, race along a high road. C is lying drunk in the middle of the road. One or other or both of the carts run over C and kill him. In either case both A and B have killed C.

(7.) <sup>7</sup> It is the duty of A to put up air headings in a colliery where they are required. It is the duty of B to give A notice when an air heading is required. But A has means, apart from B's report, of knowing whether such air headings are required or not. A omits to put up an air heading, B omits to give A notice that one is wanted. An explosion follows, and C is killed. Both A and B have killed C.

<sup>1</sup> *R. v. Pym*, 1846, 1 Cox C. C. 339 ; 1 Russ. Cr. 675.

<sup>2</sup> Founded on 1 Hale, 428.

<sup>3</sup> *R. v. Holland*, 2 Moo. and Ro. 357.

<sup>4</sup> *R. v. Evans*, 1 Russ. Cr. 651 ; *R. v. Wager*, tried at Derby Summer Assizes, 1864, was precisely similar. See, upon this subject, Wharton on Homicide, §§ 374-5. If the intention was to escape further ill-usage by suicide, the case would be altered.

<sup>5</sup> *R. v. Fletcher*, 1 Russ. Cr. 676.

<sup>6</sup> *R. v. Swindall*, 1846, 2 C. & K. 230.

<sup>7</sup> *R. v. Haines*, 1847, 2 C. & K. 368.

## ARTICLE 242.

## WHEN CAUSING DEATH DOES NOT AMOUNT TO HOMICIDE.

A person is not deemed to have committed homicide, although his conduct may have caused death, in the following cases :—

(a.) <sup>1</sup> When the death takes place more than a year and a day after the injury causing it. In computing the period the day on which the injury is inflicted is to be counted as the first day ;

(b.) [It is said] <sup>2</sup> When the death is caused without any definite bodily injury to the person killed, but this does not extend to the case of a person whose death is caused not by any one bodily injury, but by repeated acts affecting the body, which collectively cause death, though no one of them by itself would have caused death ;

<sup>1</sup> 1 East, P. C. 343, 4 ; 1 Russ. Cr. 673, 4 ; Draft Code, s. 169.

<sup>2</sup> 1 Hale, 429. Lord Hale's reason is that "secret things belong to God ; and hence it was that before 1 Ja. 1, c. 12, witchcraft or fascination was not felony, because it wanted a trial" (i.e. I suppose because of the difficulty of proof). I suspect that the fear of encouraging prosecutions for witchcraft was the real reason of this rule. Dr. Wharton rationalizes the rule thus : "Death from nervous causes does not involve penal consequences." This appears to me to substitute an arbitrary quasi-scientific rule for a bad rule founded on ignorance now dispelled. Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him, might not this be murder ? Suppose a man kills a sick person intentionally, by making a loud noise which wakes him when sleep gives him a chance of life ; or suppose knowing that a man has aneurism of the heart, his heir rushes into his room, and roars in his ear, "Your wife is dead !" intending to kill and killing him, why are not these acts murder ? They are no more "secret things belonging to God" than the operation of arsenic. As to the fear that by admitting that such acts are made, people might be rendered liable to prosecution by breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct, gradually "breaking a man's heart," could never be the "direct or immediate" cause of death. If it was, and it was intended to have that effect, why should it not be murder ? In *R. v. Towlers*, 1874, 12 Cox C. C. 530, a man was tried before Denman, J., for manslaughter, for frightening a child to death (see Wharton on Homicide, § 372, on this point).

Lord Hale doubts whether voluntarily and maliciously infecting a person with the plague, and so causing his death, would be murder (i. 432). It is hard to see why. He says that "infection is God's arrow." A different view was taken in the analogous case of *R. v. Greenwood*, 1857, 7 Cox, C. C. 404, and 1 Russ. Cr. 673. As to this proviso, see Illustration (1).

(c.) [It seems] <sup>1</sup> When death is caused by false testimony given in a court of justice.

*Illustrations.*

(1.) <sup>2</sup> A by a long series of acts of ill-treatment, no one of which by itself would cause death, causes the death of B. A has killed B.

(2.) <sup>3</sup> A and B, in order to get a reward, offered for the conviction of highway robbers, conspire together to bring a false accusation of highway robbery against C, whereby C is convicted and executed. A and B do not kill C.

ARTICLE 243.

WHEN HOMICIDE IS UNLAWFUL.

<sup>4</sup> Homicide is unlawful,

(a.) When death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and when such act is neither justified nor excused by the provisions contained in Chapter III., or Chapter XXI.;

(b.) when death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm;

(c.) when death is caused accidentally by an unlawful act.

<sup>1</sup> Illustration (1). Draft Code, s. 168.

<sup>2</sup> *R. v. Self*, 1 East, P. C. 226, 227, and 1 Russ. Cr. 652, 777; *R. v. Squire*, 1 Russ. Cr. 653.

<sup>3</sup> *R. v. MacDaniel and Others*, 1755, 19 S. T. 746, and see particularly the note 810-14, and Foster, 131, 132.

<sup>4</sup> This Article sums up the result of the preceding chapters. See Note VII. Draft Code, s. 167.



## CHAPTER XXIV

<sup>1</sup> *MURDER—MANSLAUGHTER—ATTEMPTS TO COMMIT  
MURDER—CONCEALMENT OF BIRTH*

## ARTICLE 244.

## MANSLAUGHTER AND MURDER DEFINED.

<sup>2</sup> **MANSLAUGHTER** is unlawful homicide without malice aforethought.

Murder is unlawful homicide with malice aforethought.

Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and <sup>3</sup> it may exist where that act is unpremeditated.

(a.) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not ;

(b.) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused ;

<sup>1</sup> See 3 Hist. Cr. Law, ch. xxvi. pp. 1-107.

<sup>2</sup> For the authorities for this Article see Note VIII. Draft Code, s. 174-177.

<sup>3</sup> Coke's first case of implied malice is malice implied from the want of provocation. A man who wantonly or on a slight cause intentionally and violently kills another, shows by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred instantly conceived and executed, which is at least as bad if not worse. This in the strict sense of the words is malice aforethought. As Hobbes well observes : "it is malice forethought, though not long forethought." (Dialogue of the Common Laws, "Works," vi. 85). And it is not by law necessary that it should be long. If a slight provocation does not reduce murder to manslaughter, *a fortiori*, the total absence of all provocation, and the mere rapidity with which the execution of a cruel and wicked design follows on its conception cannot have that effect. For cases slight provocation, see 1 Russ. Cr. 676, and cases there collected.

(c.) an intent to commit any felony whatever ;

(d.) an intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed.

The expression "officer of justice" in this clause includes every person who has a legal right to do any of the acts mentioned, whether he is an officer or a private person.

Notice may be given, either by words, by the production of a warrant, or other legal authority by the known official character of the person killed, or by the circumstances of the case.

This Article is subject to the provisions contained in Articles 245-247, both inclusive, as to the effect of provocation.

#### *Illustrations.*

(1.) <sup>1</sup> A knowing that B is suffering from disease of the heart, and intending to kill B, gives B a slight push, and thereby kills B. A commits murder.

(2.) <sup>1</sup> A in the last illustration pushes B unlawfully, but without knowledge of his state of health or intention to kill him, or do him grievous bodily harm. A commits manslaughter. If A laid his hand gently on B to attract his attention, and by doing so startled and killed him, A's act would be no offence at all.

(3.) <sup>2</sup> A finding B asleep on straw, lights the straw, meaning to do B serious injury, but not to kill him. B is burnt to death. A commits murder.

(4.) <sup>3</sup> A waylays B, intending to beat, but not intending to kill him or do him grievous bodily harm. A beats B and does kill him. This is manslaughter at least, and may be murder if the beating were so violent as to be likely, according to common knowledge, to cause death.

<sup>1</sup> I know of no direct authority for these illustrations, but they follow directly from the principles stated in the note.

<sup>2</sup> *Errington's Case*, 1838, 2 Lewin, 217.

<sup>3</sup> Fost. 259.

(5.) <sup>1</sup> A strikes at B with a small stick, not intending either to kill or to do him grievous bodily harm. The blow kills B. A commits manslaughter.

(6.) <sup>2</sup> A, recently delivered of a child, lays it naked by the side of the road and wholly conceals its birth. It dies of cold. This is murder or manslaughter, according as A had or had not reasonable ground for believing that the child would be preserved.

(7.) <sup>3</sup> It is A's duty to put a stage at the mouth of the shaft of a colliery. He omits to do so. A truck falls down the shaft in consequence and kills B. If by omitting to erect the stage A intended that B's death should be caused, A is guilty of murder. If the omission was caused only by the culpable negligence of A, and without any intention to kill or injure B, or a reckless disregard to the chance of his being killed, A is guilty of manslaughter.

(8.) <sup>4</sup> A, for the purpose of rescuing a prisoner, explodes a barrel of gunpowder in a crowded street and kills a number of persons, intending to explode the barrel of powder in a crowded street. A commits murder, although he may have no intention at all about the people in the street, or may hope that they will escape injury.

(9.) <sup>5</sup> A shoots at a domestic fowl, intending to steal it, and accidentally kills B. A commits murder.

<sup>1</sup> *Rowley's Case*, Fost. 294, remarking on earlier reporters; and see 1 Russ. Cr. 682, 683, where some other cases are given.

<sup>2</sup> *R. v. Walters*, 1841, C. & M. 164, and 1 Russ. Cr. 651. This case appears to me to illustrate the true doctrine on the subject better than the old and often quoted case of the woman who left her child in a place where it was struck by a kite and killed. The point of that case I take to be that the striking by a kite was an occurrence sufficiently likely to impose upon the mother the duty of guarding against it. Kites having been almost exterminated in England their habits are forgotten. But to lay a child on the ground in Calcutta would be to expose it to almost certain and speedy death from kites and other birds of prey. I have myself been struck by a kite which had just struck at one of my children.

<sup>3</sup> *R. v. Hughes*, 1857, D. & B. 248.

<sup>4</sup> *R. v. Desmond, Barrett and Others*. In this case Lord Chief Justice Cockburn said, "If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to take life, yet if it were such that life was necessarily endangered by it—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it," that was murder: *Times Report*, Apr. 28, 1868. It is singular that this case is noticed in Cox's Reports only for the sake of a point about evidence not the least worth reporting: see 11 Cox, C. C. 146. The case of *R. v. Allen and Others*, the Fenians executed after the Manchester Special Commission in 1867, is not, so far as I know, reported, except in 17 L. T. (N.S.) 223, which reprints the letters printed in Note IX.

<sup>5</sup> Fost. 258-9, and see note. This dictum (which is supported by many

(10.) <sup>1</sup> A, from wanton mischief, throws stones down a coal-pit and knocks away a scaffolding. The absence of the scaffolding causes an accident by which B is killed. A commits manslaughter.

(11.) <sup>2</sup> A, a thief, pursued by B, a policeman, who wishes to arrest A, trips up B, who is accidentally killed. A commits murder.

(12.) <sup>3</sup> A, having words with his wife, B, strikes her on the head with a pestle, and kills her. A commits murder, though the act was not premeditated.

(13.) <sup>4</sup> A, being called names by B, a woman, throws a broomstick at her, which happens to kill her. A commits manslaughter.

(14.) <sup>5</sup> A shoots at B, intending to kill him, and kills C. A commits murder.

## ARTICLE 245.

### EFFECT AND DEFINITION OF PROVOCATION.

<sup>6</sup> Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm.

other authorities) was followed by Lord Chief Justice Cockburn in *Barrett's Case*. He said, "If a person seeking to commit a felony should in the prosecution of that purpose cause, although it might be unintentionally, the death of another, that, by the law of England, was murder. There were persons who thought and maintained that where death thus occurred, not being the immediate purpose of the person causing the death, it was a harsh law which made the act murder. But the Court and jury were sitting there to administer law, not to make or mould it, and the law was what he told them." *Times*, April 28, 1868.

<sup>1</sup> *R. v. Fenton*, 1830, 1 Lewin, 179; 1 Russ. Cr. 817.

<sup>2</sup> 1 Russ. Cr. 707-59 for a large collection of cases and authorities. See, too, 1 Hale, 456, 460; no distinction is taken in any of these cases as to the manner in which death is caused.

<sup>3</sup> 1 Russ. Cr. 676.

<sup>4</sup> Founded on 1 Hale, 455-6. The judges doubted whether the case was murder or manslaughter, and no judgment was delivered, but the prisoner was pardoned. This would no doubt be held to be manslaughter at the present day.

<sup>5</sup> Fost. 261; 1 Russ. Cr. 759.

<sup>6</sup> Draft Code, s. 176.

The following acts may, subject to the provisions contained in Article 246, amount to provocation :—

(a.) An assault and battery of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the person assaulted.

(b.) <sup>2</sup> If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel, and whichever strikes the first blow.

(c.) <sup>3</sup> An unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest by officers of justice, whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders.

(d.) <sup>4</sup> The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part both of the adulterer and of the adulteress.

(e.) <sup>5</sup> The sight of the act of sodomy committed upon a man's son is provocation to the father on the part of the person committing the offence.

(f.) <sup>6</sup> Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation within this Article, <sup>7</sup> except [perhaps] words expressing an intention to

<sup>1</sup> 1 Russ. Cr. 678.

<sup>2</sup> *Lord Byron's Case*, 19 St. Tr. 1177; *R. v. Walters*, 12 St. Tr. 113; and 1 Russ. Cr. 695-707, where other cases are cited.

<sup>3</sup> For the first part of the clause see *Buckner's Case*, 1 Russ. Cr. 680; *R. v. Withers*, *Ibid.* For the latter part compare *Huggell's Case*, *Sir H. Ferrer's Case*, *Tooley's Case*, and *Adey's Case*, with Foster's remarks on *Tooley's Case*; 1 Russ. Cr. 753-7. See also 1 Hawk. P. C. 489; *R. v. Omer*, 5 Ea. 308. Also Illustration (5), and Note IX.

<sup>4</sup> Cases cited, 1 Russ. Cr. 687. I am not aware that it has ever been decided that adultery by the husband is provocation to the wife.

<sup>5</sup> *R. v. Fisher*, 1837, 8 C. & P. 182.

<sup>6</sup> 1 East, P. C. 232; 1 Russ. Cr. 677-9.

<sup>7</sup> 1 Russ. Cr. 678, note i.; *Lord Morley's Case*, 1 Hale, P. C. 455; *R. v. Sherwood*, 1844, 1 C. & K. 556, and see *R. v. W. Smith*, 1866, 4 F. & F. 1066.

inflict actual bodily injury, accompanied by some act which shows that such injury is intended; but words used at the time of an assault—slight in itself—may be taken into account in estimating the degree of provocation given by a blow.

(g.) <sup>1</sup> The employment of lawful force against the person of another is not a provocation to the person against whom it is employed.

### *Illustrations.*

(1.) <sup>2</sup> A, a woman, gives B, a soldier, a slap in the face. A has not given B provocation within this Article.

(2.) <sup>3</sup> A, a woman, strikes B, a soldier, with a heavy clog violently in the face and wounds him. A has given B provocation within this Article.

(3.) <sup>4</sup> A pulls B by the nose. A has given B provocation within the meaning of this Article.

(4.) <sup>5</sup> A attempts to arrest B under an irregular warrant and in an irregular way. B shoots A dead. This is manslaughter by reason of the provocation given by A to B.

(5.) <sup>6</sup> A arrests B under an irregular warrant and conveys him to gaol. C, D, and others attempt to rescue B. A resists, and one of the party shoots A dead. This is murder in C, D and all their party.

(6.) <sup>7</sup> A and B, armed with swords, quarrel, draw their swords, and fight. Each gives the other provocation.

(7.) <sup>8</sup> A and B quarrel, and agree together to fight, and do fight a duel next day. Neither gives the other such provocation as would reduce the offence to manslaughter if either is killed.

(8.) <sup>9</sup> A and B quarrel, and upon the spot agree to fight

<sup>1</sup> Illustration (12).

<sup>2</sup> *Stedman's Case*, 1704, Fost. 292.

<sup>3</sup> *Ibid.*

<sup>4</sup> 1 East, P. C. 233.

<sup>5</sup> *R. v. Stevenson*, 1759, 19 St. Tr. 846. This case must be understood to be subject to the provisions of the next Article.

<sup>6</sup> This is the case of the Fenians executed at Manchester in 1867, for shooting Brett, a police constable in charge of a police van containing a Fenian prisoner. See Note IX.

<sup>7</sup> *R. v. Walters*, 1688, 12 St. Tr. 113; and see *R. v. Lord Byron*, 19 St. Tr. 1177.

<sup>8</sup> *R. v. Cuddy*, 1843, 1 C. & K. 210; *R. v. Barronet*, and *R. v. Barthelemy*, 1852, D. & P., 51 and 63, are recent cases of duelling.

<sup>9</sup> *R. v. Anderson*, 1816, 1 Russ. Cr. 701.

with their fists. A, from the beginning of the fight, uses a knife and kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(9.) <sup>1</sup> A and B quarrel and agree to fight with their fists. In the course of the fight A snatches up a knife, which happens to be near, and which he has not previously provided, and kills B. A has received such provocation from B as reduces his offence to manslaughter.

(10.) <sup>2</sup> A, at a tavern, throws a bottle at B's head and draws his sword. B throws a bottle at A's head. A kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(11.) <sup>3</sup> A and B quarrel and fight in a public-house. A leaves the public-house, says he will kill B, conceals a sword under his coat, returns to the public-house, tempts B to strike him with a stick, saying, "Stand off, or I'll stab you," and without giving B time to retreat, does stab him mortally. A does not receive from B such provocation as reduces his offence to manslaughter.

(12.) <sup>4</sup> A attacks B in such a manner as to endanger B's life. B drives off and pursues A. A in self-defence kills B. This is murder in A.

#### ARTICLE 246.

##### WHEN PROVOCATION DOES NOT EXTENUATE HOMICIDE.

<sup>5</sup> Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind.

<sup>1</sup> *R. v. Anderson*, 1816, 1 Russ. Cr. 701.

<sup>2</sup> *R. v. Mawgridge*, 1706, Kel. 128-9; Foster, 295-6.

<sup>3</sup> *Mason's Case*, 1756, Foster, 132.

<sup>4</sup> Bacon's Maxims, 37, 38. I suppose B is trying to arrest A.

<sup>5</sup> See the cases quoted in the Illustrations, and *R. v. Lynch*, 1832, 5 C. & P. 324. Draft Code, s. 176.

*Illustrations.*

(1.) <sup>1</sup> A and B violently quarrel, and throw bottles at each other at a tavern, A throwing the first bottle. The company interfering, they remain quiet for an hour, B wishing to be reconciled. A refuses, and says he will have B's blood. When B and the rest of the company leave, A calls B back in terms of insult, and fights with him with swords; B is killed. A commits murder, though the fight is on equal terms.

(2.) <sup>2</sup> B strikes A with his fist. A, being the stronger man of the two, throws B down on the ground, and beats out his brains with a poker. A commits murder.

(3.) <sup>3</sup> A and B quarrel and fight. B, getting the best of the fight, leaves A. A throws a coal-pick at B and injures him, and then wounds him with a knife. B leaves the house, saying to A, "You have killed me." A says to a third person, "I will have my revenge." B returns to the house soon afterwards and A stabs him again and kills him. A has committed murder.

(4.) <sup>4</sup> A is turned out of a house and kicked by B. A runs to his own house, between 200 and 300 yards off, returns with a knife, and meeting B, stabs him after walking quietly with him some yards. A then runs back and puts his knife in its usual place. The deliberation shown in fetching and replacing the knife are facts to be considered by the jury in deciding whether or not A committed the offence whilst deprived of self-control by passion.

(5.) <sup>5</sup> Police-officers in charge of a police-van have in custody D, a person charged with felony under 11 Vict. c. 12. A, B, and C, and others assault the van in concert, rescue the prisoner, and shoot one of the policemen dead with a pistol. The warrant under which D was in custody was informal, but not to the knowledge of A, B, and C. A, B, and C, and the others are guilty of murder, and it would have made no difference if they had known of the irregularity of the warrant.

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<sup>1</sup> *R. v. Oneby*, 1725, 2 St. Tr. 766; 1 Russ. Cr. 699.

<sup>2</sup> *Per Parke, B. in R. v. Thomas*, 1837, 7 C. & P. 817.

<sup>3</sup> *R. v. Kirkham*, 1837, 8 C. & P. 115.

<sup>4</sup> *R. v. Hayward*, 1833, 6 C. & P. 157.

<sup>5</sup> This is the case of *R. v. Allen and Others*, the Fenians, who murdered Brett, the policeman. See Note IX.



## ARTICLE 247.

## PROVOCATION TO THIRD PERSON.

<sup>1</sup> Provocation to a person by an actual assault or by a mutual combat, or by a false imprisonment, is in some cases provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence. But it is uncertain how far this principle extends.

## ARTICLE 248.

## SUICIDE—ABETTING SUICIDE.

<sup>2</sup> A person who kills himself in a manner which in the case of another person would amount to murder is guilty of murder, and every person who aids and abets any person in so killing himself is an accessory before the fact, or a principal in the second degree in such murder.

## ARTICLE 249.

## MANSLAUGHTER ON ONESELF.

<sup>3</sup> A person cannot commit manslaughter on himself.

## ARTICLE 250.

## ACCESSORIES BEFORE THE FACT IN MANSLAUGHTER.

It seems that there may be accessories before the fact in manslaughter if the act or omission by which death is caused

<sup>1</sup> 1 Russ. Cr. 704-5. The passage referred to is taken from Hawkins. See *Cary's Case* (p. 705), which is this: "A and B were fighting in a field in a quarrel. C, A's kinsman, casually riding by and seeing them in fight and his kinsman one of them, rode in, drew his sword, thrust B through and killed him. Coke, C.J., and the rest of the Court agreed that this is clearly but manslaughter in him (*i.e.* C) and murder in the other, for the one may have malice and the other not." I should have said C's offence was infinitely worse than A's, and I do not think this case would be followed in the present day.

<sup>2</sup> 1 Hale, P. C. 411-419. See *R. v. Fretwell*, 1862, L. & C. 161; *R. v. Russell*, 1832, 1 Moo. C. C. 356. Draft Code, s. 183.

<sup>3</sup> *Per* Pollock, C.B., and Williams, J., in *R. v. Burgess*, 1862, L. & C. 258, referring to *Jervis on Coroners*, App. p. 322, note 4.

is not such an act or omission as, but for provocation received by the offender, would have been murder.

### *Illustration.*

<sup>1</sup> A advises B to give C a strong dose of medicine to make him feel sick and uncomfortable. B does so and C dies. B is guilty of manslaughter, and A is accessory before the fact to manslaughter.

## ARTICLE 251.

### PRESUMPTION THAT KILLING IS MURDER.

<sup>2</sup> Every person who kills another is presumed to have wilfully murdered him unless the circumstances are such as to raise a contrary presumption.

The burden of proving circumstances of excuse, justification, or extenuation is upon the person who is shown to have killed another.

## ARTICLE 252.

### PUNISHMENT OF MURDER.

<sup>3</sup> Every one who commits murder is guilty of felony, and must on conviction thereof be sentenced to death,<sup>4</sup> and the

<sup>1</sup> *Per* Bramwell, B., in *R. v. Gaylor*, 57, D. & B. at p. 291. The text is stated doubtfully because the question has never been positively decided: Coke (3rd Inst. 55), Hale (2 P. C. 437) and East (1 P. C. 218) say that there can be no accessories before the fact in manslaughter; but the doctrine on the subject is very differently understood in these days. See *R. v. Taylor*, 1875, 2 C. C. R. 147. That unlawful killing with a deliberate intent to do slight bodily harm, which happens to cause death, is manslaughter, is a comparatively modern doctrine. By Coke's definition it would be murder. Whatever it is called there may obviously be an accessory before the fact to such an act. If a principal is convicted of manslaughter upon an indictment for murder a person charged as accessory after the fact can be convicted, *R. v. Greenacre, post*.

<sup>2</sup> 1 Russ. Cr. 642; *R. v. Greenacre*, 1837, 8 C. & P. 35.

<sup>3</sup> 24 & 25 Vict. c. 100, s. 3. Draft Code, s. 178.

<sup>4</sup> *Ibid.* Probably the latter part of the section would be held if the case arose to be merely directory, so that its omission would not render the sentence void. See *R. v. Wyatt*, 1812, R. & R. 230, decided on analogous provision in 25 Geo. 2, c. 37, ss. 4, 7. The execution must in this case be private. See 31 Vict. c. 24.

judgment must direct that his body shall be buried within the precincts of the prison in which he shall have been last confined after conviction.

### <sup>1</sup> ARTICLE 253.

#### PUNISHMENT OF MANSLAUGHTER.

<sup>2</sup> Every who commits manslaughter is guilty of felony and liable to penal servitude for life, or to a fine.

### ARTICLE 254.

#### <sup>3</sup> ATTEMPTS TO COMMIT MURDER.

<sup>4</sup> Every one is guilty of felony, and is liable upon conviction thereof to penal servitude for life, who does any of the following things with intent to commit murder; that is to say—

(a.) <sup>5</sup> administers any poison or other destructive thing to any person, or causes any such poisonous thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken;

(b.) <sup>6</sup> by any means whatever wounds or causes any grievous bodily harm to any person;

(c.) <sup>7</sup> shoots at any person, or, by drawing a trigger or in any

<sup>1</sup> 3 Hist. Cr. Law, 78-9. Draft Code, s. 182.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 5.

<sup>3</sup> For the history of the provisions see 3 Hist. Cr. Law, ch. xxvii. p. 108-120. Draft Code, s. 179.

<sup>4</sup> 24 & 25 Vict. c. 100, ss. 11-15.

<sup>5</sup> Ibid, ss. 11 & 14.

<sup>6</sup> 24 & 25 Vict. c. 100, s. 11. In *R. v. Gray*, 1857, D. & B. 303, it was held that to cause congestion of the lungs by exposing a child in a field was not causing "a bodily injury dangerous to life" within 7 Will. 4 & 1 Vict. c. 15, s. 2, but such a case would now fall under clause (b), s. 15. See remark of Cockburn, C.J., p. 306.

<sup>7</sup> Ibid, s. 14. The words "any other manner" mean any other manner like drawing a trigger, e.g. applying a lighted match to a matchlock, or striking a percussion cap with a hammer, and include attempting to draw a trigger. *R. v. Duckworth*, 1892, 2 Q. B. 83, overruling *R. v. St. George*, 1840, 9 C. & P. 483. See *R. v. Lewis*, 1840, 9 C. & P. 523, as to what constitutes an attempt to discharge a fire-arm. *R. v. Duckworth* was decided not upon this section, but upon s. 18, which contemplates the same acts with different intents. Art. 257 (a).

other manner, attempts to discharge at any person <sup>1</sup> any kind of loaded arms ;

(*d.*) <sup>2</sup> attempts to drown, suffocate, or strangle any person ;

(*e.*) <sup>3</sup> destroys or damages any building by the explosion of gunpowder or other explosive substance ;

(*f.*) <sup>4</sup> sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture thereof, or to any goods or chattels being therein ;

(*g.*) <sup>5</sup> casts away or destroys any vessel ;

(*h.*) <sup>6</sup> or who attempts to commit murder by any means other than those specified in clauses (*a.*)–(*g.*), both inclusive ;

(*i.*) <sup>7</sup> or who is accessory after the fact to any murder.

#### ARTICLE 255.

##### TREATS AND CONSPIRACIES TO MURDER.

Every one is liable to ten years penal servitude who commits either of the following offences, the first of which is a felony and the others misdemeanors ; that is to say—

(*a.*) <sup>8</sup> whoever maliciously sends, delivers, or utters or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person ;

(*b.*) <sup>9</sup> all persons who conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not ;

<sup>1</sup> "Loaded arms" means arms loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, although the attempt to discharge the same may fail from want of proper priming or any other cause, 24 & 25 Vict. c. 100, s. 19.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 14.

<sup>3</sup> Ibid. s. 12.

<sup>4</sup> Ibid. s. 13.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid. s. 15. As to the cases to which this section applies see *R. v. Brown*, 1883, 10 Q. B. D. 381. It does not apply to attempts to commit suicide ; *R. v. Burgess*, 1862, L. & C. 258.

<sup>7</sup> Ibid. s. 67.

<sup>8</sup> Ibid. s. 16, W.

<sup>9</sup> Ibid. s. 4.

(c.)<sup>1</sup> every one who solicits, encourages, persuades, endeavours to persuade, or proposes to any person to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not.

[<sup>2</sup> And whether the solicitation, encouragement, persuasion, or endeavour to persuade is addressed to any specific person or not, or relates to the murder of any specific person or not.]

#### ARTICLE 256.

##### <sup>3</sup> CONCEALING THE BIRTH OF CHILDREN.

<sup>4</sup> Every person is guilty of a misdemeanor, and is liable upon conviction thereof to two years imprisonment and hard labour, who, if any woman is delivered of a child, endeavours to conceal the birth thereof by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth.

<sup>5</sup> The expression "delivered of a child" does not include delivery of a fœtus which has not reached the period at which it might have been born alive.

<sup>6</sup> The words "secret disposition of the body" include cases in which the body is placed in a situation where it is not likely to be found except by accident, or upon search, although the body is in no way concealed from any one who happens to go to that place.

<sup>1</sup> 24 & 25 Vict. c. 100, s. 4.

<sup>2</sup> The words in brackets are intended to give the effect of *R. v. Mont*, 1881, 7 Q. B. D. 244.

<sup>3</sup> 3 Hist. Cr. Law, 118. Cf. Draft Code, ss. 185-7.

<sup>4</sup> 24 & 25 Vict. c. 100, s. 60 (verbally altered).

<sup>5</sup> *R. v. Berriman*, 1854, 6 Cox C. C. 388.

<sup>6</sup> *R. v. Brown*, 1870, 1 C. C. R. 244. The Act seems to be defective in punishing only the secret disposition of the body, and not the disposing of the body in such a way as to conceal the fact that it was born of its mother. If a woman were to leave a child's body by night in the middle of a street, or to drop it by day in a crowd of people, there would be an effectual concealment of the birth, but would there be a "secret disposition" of the body? Under the old Act, 9 Geo. 4, c. 31, s. 14, it was held that a temporary concealment of the body with intent to remove it afterwards to some other place was within the words "secret burying or otherwise disposing": *R. v. Perry*, 1855, D. & P. 471. This would seem to be so *à fortiori* under the present law.

## CHAPTER XXV.

THE MALICIOUS INFLICTION OF BODILY INJURIES  
AMOUNTING TO FELONY

## ARTICLE 257.

WOUNDINGS AND ACTS ENDANGERING LIFE PUNISHABLE WITH  
PENAL SERVITUDE FOR LIFE.

EVERY one is guilty of felony, and liable to penal servitude for life, who does any of the following things unlawfully and maliciously; that is to say—

(a.) <sup>2</sup> who, with intent to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or to resist or prevent the lawful apprehension or detainer of any person,

by any means whatsoever <sup>3</sup> wounds or causes any grievous bodily harm to any person, or shoots at any person, or by drawing a trigger, or <sup>4</sup> in any other manner attempts to discharge at any person any kind of <sup>5</sup> loaded arms; or

(b.) <sup>6</sup> shoots at any vessel or boat belonging to Her Majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or

(c.) <sup>6</sup> shoots at, maims, or wounds any officer of the army, navy, marines, or coast-guard, being duly employed in the

<sup>1</sup> 3 Hist. Cr. Law, ch. xxvii. pp. 108–120. Draft Code, Part xviii. ss. 188–202.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 18.

<sup>3</sup> To wound means to divide the surface of the body whether it be an internal or external surface, *e.g.* the inside of the mouth. *R. v. Leonard Smith*, 1837, 8 C. & P. 173, and see other cases in 1 Russ. Cr. 921.

<sup>4</sup> Attempting to draw a trigger is “another manner” within the meaning of this section. *R. v. Duckworth*, 1892, 2 Q. B. See also *R. v. Brown*, 10 Q. B. D. 381.

<sup>5</sup> See p. 193, note 1, for definition of loaded arms.

<sup>6</sup> 39 & 40 Vict. c. 36, s. 193. The word “unlawfully” is not in this section. An offender against the section may be imprisoned for any term not exceeding three years.

prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty: or

(d.) <sup>1</sup> aids, abets, or assists in any offence mentioned in (b.) or (c.); or

(c.) <sup>2</sup> who with intent to enable himself or any other person to commit, or with intent to assist any other person in committing, any indictable offence,

<sup>3</sup> attempts by any means whatsoever to choke, suffocate, or strangle any other person, or attempts by any means calculated to choke, suffocate, or strangle, to render any other person insensible, unconscious, or incapable of resistance;

<sup>4</sup> or <sup>5</sup> administers to any person any chloroform, laudanum, or other stupefying or overpowering <sup>5</sup> matter <sup>6</sup> or attempts to do so;

(f.) <sup>7</sup> or who burns, maims, disfigures, disables, or does any grievous bodily harm to any person by the explosion of gunpowder or other explosive substance;

(g.) <sup>8</sup> or who, with intent to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, causes any gunpowder or other explosive substance to explode, or

sends or delivers, or causes to be taken or received by any person, any explosive substance or other dangerous or noxious thing, or puts or lays at any place or casts or throws at or upon or otherwise applies to any person any corrosive fluid or destructive or explosive substance;

<sup>1</sup> 39 & 40 Vict. c. 36, s. 193.

<sup>2</sup> 24 & 25 Vict. c. 100, ss. 21 & 22.

<sup>3</sup> *Ibid.* s. 21. An offender against this section is liable, if a male of whatever age, to be thrice privately whipped in addition to the other punishments specified above: 26 & 27 Vict. c. 44, s. 1, and see Article 12 (d.), as to the manner of inflicting the punishment. The words "unlawfully and maliciously" do not apply to this section.

<sup>4</sup> *Ibid.* s. 22. The word "maliciously" does not apply to this section.

<sup>5</sup> "Applies or administers to, or causes to be taken by, or attempts to apply or administer to or attempts to cause to be administered to or taken by."

<sup>6</sup> "Drug, matter, or thing."

<sup>7</sup> 24 & 25 Vict. c. 100, s. 28, W.

<sup>8</sup> *Ibid.* s. 29, W.

(h.)<sup>1</sup> or who, with intent to endanger the safety of any person travelling or being upon any railway,  
 puts or throws<sup>2</sup> anything upon or across any railway, or  
 takes up, removes, or displaces any rail, sleeper, or other matter or thing belonging to any railway, or  
 turns, moves, or diverts any points or other machinery belonging to any railway, or

makes or shows, hides or removes, any signal or light upon or near any railway, or

does or causes to be done any other matter or thing;

(i.)<sup>3</sup> or who<sup>4</sup> throws<sup>5</sup> anything at any<sup>6</sup> carriage used upon any railway with intent to injure or endanger the safety of any person therein or thereon, or in or upon any other<sup>6</sup> carriage forming part of the same train;

(j.)<sup>7</sup> or who prevents or impedes any person being on board of or having quitted any ship or vessel in distress, wrecked, stranded, or cast on shore, in his endeavour to save his life, or prevents and impedes any person in his endeavour to save the life of any person so situated;

(k.)<sup>8</sup> or who, being a woman with child, unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means whatsoever with intent to procure her own miscarriage;

(l.)<sup>9</sup> or who, with intent to procure the miscarriage of any woman, whether she be or be not with child, unlawfully administers to or causes to be taken by her any poison or other

<sup>1</sup> 24 & 25 Vict. c. 100, s. 32, W.

<sup>2</sup> "Any wood, stone, or other matter or thing."

<sup>3</sup> 24 & 25 Vict. c. 100, s. 33.

<sup>4</sup> Throws, or causes to fall, or strikes at, against, into, or upon.

<sup>5</sup> Any wood, stone, or other matter or thing.

<sup>6</sup> Engine, tender, carriage, or truck.

<sup>7</sup> 24 & 25 Vict. c. 100, s. 17.

<sup>8</sup> *Ibid.* s. 58. A person who gives another a drug to be taken in the absence of the giver "causes it to be taken," and, it would seem, "administers" it, though absent when it is taken: *R. v. Wilson*, 1856, D. & B. 127, and cases referred to in the argument; also *R. v. Farrow*, 1857, 11. & B. 164.

<sup>9</sup> *Ibid.* s. 58. A conspiracy to procure abortion may be an offence both by the woman on whom an abortion is to be procured and by men with whom she conspires to procure it, although the woman is not pregnant: *R. v. Whitechurch*, 1890, 24 Q. B. D. 420; 16 Cox, C. C. 743; cf. *R. v. Ring*, and *R. v. Brown*, *ante*, p. 41, n. 4.



<sup>1</sup>noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent.

#### ARTICLE 258.

##### BLOWING UP BUILDINGS AND SHIPS WITH INTENT TO INJURE— FOURTEEN YEARS PENAL SERVITUDE.

<sup>2</sup> Every one is guilty of felony, and is liable on conviction to fourteen years penal servitude, who, with intent to do any bodily injury to any person, unlawfully and maliciously places or throws any gunpowder or other explosive substance in, into, upon, against, or near any building, ship or vessel, whether or not any explosion takes place, and whether or not any bodily injury is effected.

#### ARTICLE 259.

##### ADMINISTERING POISON SO AS TO ENDANGER LIFE OR CAUSE HARM—TEN YEARS PENAL SERVITUDE.

<sup>3</sup> Every one is guilty of felony, and is liable upon conviction to ten years penal servitude, who unlawfully and maliciously administers to, or causes to be administered to, or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm.

<sup>1</sup> A thing not otherwise noxious may be noxious if administered in excess, but some things are so commonly noxious (arsenic, *e.g.*) that perhaps the administration even of a quantity too small to do harm might be held to constitute the offence punished by this section if there were an intent to procure miscarriage. See *R. v. Cramp*, 1880, 5 Q. B. D. 307; also *R. v. Isaacs*, 1862, L. & C. 220, and *R. v. Hennah*, 1877, 13 Cox, C. C. 547.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 30, W.; and see 46 Vict. c. 3, Art. 418, *post*.

<sup>3</sup> *Ibid.* s. 23.

## CHAPTER XXVI

**<sup>1</sup> THE INFLICTION OF BODILY INJURIES NOT AMOUNTING TO FELONY**

## ARTICLE 260.

**MALICIOUS WOUNDING AND SIMILAR ACTS PUNISHABLE WITH FIVE YEARS PENAL SERVITUDE.**

EVERY one commits a misdemeanor, and is liable to five years penal servitude, who

(a.) <sup>2</sup> unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person either with or without any weapon or instrument ;

(b.) <sup>3</sup> or who unlawfully and maliciously administers, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing with intent to injure, aggrieve, or annoy such person ;

(c.) <sup>4</sup> or who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child (<sup>5</sup> even if the intention so to use the same exists only in his own mind,

<sup>1</sup> Draft Code, Part xviii. ss. 188-202.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 20. "Maliciously" in this section covers all cases in which a person wilfully and without lawful excuse does that which he knows to be likely to injure another : *R. v. Martin*, 1881, 8 Q. B. D. 54. It applies to cases in which a man strikes at one person maliciously and wounds another accidentally : *R. v. Latimer*, 1886, 17 Q. B. D. 359 ; *R. v. Hunt*, 1825, 1 Moo. C. C. 93.

<sup>3</sup> *Ibid.* s. 24. An intent to excite sexual passion is within this provision : *R. v. Wilkins*, 1861, L. & C. 89. This case was not argued, nor were reasons given for the judgment. The facts were that the thing administered was likely to cause and did cause injury and annoyance.

<sup>4</sup> *Ibid.* s. 59. To supply a thing which is not noxious with the intent mentioned is not within the section : *R. v. Isaac*, 1862, L. & C. 220.

<sup>5</sup> *R. v. Hillman*, 1863, L. & C. 343.

and is not entertained by the woman whose miscarriage he intends to procure).

(d.)<sup>1</sup> or who, being legally liable either as a master or a mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, or unlawfully and maliciously does, or causes to be done, any bodily harm to such apprentice or servant, so that the life of such apprentice or servant is endangered, or that his health has been or is likely to be permanently injured ;

(e.)<sup>2</sup> or who<sup>3</sup> sets any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same<sup>4</sup> or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith.

Every person is deemed to have set any of the above-mentioned engines who, when it has been set by any other person in any place then in or afterwards coming into the possession or occupation of the person first mentioned, permits it to continue so set with the intent aforesaid.

Provided that this clause does not extend to any gin or trap usually set with the intent of destroying vermin, or to any spring-gun, man-trap, or engine, set from sunset or sunrise in a dwelling-house for the protection thereof.

## ARTICLE 261.

### NEGLIGENT ACTS PUNISHABLE WITH TWO YEARS IMPRISONMENT.

Every one is guilty of a misdemeanor, and liable to two years imprisonment with hard labour,

(a.)<sup>5</sup> who by any unlawful act, wilful omission, or neglect,

<sup>1</sup> 24 & 25 Vict. c. 100, s. 26.

<sup>2</sup> Ibid. s. 31.

<sup>3</sup> "Sets or places or causes to be set or placed."

<sup>4</sup> The words "or whereby the same" in the corresponding section of the preceding statute 7 & 8 Geo. 4, c. 18 were held, upon demurrer in an action for the value of a dog, not to create an offence where there was no intent. *Jordin v. Crump*, 1841, 8 M. & W. 782. It seems unlikely that this ruling would now be followed in a criminal prosecution.

<sup>5</sup> 24 & 25 Vict. c. 100, s. 34.

endangers, or causes to be endangered, the safety of any person conveyed or being in or upon a railway, or aids or assists therein,

(b.)<sup>1</sup> or who, having the charge of any carriage or vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person whatsoever.

(c.)<sup>2</sup> or who, being an engine-driver, guard, porter, or other servant in the employ of a railway company, is found drunk or committing an offence against the bye-laws of the company, or wilfully, maliciously, or negligently does or omits to do any act whereby the life or limb of any person upon the railway shall or might be injured or the passage of engines, carriages, or trains impeded, or counsels, aids, or assists in such an offence.

<sup>1</sup> 24 & 25 Vict. c. 100, s. 35.

<sup>2</sup> 3 & 4 Vict. c. 97, s. 13. This offence is also punishable summarily, when its scope is extended by 5 & 6 Vict. c. 55, s. 17.

## CHAPTER XXVII

*<sup>1</sup> ASSAULTS AGGRAVATED AND COMMON PUNISHABLE ON  
INDICTMENT*

## ARTICLE 262.

## ASSAULT AND BATTERY AND ASSAULT DEFINED.

AN assault is

(a.) <sup>2</sup> an attempt unlawfully to apply any the least actual  
<sup>3</sup> force to the person of another directly or indirectly,

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

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

<sup>4</sup> It is no defence to a charge or an indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency.

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

<sup>1</sup> Draft Code, Part xix. ss. 203-6.

<sup>2</sup> See Article 43 for a definition of an attempt.

<sup>3</sup> 1 Russ. Cr. 956; 1 Hawk. P. C. 100. A most elaborate definition of "force" is given in the Indian Penal Code, s. 350, as the foundation for a definition of assault, s. 351. The definition is almost more mathematical than legal. It begins thus: "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other," &c., &c. It is impossible not to ask why, if force is to be defined, motion should be left undefined. It is, I think, hardly too great a demand on the candour of a reader to suppose that he will see that a man who withdraws a chair on which a person is about to sit down, causing him thereby to fall to the ground; or who whips a horse on which he is sitting, and so makes him run away with his rider; or who breaks a hole in ice in front of a skater, and so causes him to fall into the water—"applies actual force to his person indirectly."

<sup>4</sup> 43 & 44 Vict. c. 45, s. 2.

Provided that such acts as are reasonably necessary for the common intercourse of life, are not assaults or batteries if they are done for the purpose of such intercourse only and with no greater force than the occasion requires.

No mere words can in any case amount to an assault.

### *Illustrations.*

The following are cases of assault and battery :—

(1.) <sup>1</sup> A cuts B's dress whilst B is wearing it, but without touching or intending to touch any part of B's person.

(2.) <sup>2</sup> A sets a dog at B, which bites B.

(3.) <sup>3</sup> A man professing to act as a medical adviser fraudulently induces a girl to allow him to undress her, by falsely alleging that it is necessary for medical reasons to do so.

(4.) <sup>4</sup> A touches B, a boy of eight, in a grossly indecent manner, B acquiescing in ignorance of the nature of the act.

(5.) <sup>5</sup> A induces B to permit him to have connection with her by pretending to be her husband. (This is now also rape, by statute 48 & 49 Vict. c. 69, s. 4.)

The following are cases of assault without battery :—

(6.) <sup>6</sup> A strikes at B with a stick without hitting him.

(7.) <sup>7</sup> A aims a pistol at B which A knows is not loaded, but which B believes to be loaded.

In the following cases no assault or battery is committed :—

(8.) A lays his hand on B to attract his attention.

(9.) A, falling down, catches hold of B to save himself.

(10.) A crowd of people, going into a theatre, push and are pushed against each other.

<sup>1</sup> *R. v. Day*, 1845, 1 Cox, C. C. 207.

<sup>2</sup> 1 Russ. Cr. 958, gives several cases of this sort.

<sup>3</sup> *R. v. Rosinski*, 1 Russ. Cr. 959; and see *R. v. Case*, 1850, 1 Den. C. C. 580.

<sup>4</sup> *R. v. Lock*, 1872, 2 C. C. R. 10, and see *R. v. Barratt*, 1873, 2 C. C. R. 81.

<sup>5</sup> *R. v. Williams*, 1838, 8 C. & P. 286. The prisoner was sentenced to three years imprisonment with hard labour, no doubt on the ground that the assault was indecent. The maximum punishment would now be two years hard labour. See Article 267 (d).

<sup>6</sup> 1 Hawk. P. C. 110.

<sup>7</sup> *R. v. St. George*, 1840, 9 C. & P. 483. This case has been overruled (*R. v. Duckworth*, 1892, 2 Q. B. 83), but not upon this point. *Ante*, p. 192, n. 7.

## ARTICLE 263.

## PUNISHMENT OF ASSAULTS WITH INTENT TO COMMIT SODOMY.

<sup>1</sup> Every one is guilty of a misdemeanor, and is liable upon conviction thereof to ten years penal servitude, who is guilty of any assault with intent to commit sodomy or of any indecent assault upon any male person.

## ARTICLE 264.

## ASSAULTS ON PERSONS PROTECTING WRECK.

<sup>2</sup> Every one is guilty of a misdemeanor, and is liable upon conviction thereof to seven years penal servitude, who assaults and strikes or wounds any magistrate, officer, or other person lawfully authorized, in or on account of the execution of his duty in or concerning the preservation of any vessel in distress, or of any vessel or goods or effects wrecked, stranded, or cast on shore, or lying under water.

## ARTICLE 265.

## ASSAULTS CAUSING ACTUAL BODILY HARM.

<sup>3</sup> Every one commits a misdemeanor, and is liable upon conviction thereof to five years penal servitude, who commits an assault occasioning actual bodily harm.

## ARTICLE 266.

## RESISTING LAWFUL ARREST.

<sup>4</sup> Every one is guilty of a misdemeanor, and is liable to imprisonment with hard labour for three years, who, being

<sup>1</sup> 24 & 25 Vict. c. 100, s. 62. The last words of this enactment would cover the case of an indecent assault by a woman on a man ; but this can hardly have been intended. Consent is no defence when the boy is under thirteen. See 43 & 44 Vict. c. 45, referred to in Art. 263.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 37.

<sup>3</sup> Ibid. s. 47.

<sup>4</sup> 14 & 15 Vict. c. 19, s. 12. By s. 11 of this Act any person whatsoever may apprehend any person found committing any indictable offence

liable to be apprehended under the provisions of the Prevention of Offences Act 1851, assaults or offers violence to any person by law authorized to apprehend or detain him or to any person acting in his aid and assistance.

### ARTICLE 267.

#### ASSAULTS PUNISHABLE WITH TWO YEARS IMPRISONMENT.

Every person commits a misdemeanor, and is liable upon conviction to two years imprisonment and hard labour,

(a.)<sup>1</sup> who assaults any person with intent to commit a felony or to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence ;

(b.)<sup>1</sup> or who assaults, resists, or wilfully obstructs any peace officer in the due execution of his duty, or any person acting in aid of such officer ;

(c.)<sup>2</sup> or who assaults any officer of a workhouse or relieving officer in the due execution of his duty, or any person acting in aid of such officer ;

(d.)<sup>3</sup> or who indecently assaults any female ;

(e.)<sup>4</sup> or who by threats or force obstructs, or prevents, or endeavours to obstruct or prevent any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place ;

(f.)<sup>5</sup> or who strikes or offers any violence to, or arrests upon

in the night, and may convey him or deliver him to some constable or other peace officer to be conveyed as soon as may be before a justice.

<sup>1</sup> 24 & 25 Vict. c. 100, s. 38 ; s. 41 was repealed by 34 & 35 Vict. c. 32. This applies to assaults on special constables appointed under 1 & 2 Will. 4 c. 41, see s. 11, and to county constables, see 2 & 3 Vict. c. 93, s. 8. As to assaults on constables generally punishable summarily, see 34 & 35 Vict. c. 112, s. 12 and 48 & 49 Vict. c. 75, s. 2, Oke's Synopsis, p. 206.

<sup>2</sup> 13 & 14 Vict. c. 101, s. 9.

<sup>3</sup> 24 & 25 Vict. c. 100, s. 52. In cases of indecent assault consent is no defence if the girl is under thirteen, 43 & 44 Vict. c. 45. See Art. 262.

<sup>4</sup> 24 & 25 Vict. c. 100, s. 36.

<sup>5</sup> Ibid.



or under the pretence of executing any civil process, any clergyman or other minister engaged in or to the knowledge of the offender about to engage in any of the rites or duties mentioned in the last clause, or to the knowledge of the offender going to perform the same, or returning from the performance thereof.

#### ARTICLE 268.

##### PUNISHMENT OF COMMON ASSAULT ON INDICTMENT.

<sup>1</sup> Every person who commits a common assault is guilty of a misdemeanor, and is liable on conviction thereof to one year's imprisonment and hard labour.

The punishment specified in this chapter can be inflicted only in cases in which the offender is convicted on an indictment [? or information].

<sup>1</sup> 24 & 25 Vict. c. 100, s. 47.

## CHAPTER XXVIII

<sup>1</sup> RAPE, ETC.

## ARTICLE 269.

## DEFINITION OF CARNAL KNOWLEDGE.

<sup>2</sup> CARNAL knowledge means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation.

## ARTICLE 270.

## DEFINITION OF RAPE.

<sup>3</sup> Rape is the act of having carnal knowledge of a woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm; but if such permission is given, the act <sup>4</sup> does not, <sup>5</sup> except in the case next hereinafter mentioned, amount to rape, although such permission may have been obtained by fraud, and although the woman may not have been aware of the nature of the act.

<sup>6</sup> Whereas before the Criminal Law Amendment Act 1885

<sup>1</sup> Draft Code, Part X. ss. 207-11.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 63, and see *R. v. Cox*, 1832, 1 Moo. C. C., 337, and *R. v. Allen*, 1839, 9 C. & P. 31, decided on the earlier enactment, 9 Geo. 4, c. 31, s. 18. Proof of emission is not needed under the Criminal Law Amendment Act 1885, see *R. v. Marsden*, 1891, 2 Q. B. 149.

<sup>3</sup> See the cases in the Illustrations, and see 1 Russ. Cr. 858, &c.

<sup>4</sup> See *R. v. Dee*, Irish C. C. R., reported in *Law Times*, Jan. 24, 1884.

<sup>5</sup> It would, however, amount to an offence under Article 194 (*f*). The effect of the Criminal Law Amendment Act appears to be that *R. v. Flattery* is no longer law, though it was recognised as having created doubts as to *R. v. Barrow*, &c., which doubts are declared to have been well founded, but I think the point doubtful.

<sup>6</sup> 48 & 49 Vict. c. 69, s. 4. The doubts referred to were founded on the cases of *R. v. Flattery*, 1877, 2 Q. B. 410, and *R. v. Barrow*, 1 C. C. R. 156.

doubts were entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it was by that Act enacted and declared that every such offender should be deemed to be guilty of rape.

#### ARTICLE 271.

##### OTHER PROVISIONS AS TO RAPE.

(1.) <sup>1</sup> A husband [it is said] cannot commit rape upon his wife by carnally knowing her himself, but he may do so if he aids another person to have carnal knowledge of her.

(2.) <sup>2</sup> A boy under fourteen years of age is conclusively presumed to be incapable of committing rape.

#### *Illustrations.*

(1.) <sup>3</sup> A has connection with B, a woman who at the time of the connection is in a state of insensibility. A has ravished B.

(2.) <sup>4</sup> A has connection with B, an idiot, who by reason of her idiocy submits, but does not permit the act. A has ravished B.

<sup>1</sup> 1 Hale, P. C. 629. Hale's reason is that the wife's consent at marriage is irrevocable. It may be doubted however whether the consent is not confined to the decent and proper use of marital rights. If a man used violence to his wife under circumstances in which decency or her own health or safety required or justified her in refusing her consent, I think he might be convicted at least of an indecent assault. Hale gives no authority for it, but makes the remark only by way of introduction to the qualification contained in the latter part of clause (1), for which *Lord Castlehaven's Case*, 1631, 3 St. Tr. 402, is an authority.

<sup>2</sup> Hale, P. C. 630. See *R. v. Groombridge*, 1836, 7 C. & P. 582. The presumption extends to cases of assault with intent to ravish. See *R. v. Phillips*, 1839, 8 C. & P. 736. The occasional incorrectness of this presumption is shown by *R. v. Read*, 1848, 1 Den. 377. The presumption is founded, I believe, on the notion that a boy under fourteen cannot be a father, and could not thus inflict what was regarded as the principal injury involved in rape.

<sup>3</sup> *R. v. Camplin*, 1845, 1 Den. C. C. 89.

<sup>4</sup> *R. v. N. Fletcher*, 1859, Bell, C. C. 63; referring to the definition given in Westm. 2, c. 34.

(3.) <sup>1</sup> A has connection with B, an idiot, who permits the act from mere sexual instinct, but without understanding its nature. A has not ravished B.

## ARTICLE 272.

## PUNISHMENT OF RAPE AND CARNALLY KNOWING CHILDREN UNDER THIRTEEN.

<sup>2</sup> Every one is guilty of felony and liable to penal servitude for life, who

(a.) commits rape, or

(b.) <sup>3</sup> unlawfully and carnally knows any girl under the age of thirteen years.

## ARTICLE 273.

## CARNALLY KNOWING GIRLS BETWEEN THIRTEEN AND SIXTEEN.

Every one commits a misdemeanor, and is liable upon conviction thereof to two years imprisonment and hard labour, who

(1.) <sup>4</sup> attempts to have unlawful carnal knowledge of any girl under the age of thirteen;

(2.) <sup>5</sup> unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen and under the age of sixteen; provided that it is a sufficient defence to any charge of either of these offences if it shall be made to appear to the Court or jury before whom the charge is brought that the person so

<sup>1</sup> *R. v. C. Fletcher*, 1866, 1 C. C. R. 39. In *R. Barratt*, 1873 (2 C. C. R. 81), in which the facts are similar to those in the case of *N. Fletcher*, the judges said that there was no inconsistency between the cases of *N. Fletcher* and *C. Fletcher*.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 48.

<sup>3</sup> 48 & 49 Vict. c. 69, s. 4. The ordinary rule as to the necessity of proving capacity for knowing that the act was wrong (*ante* Art. 27) prevails when a boy under fourteen is accused of this offence, as also does the rule stated in subs. (2) of the last Article; *R. v. Waite*, 1892, 2 Q. B. 600, 17 Cox. C. C. 554. It is a question whether he can be convicted of an attempt to ravish; but he can be convicted of an indecent assault by reason of 48 & 49 Vict. c. 69 s. 9, *R. v. Williams*; 1893, 1 Q. B. 320.

<sup>4</sup> 48 & 49 Vict. c. 69, s. 4.

<sup>5</sup> *Ibid.* s. 5.

charged had reasonable cause to believe that the girl was of or above the age of sixteen years; and

Provided also that no prosecution may be commenced for any such offence more than three months after the commission of the offence; or

(3.) <sup>1</sup>unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman was an idiot or imbecile.

An offender against (1) whose age [<sup>2</sup>at the time of the offence] does not exceed sixteen years may instead of being sentenced to imprisonment be sentenced to be whipped and to be sent to a certified reformatory school for not less than two years and not more than five years, and to be detained in custody for seven days before he is sent to such reformatory school.

<sup>1</sup> 48 & 49 Vict. c. 69, s. 4.

<sup>2</sup> So held by Lord Coleridge, C.J., after consulting with Stephen, J., at Swansea Summer Assizes, August 1890.

## CHAPTER XXIX

CRIMES AFFECTING CONJUGAL AND PARENTAL RIGHTS—  
BIGAMY—ABDUCTION

## ARTICLE 274.

<sup>1</sup> DEFINITION AND PUNISHMENT OF BIGAMY.

<sup>2</sup> EVERY one commits the felony called bigamy, and is liable, upon conviction thereof, to seven years penal servitude, who, being married, marries any other person during the life of his or her wife or husband.

<sup>3</sup> The expression "being married" means being legally married. The word "marries" means goes through a form of marriage which the <sup>4</sup> law of the place where such form is used recognizes as <sup>5</sup> binding, whether the parties are by that law competent to contract marriage or not, and although by their fraud the form employed may, apart from the <sup>6</sup> bigamy, have been insufficient to constitute a binding marriage.

Provided that this Article does not extend

(i.) <sup>7</sup> to any person who marries again during his wife's or her husband's lifetime, but in the honest belief on reasonable grounds that she or he is dead.

(ii.) <sup>8</sup> to a second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty; nor

<sup>1</sup> 2 Hist. Cr. Law, 430.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 57, as explained by the authorities referred to in the Illustrations. See note to Article 35, *ante*.

<sup>3</sup> See Illustration (2).

<sup>4</sup> *Burt v. Burt*, 1860, 29 L. J. N. S., P. D. A. 133.

<sup>5</sup> See Illustration (3).

<sup>6</sup> See Illustration (4).

<sup>7</sup> *R. v. Tolson*, 1889, 23 Q. B. D. 168.

<sup>8</sup> The Act does extend to a subject of Her Majesty who has contracted a second marriage in Scotland during the lifetime of a wife previously married in Scotland; *R. v. Topping*, 1856, D. & P. 647. The same rule would, of course, apply to a bigamous marriage in any foreign country.

(iii.) to any person marrying a second time, whose husband or wife has been continually absent from such person for seven years then last past, and has not been known by such person to be living within that time.

<sup>1</sup> The burden of proving such knowledge is upon the prosecutor when (<sup>2</sup> but not until) the fact that the parties have been continually absent for seven years has been proved; nor

(iv.) to any person who at the time of such second marriage was divorced from the bond of the first marriage, nor to any person whose first marriage has been declared void by the sentence of any Court of competent jurisdiction.

<sup>3</sup> A divorce *a vinculo matrimonii* pronounced by a foreign Court between persons who have contracted marriage in England, and who continued to be domiciled in England, on grounds which would not justify such a divorce in England, is not a divorce within the meaning of this clause.

#### *Illustrations.*

(1.) <sup>4</sup> A marries B, a person within the prohibited degrees of affinity, and during B's lifetime marries C. A has not committed bigamy.

<sup>1</sup> *R. v. Curgerwen*, 1865, 1 C. C. R. 1.

<sup>2</sup> *R. v. Jones*, 1883, 11 Q. B. D. 118.

<sup>3</sup> *R. v. Lolley*, 1812, R. & R. 237. The decision does not refer to domicile, but this qualification appears from later cases to be required. See *Harvey v. Farnie*, 1880, L. R. 5 P. D. 153, 6 P. D. 32, and 8 App. Ca. 43, where *R. v. Lolley* is explained as above by Lord Selborne at p. 54, and Lord Blackburn at p. 59. *Harvey v. Farnie* was the converse of *R. v. Lolley*. It recognized a Scotch divorce as dissolving a marriage between people domiciled in Scotland at the time of the divorce, though the marriage took place in England, the wife being domiciled at the time of the marriage in England. The cases on the effect of foreign judgments on marriage are collected in 2 Sm. L. C. 897-904, 9th Edition.

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

<sup>4</sup> *R. v. Chadwick*, 1847, 11 Q. B. 205.

(2.) <sup>1</sup> A marries B, and during B's lifetime, goes through a form of marriage with C, a person within the prohibited degrees of affinity. A has committed bigamy.

(3.) <sup>2</sup> A marries B in Ireland, and during B's lifetime goes through a form of marriage with C in Ireland which is invalid, because both A and C are Protestants, and the marriage is performed by a Roman Catholic priest. A commits bigamy.

(4.) <sup>3</sup> A, married to C, marries B in C's lifetime by banns. B (the woman) being married, for purposes of concealment under a false name. A has committed bigamy.

(5.) <sup>4</sup> A, married to B, marries C in B's lifetime, in the colony of Victoria.

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

(6.) <sup>5</sup> A, married to B, sees B washed overboard from a ship in mid ocean, and never hears of B's rescue. B is in fact rescued and A marries C in B's lifetime. A has not committed bigamy.

#### ARTICLE 275.

##### PRINCIPALS IN SECOND DEGREE IN BIGAMY.

<sup>6</sup> Every one is a principal in the second degree in the crime of bigamy who, being unmarried, knowingly enters into a marriage which renders the other party thereto guilty of bigamy.

#### ARTICLE 276.

##### IRREGULAR MARRIAGES UNDER THE MARRIAGE ACT OF 1823.

<sup>7</sup> Every one is guilty of felony, and is liable upon conviction thereof to fourteen years penal servitude, who knowingly and wilfully

<sup>1</sup> *R. v. Brown*, 1843, 1 C. & K. 144; *R. v. Allen*, 1872, 1 C. C. R. 367.

<sup>2</sup> *R. v. Allen*, *ub. sup.* pp. 373-5, disapproving of *R. v. Fanning*, 17 Ir. C. L. 289.

<sup>3</sup> *R. v. Penson*, 1832, 5 C. & P. 412. In *R. v. Rea*, 1872, 1 C. C. R. 365, the prisoner at the bigamous marriage (before the registrar) gave a false Christian name, and was held to be rightly convicted.

<sup>4</sup> *Burt v. Burt*, 1860, 29 L. J. N. S., P. D. A. 133.

<sup>5</sup> *R. v. Tolson*, 1889, 23 Q. B. D. 168.

<sup>6</sup> *R. v. Brown & Webb*, 1843, 1 C. & K. 144.

<sup>7</sup> 4 Geo. 4, c. 76, s. 21.



(a.) solemnises matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of <sup>1</sup> eight in the forenoon and three in the afternoon, unless by special licence from the Archbishop of Canterbury ; or

(b.) solemnises matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person having authority to grant the same ; or

(c.) falsely pretending to be in holy orders, solemnises matrimony according to the rites of the Church of England.

All prosecutions for any felony mentioned in this Article must be commenced within three years after the offence committed.

<sup>2</sup> Provided also that nothing in this Article contained applies to the solemnisation of marriage under the provisions of any Act of Parliament passed after the 18th of July, 1823.

#### ARTICLE 277.

##### IRREGULAR MARRIAGES UNDER THE MARRIAGE ACT OF 1837.

<sup>3</sup> Every one is guilty of felony who knowingly and wilfully

(a.) solemnises any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in a <sup>4</sup> notice and certificate used under the 6 & 7 Will. 4, c. 85 (<sup>5</sup> except in the case of a marriage between

<sup>1</sup> 49 Vict. c. 14, s. 2.

<sup>2</sup> This proviso is added to express the effect of subsequent legislation on the subject. The Acts referred to are 6 Geo. 4, c. 92 ; 11 Geo. 4 & 1 Will. 4, c. 18 ; 6 & 7 Will. 4, c. 85 ; 7 Will. 4 & 1 Vict. c. 22, and some others. The Act of 1823 assumes that all marriages are solemnised in the Established Church. The Act of 1837, 6 & 7 Will. 4, c. 85, provides for the solemnisation of marriages elsewhere.

<sup>3</sup> 6 & 7 Will. 4, c. 85, s. 39. As to similar felonies by superintendent-registrars and registrars of marriage see sect. 40.

<sup>4</sup> Sect. 7, relating to the certificate, is repealed, 37 & 38 Vict. c. 35.

<sup>5</sup> No such exception is contained in the Act of 1823 ; but it can hardly have been intended to apply to such marriages. See 10 & 11 Vict. c. 58 (passed in consequence of the decision in *R. v. Millis*, 1844, 10 C. & F. 534).

two of the Society of Friends, commonly called Quakers, or between two persons professing the Jewish religion, according to the usages of the Jews); or

(b.) who, in any such registered building or office, solemnises any marriage in the absence of a registrar of the district in which such registered building or office is situated; or

(c.) who solemnises any marriage in England (except by licence) within <sup>1</sup> one day after the entry of the notice to the superintendent registrar, or after three months after such entry.

<sup>2</sup> Every prosecution for any felony mentioned in this Article must be commenced within three years of the offence committed.

#### ARTICLE 278.

##### ABDUCTION WITH INTENT TO MARRY.

Every one commits felony and is liable, upon conviction, to fourteen years penal servitude, who, with intent to marry or carnally know any woman, or with intent to cause any woman to be married or carnally known by any other person,

(a.) <sup>3</sup> from motives of lucre, takes away or detains against her will any such woman having any such interest in property as is hereinafter mentioned; or

(b.) <sup>3</sup> fraudulently allures, takes away, or detains, any such woman, being under the age of twenty-one years, and having any such interest in property as is hereinafter mentioned, 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; or

(c.) <sup>4</sup> by force takes away or detains against her will any woman of any age.

<sup>1</sup> Formerly twenty-one days, but see 19 & 20 Vict. c. 119, s. 9.

<sup>2</sup> 6 & 7 Will. 4, c. 85, s. 41.

<sup>3</sup> 24 & 25 Vict. c. 100, s. 53 (redrawn). The meaning of the words "possession" and "fraudulently" was considerably discussed in *R. v. Burrell*, 1863, L. & C. 354; but as the Court differed on the facts of the case, no definite conclusion was arrived at.

<sup>4</sup> *Ibid.* s. 54.

If any woman, against whom either of the offences defined in clauses (a.) and (b.) is committed, has any interest, legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or is a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin to any one having such interest, any person convicted of either of the said offences against her is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress, or next-of-kin, and if any such marriage has taken place, such property must, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland may, upon any information at the suit of the Attorney-General, appoint.

<sup>1</sup> In prosecutions for offences against this Article, a woman who, having been taken away, has been married to the offender, is, notwithstanding that marriage, competent to be a witness against him.

#### ARTICLE 279.

##### ABDUCTION OF GIRLS UNDER SIXTEEN.

<sup>2</sup> Every one commits a misdemeanor and is liable to two years imprisonment and hard labour, who unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

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

The expression "taking out of the possession" means

<sup>1</sup> *R. v. Wakefield*, 1827, 2 Lew. 279; *R. v. Perry*, 1794, R. & M. at p. 354.

<sup>2</sup> 24 & 25 Vict. c. 100, s. 55, as explained by the case referred to in the Illustrations.

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

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

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

#### *Illustrations.*

(1.) <sup>1</sup> A and B, two girls under sixteen, run away from home together. Neither abducts the other.

(2.) <sup>2</sup> A persuades B, a girl under sixteen, to leave her father's house, and sleep with him for three nights, and then sends her back. A has abducted B.

(3.) <sup>3</sup> A, a lady, persuades B, a girl under sixteen to leave her father's house, and come to A's house for a short time, for the purpose of going to the play with her. A has not abducted B.

(4.) <sup>4</sup> A, a girl, under sixteen, asks B, by whom she has been seduced, to elope with her, which he does. B commits abduction.

(5.) <sup>5</sup> A induces B to permit his daughter C to go away by falsely pretending that he (A) will find a place for C. A abducts C.

(6.) <sup>6</sup> A takes B, a girl under sixteen, out of her father's possession, believing her upon good grounds to be eighteen. A has abducted B.

(7.) <sup>7</sup> A meets B, a girl under sixteen, in the street, gets her to stay with him some hours, during which interval he seduces

<sup>1</sup> *R. v. Meadows*, 1844, 1 C. & K. 399, as explained by note to *R. v. Kipps*, 1850, 4 Cox, C. C. 167; and *R. v. Mankletow*, 1853, D. & P. 159.

<sup>2</sup> *R. v. Timmins*, 1860, Bell C. C. 276.

<sup>3</sup> Founded on a dictum of Crompton, J., in *R. v. Timmins* (*sup.*).

<sup>4</sup> *R. v. Biswell*, 1847, 2 Cox, C. C. 259; and see *R. v. Robins*, 1844, 1 C. & K. 456.

<sup>5</sup> *R. v. Hopkins*, 1842, Car. & Mar. 254.

<sup>6</sup> *R. v. Prince*, 1875, 2 C. C. R. 154.

<sup>7</sup> *R. v. Hibbert*, 1869, 1 C. C. R. 184.

her, takes her back to the place where he found her, and there leaves her. She returns home. A was not aware at the time that B had a father or mother living. A has not abducted B.

#### ARTICLE 280.

##### ABDUCTION OF GIRLS UNDER EIGHTEEN.

<sup>1</sup> Every person commits a misdemeanor, and being convicted thereof is liable to two years imprisonment with hard labour, who, with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her.

It is a sufficient defence to any charge under this Article if it is made to appear to the Court or jury that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years.

#### ARTICLE 281.

##### DETAINING WOMEN IN BROTHELS.

<sup>2</sup> Every one commits a misdemeanor, and upon conviction thereof is liable to imprisonment with hard labour for two years who detains any woman or girl against her will—

(1.) in or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally, or

(2.) in any brothel.

Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connection, or is in any brothel, a person shall be deemed to detain such woman

<sup>1</sup> 48 & 49 Vict. c. 69, s. 7.

<sup>2</sup> Ibid. s. 8.

or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or, where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.

No legal proceeding, whether civil or criminal, may be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel.

#### ARTICLE 282.

##### STEALING CHILDREN UNDER FOURTEEN.

<sup>1</sup> Every one is guilty of felony and is liable, upon conviction, to seven years penal servitude, who

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

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

with intent to deprive any parent or guardian, or other person having the lawful care or charge of such child, of the possession of it, or with intent to steal any article about or upon the person of such child.

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

<sup>1</sup> 24 & 25 Vict. c. 100, s. 56, W.

## CHAPTER XXX

## OFFENCES AGAINST CHILDREN BY PARENTS AND OTHERS

## ARTICLE 283.

## NEGLECTING TO PROVIDE FOOD, ETC., FOR CHILDREN.

<sup>1</sup> EVERY one commits a misdemeanor who, being the parent, or master, or mistress, of any child of tender years, and unable to provide for itself, refuses or neglects (being able to do so) to provide sufficient food, clothes, bedding, and other <sup>2</sup>necessaries for such child, so as thereby to injure the health of such child.

## ARTICLE 284.

## CRUELTY TO CHILDREN.

<sup>3</sup> Every person over the age of sixteen years commits a misdemeanor, and is liable upon conviction thereof (subject to the exception mentioned in Article 285) to two years imprisonment and hard labour, or a fine not exceeding one hundred pounds, or both, who

<sup>1</sup> *Friend's Case*, 1802, R. & R. 20; *R. v. Ryland*, 1867, 1 C. C. R. 99. It is necessary to prove actual injury to the child's health, *R. v. Philpott*, 1853, D. & P. 179, and *R. v. Hogan*, 1851, 2 Den. 277, and that the defendant actually has, not merely that he might get from the relieving officer the means of providing for the child: *R. v. Chandler*, 1855, D. & P. 453. The common law misdemeanor is of less practical importance since the passing of the Prevention of Cruelty to and Protection of Children Acts, 1889-1894. See Articles 284-5.

<sup>2</sup> It is doubtful whether this includes medical attendance as regards any one but a parent who is under a statutory obligation to provide it. See Article 286; *R. v. Dornes*, 1875, 1 Q. B. D. 25.

<sup>3</sup> 57 & 58 Vict. c. 41, s. 1. The Prevention of Cruelty to Children Act, 1894. This Act consolidates and repeals the Prevention of Cruelty to and Protection of Children Act, 1889, and the previous Prevention of Cruelty to Children Act, 1894. Ss. 6, 7, & 8 of the present Act give power to the Court, upon the conviction of a person under s. 1, to make an order giving custody of the child to some fit person, having regard, as far as possible, to "the religious persuasion to which the child belongs." These offences are also punishable summarily.

having the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or

causes such child to be assaulted, ill-treated, neglected, abandoned, or exposed,

in a manner likely to cause such child unnecessary suffering or injury to its <sup>1</sup> health.

#### ARTICLE 285.

##### CRUELTY TO CHILDREN BY INTERESTED PERSON.

<sup>2</sup> If it is proved that a person indicted under the 1st section of the Prevention of Cruelty to Children Act, 1894, (Art. 284) was <sup>3</sup> interested in any sum of money accruable or payable in the event of the death of the child, and knew that such sum of money was accruing or becoming payable,

such person is liable, upon conviction, to penal servitude for any term not exceeding five years in lieu of any other penalty, or to

a fine of two hundred pounds.

#### ARTICLE 286.

##### ABANDONING CHILDREN UNDER TWO.

Every one commits a misdemeanor, and is liable upon conviction thereof to five years penal servitude,

<sup>4</sup> who unlawfully abandons or exposes any child being under the age of two years, whereby the life of such child is endangered or its health has been or is likely to be permanently injured.

<sup>1</sup> It is enacted (s. 1, subs. [1]) that "injury to or loss of sight, or hearing, or limb, or organ of the body" is injury to a child's health. It is probable that injury to or loss of one of the other senses would be held to be so. Neither "limb" nor "organ" is defined.

<sup>2</sup> 57 & 58 Vict. c. 41, s. 1, subs. (3).

<sup>3</sup> A person is interested in such money "if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable." S. 1, subs. (4).

<sup>4</sup> 24 & 25 Vict. c. 100, s. 27. Part of sect. 26 refers to the same subject. See Art. 260 (d.).



The words "abandoned" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection.

*Illustrations.*

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

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

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<sup>1</sup> *R. v. White*, 1871, 1 C. C. R. 311.

<sup>2</sup> *R. v. Falkingham*, 1870, 1 C. C. R. 222.

## CHAPTER XXXI

## OFFENCES CONCERNING PAUPERS

## ARTICLE 287.

## PROMOTING MARRIAGES

<sup>1</sup> EVERY officer of any parish, union, or place is guilty of a misdemeanor who endeavours to induce any person to contract a marriage by threat or promise respecting any application to be made or any order to be enforced with respect to the maintenance of any bastard child.

## ARTICLE 288.

## DESERTION OF PAUPERS.

<sup>2</sup> Every one is guilty of a misdemeanor and liable to a fine not exceeding ten pounds, and in default of payment to imprisonment for three months, who being employed in the execution of a warrant duly issued under the authority of 24 and 25 Vict. c. 76 or 8 and 9 Vict. c. 117. (relating to the removal of paupers out of England) wilfully deserts any person mentioned therein before he or she is conveyed to the place of destination.

<sup>1</sup> 7 & 8 Vict. c. 101, s. 8.

<sup>2</sup> 26 & 27 Vict. c. 89, s. 4.

## CHAPTER XXXII

## \*OFFENCES AS TO LUNATICS AND ASYLUMS

## ARTICLE 289.

## OFFENCES COMMITTED IN RESPECT OF LUNATICS.

EVERY person is guilty of a misdemeanor who

<sup>1</sup>(a.) except under the provisions of this Act receives or detains a lunatic, or alleged lunatic, in an institution for lunatics, or for payment takes charge of, receives to board or lodge, or detains a lunatic or alleged lunatic in an unlicensed house; or

<sup>2</sup>(b.) receives or detains two or more lunatics in any house not being an institution for lunatics or a workhouse, except under the provisions of this Act; or

<sup>3</sup>(c.) being the manager of any hospital or licensed house, or any person having charge of a single patient, omits to send to the Commissioners the prescribed documents and information upon the admission of a patient, or to make the prescribed entries, and give the prescribed notices upon the removal, discharge or death of a patient; or

<sup>4</sup>(d.) makes a wilful misstatement of any material fact in any petition, statement of particulars, or reception order under the Lunacy Act 1890; or in any medical or other

\* By 53 Vict. c. 5, s. 325, the secretary of the Commissioners, the clerk of the visitors, and the clerk of the visiting committee may prosecute for offences under this Act; also such proceedings may not be taken except by order of the Commissioners, or of visitors having jurisdiction or with the consent of the Attorney-General. The second part of the section seems to render the decision in *Anderson v. Hamlin*, 1890, 25 Q. B. D. 221 inapplicable.

<sup>1</sup> 53 Vict. c. 5, s. 315 (1).

<sup>2</sup> Ibid. s. 315 (2) (3).

<sup>3</sup> Ibid. s. 316.

<sup>4</sup> Ibid. 317 (1) (2); a prosecution for this offence must be by order of the Commissioners or by the direction of the Attorney-General, or the Solicitor to the Treasury.

certificate, or in any statement or report of bodily or mental condition under this Act; or

<sup>1</sup>(*e.*) in any book, statement or return knowingly makes any false entry as to any matter as to which he is, by the Lunacy Act 1890, or the rules under it, required to make any entry; or

<sup>2</sup>(*f.*) being the manager of an institution for lunatics or the person having charge of a single patient, omits to send to the coroner notice of the death of a lunatic within the prescribed time; or

<sup>3</sup>(*g.*) obstructs any Commissioner or Chancery or other visitor in the exercise of the powers conferred by the Lunacy Act 1890, or any other Act; or

<sup>4</sup>(*h.*) being a manager, officer, nurse, attendant, servant, or other person employed in an institution for lunatics, or any person having charge of a lunatic whether by reason of any contract, or of any tie of relationship, or marriage or otherwise, ill-treats or wilfully neglects a patient.

<sup>5</sup> Every manager, officer, nurse, attendant, or other person employed in any institution for lunatics (including an asylum for criminal lunatics) or workhouse, or any person having the care or charge of any single patient, or any attendant of any single patient, is guilty of a misdemeanor and is liable to be imprisoned with hard labour for two years, who carnally knows, or attempts to have carnal knowledge of, any female under care or treatment as a lunatic in the institution, or workhouse, or as a single patient.

<sup>1</sup> 53 Vict. c. 5, s. 318.

<sup>2</sup> Ibid. 319.

<sup>3</sup> Ibid. 321.

<sup>4</sup> Ibid. s. 322.

<sup>5</sup> Ibid. s. 324. No consent or alleged consent of the female is a defence to an indictment for the above offence.

## ARTICLE 290.

## OTHER BREACHES OF THE LUNACY ACT.

Every person is guilty of a misdemeanor who

<sup>1</sup>(a.) presents a petition as to a lunatic after another as to the same lunatic has been dismissed, without stating the facts with regard to the previous petition and its dismissal so far as they are within his knowledge, and obtaining from the Commissioners in Lunacy at his own expense, and presenting with the petition, a copy of the reasons for dismissing the previous petition; or

<sup>2</sup>(b.) contravenes the provisions of section 40 of the Lunacy Act 1890 as to the employment of mechanical means of restraint; or

<sup>3</sup>(c.) being a manager omits to send a copy of a Commissioner's minute as to a doubtful patient, or being a clerk, neglects to communicate the same to the visitors; or

<sup>4</sup>(d.) for the purpose of obtaining a licence or a renewal of a licence supplies any untrue information to the Commissioners or justices; or

<sup>5</sup>(e.) keeps a house wherein there are two or more lunatics, or has the care or charge of the lunatics therein after the lapse of two months from the expiration or revocation of the licence; or

<sup>6</sup>(f.) being the superintendent of any hospital, receives or detains any lunatic therein contrary to the provisions of the Lunacy Act 1890 or the terms of the complete certificate of registration; or

<sup>7</sup>(g.) being the superintendent of a registered hospital knowingly permits any lunatic to be detained or lodged in any building not shown on the plans; or

<sup>8</sup>(h.) is the superintendent of a hospital where lunatics are detained or kept after the day appointed for closing it.

<sup>1</sup> 53 Vict. c. 5, s. 7.

<sup>3</sup> Ibid. s. 197.

<sup>5</sup> Ibid. s. 222.

<sup>7</sup> Ibid. s. 233.

<sup>2</sup> Ibid. s. 40

<sup>4</sup> Ibid. 214.

<sup>6</sup> Ibid. s. 231.

<sup>8</sup> Ibid. s. 237.

## CHAPTER XXXIII.

## \* LIBELS ON PRIVATE PERSONS.

## ARTICLE 291.

## DEFINITION OF LIBEL.

THE word "libel" means

- (a.) the offence defined in this Article;
- (b.) anything by the publication of which the offence is committed.

<sup>1</sup> Every one commits the misdemeanor called libel who maliciously publishes defamatory matter of any person, or body of persons, definite and small enough for its individual members to be recognised as such, in or by means of anything capable of being a libel in the second sense of the word.

<sup>2</sup> The publication of a libel on the character of a dead person is not a misdemeanor unless it is intended to injure or provoke living persons.

\* See Note X.

<sup>1</sup> The best modern statement on the law of libel is by Lord Blackburn in *Capital and Counties Bank v. Henty*, 1882, 7 App. Ca. 741, at pp. 769-788. See also my *History of the Criminal Law*, vol. ii., pp. 298-395 and 1 Hawk. P. C. 542. As to what can be a "libel" see Article 292. As to "publishes," see Article 294; "maliciously," see Article 295.

<sup>2</sup> As to libels on the dead, see *R. v. Topham*, 1791, 4 T. R. 126; also *R. v. Labouchere*, 1882, 12 Q. B. D. at pp. 322-4. In February, 1887, I tried the case of *R. v. Ennor* at the assizes at Cardiff. The case was of a newspaper libel on a political opponent who had been dead for three years. It led to an assault by the dead man's sons upon the supposed libeller. I directed an acquittal on the ground that no evidence was offered to show that the libel in any way referred to any living person. I ought to have added, but I did not do so clearly, that there was no evidence that the defendant wished to provoke the sons of the deceased. It was not even stated that he knew of their existence. I thought that an actual intent to injure (I should have added) or to provoke or annoy the sons was essential to the offence, and that a mere tendency to provoke or constructive intention inferred from the fact that the libel was calculated to hurt the feelings of any surviving relations of the deceased was not enough. I have altered the wording of this article accordingly.

*Illustrations.*

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

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

## ARTICLE 292.

## THINGS CAPABLE OF BEING LIBELS.

<sup>3</sup> Any words or signs conveying defamatory matter marked upon any substance, and any thing which by its own nature conveys defamatory matter, may be a libel in the second sense of the word before mentioned. Words spoken can in no case be a libel, although they may convey defamatory matter.

*Illustration.*

A letter or passage in a book or newspaper, words written on a wall, a picture, a gallows set up before a man's door, or a waxen "portrait model" exhibited as one of a collection of notorious malefactors,<sup>4</sup> may be a libel.

## ARTICLE 293.

## DEFAMATORY MATTER.

<sup>5</sup> Defamatory matter is matter which, either directly or by insinuation or irony, tends to expose any person to hatred, contempt, or ridicule.

<sup>1</sup> *R. v. Gathercole*, 1838, 2 Lew. 237.

<sup>2</sup> *R. v. Osborne*, 1732; 2 Kel. 230.

<sup>3</sup> 3 Russ. Cr. p. 178; 1 Hawk. P. C. 542; Folkard's Starkie, 167. As to cases in which words spoken amount to a criminal offence, see Articles 72, 96, 179.

<sup>4</sup> *Monson v. Tussauds, Limited*, 1894, 1 Q. B. 671.

<sup>5</sup> Folkard's Starkie, 171, 172.

*Illustrations.*

The following are instances of defamatory matter :—

<sup>1</sup> A question suggesting that illegitimate children were born and murdered in a nunnery ;

<sup>2</sup> "A adds to his other vices ingratitude" ;

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

<sup>4</sup> "A has the itch, and smells of brimstone."

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

## ARTICLE 294.

## PUBLICATION DEFINED.

<sup>6</sup> To publish a libel is to deliver it, read it, or communicate its purport in any other manner, or to exhibit it to the person libelled, or any other person, <sup>7</sup> provided that if the person making the publication shows that he did not know, and had no opportunity of knowing, the contents of the libel, or that the newspaper or other publication of which it forms part was likely to contain libellous matter, his act is not deemed to amount to a publication.

<sup>8</sup> A libel published in the ordinary course of the business of any person whose trade it is to deal in articles of the kind to which the libel belongs, is deemed to be published, not

<sup>1</sup> *R. v. Gathercole*, 1838, 2 Lew. C. C. at p. 255.

<sup>2</sup> *Cox v. Lee*, 1869, L. R. 4 Ex. 284.

<sup>3</sup> 1 Hawk. P. C. 543.

<sup>4</sup> *Villars v. Mowley*, 1796, 2 Wils. 403.

<sup>5</sup> *R. v. Cooper*, 1846, 8 Q. B. 533. I think it might, under special circumstances, be a libel to say of a person a thing apparently quite inoffensive. Suppose, for instance, a man wrote of another "his name is A," meaning that his real name was A, and that the name of B, by which he passed, was falsely assumed, would not this be a libel? but cf. *Capital and Counties Bank v. Henty*, 1882, 7 App. Cas. 741.

<sup>6</sup> *R. v. Burdett*, 1820, 4 B. & Ald. 95. A libel published to the person libelled is a misdemeanor, because it tends to a breach of the peace, but it is not actionable, as it cannot injure the reputation of the person libelled.

<sup>7</sup> *Emmens v. Pottle*, 1885, 16 Q. B. D. 354.

<sup>8</sup> Cases in Folkard's *Starkie*, 451-454 ; and especially *R. v. Almon* 1770, 5 Burr. 2686.



only by the person who actually sells or exhibits it, but also by his master if his master has given him general authority to sell or exhibit for his master's profit articles of that kind.

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

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

#### *Illustrations.*

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

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

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

(4.) A bookseller's shopman sells a libellous book over the counter in the ordinary course of business; both the shopman and the bookseller have published the libel.

<sup>1</sup> 6 & 7 Vict. c. 96, s. 7. Probably the effect of such proof would be to excuse the master, though the Act does not say so. See *R. v. Almon* *supra* as to the rule before the statute.

<sup>2</sup> *R. v. Holbrook*, 1878, 4 Q. B. D. 42.

<sup>3</sup> All these Illustrations are founded on *R. v. Burdett*, 1820, 4 B. & Ald. 95. (1) is assumed by all the judges; (2) is doubted by Bayley, J., p. 153; (3) is given by Best, J., p. 126.

## ARTICLE 295.

## WHEN A LIBEL IS MALICIOUS.

<sup>1</sup> The publication of a libel is malicious in every case which does not fall within the provisions of some one or more of the seven articles next following.

## ARTICLE 296.

## PUBLICATION OF THE TRUTH.

<sup>2</sup> The publication of a libel is not a misdemeanor if the defamatory matter is true, and if the publisher can show that it was for the public benefit that such matter should be published.

*Illustration.*

<sup>3</sup> A writes of B, "Many years ago B committed immoral acts." The imputation is true. This is not a libel if the publisher can show that it was for the public benefit that it should be published.

## ARTICLE 297.

## PUBLICATION OF MATTER HONESTLY BELIEVED TO BE TRUE.

<sup>4</sup> The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true,

<sup>1</sup> In *Bromage v. Prosser*, 1825, 4 B. & C. 247, which is a leading case on the subject, Bayley, J., says, "Malice . . . in its legal sense means a wrongful act done intentionally and without just cause or excuse." From the nature of the case the publication of a libel must be an intentional act. The next seven Articles sum up the different states of fact which have been held to constitute "just cause or excuse" for publishing libels. In *Bromage v. Prosser* and many other cases, much is said of malice in law and malice in fact, of privileged publications, &c., &c.; but a sufficiently simple and intelligible result has at last been reached by very circuitous roads. See Note X.

<sup>2</sup> Effect of 6 & 7 Vict. c. 96, s. 6.

<sup>3</sup> *R. v. Newman*, 1853, 1 E. & B. 558; and see D. & P. 85.

<sup>4</sup> See Folkard's *Starkie*, ch. xi. 283-329. I have gone carefully through these forty-six pages twice or more, and I cannot see that they contain anything beyond this principle and rather obvious illustrations of it expressed in a very complicated way. The leading case on the subject is *Harrison v. Bush*, 1855, 5 E. & B. 344.

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

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

#### *Illustrations.*

(1.) <sup>2</sup> A being asked the character of B, who had been in his service, by C, who is about to engage B as a servant, writes of B in a letter to C, the words "B is a drunkard and a thief." If A honestly and on reasonable grounds believes that B is a drunkard and a thief, though in fact he is neither, this is not a libel.

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

As soon as the circumstances under which the letter was written are proved or appear the burden of proving that A did not honestly and on reasonable grounds believe B to be a drunkard and a thief is upon B in a prosecution or action by B.

(2.) <sup>3</sup> A, the private secretary of a general, being directed by the general to give an inspecting officer information as to the discipline of a body of troops, writes a letter to the inspector, in which he says that B, who had formerly commanded the troops, attempted to excite a mutiny when he was removed from his command. This is not a libel, though false, if A honestly believed it to be true, and if it was relevant to the subject on which A was directed to report.

(3.) <sup>4</sup> A writes a letter containing matter defamatory of B to

<sup>1</sup> *Clark v. Molyneux*, 1877, Q. B. D. 237.

<sup>2</sup> Many cases as to giving characters to servants are collected and abstracted in Folkard's edition of Starkie, pp. 286-292.

<sup>3</sup> *Beatson v. Skene*, 1860, 5 H. & N. 838. This was an action for verbal slander, but the principle is the same.

<sup>4</sup> *Todd v. Hawkins*, 1837, 8 C. & P. 88.

C, A's mother-in-law, who is about to marry B. If A in good faith believes the imputations to be true, this is not a libel although the imputations are false.

(4.)<sup>1</sup> The mate of a ship writes a letter to A accusing the captain, B, of drunkenness and misconduct. A (who has nothing to do with the matter) forwards the letter to the owner of the ship believing the accusation to be true and thinking himself morally bound to report it. The accusation was in fact false. It is uncertain whether A has or has not libelled B.

(5.) A complains to the Privy Council of the conduct of a public officer whom the Privy Council had power to remove. If the statement was made with express malice it is libellous.<sup>2</sup>

## ARTICLE 298.

### FAIR CRITICISM.

<sup>3</sup> The publication of a libel is not a misdemeanor if the defamatory matter consist of comments upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided that such comments are fair.

<sup>4</sup> A fair comment is a comment which is either true, or which, if false, expresses the real opinion of its author (as to the existence of matter of fact or otherwise), such opinion having been formed with a reasonable degree of care and on reasonable grounds.

<sup>5</sup> Every person who takes a public part in public affairs submits his conduct therein to criticism.

<sup>6</sup> Every person who publishes any book or other literary production, or any work of art, or any advertisement of goods, submits that book, or literary production, or work of art, or advertisement to public criticism.

<sup>1</sup> *Coxhead v. Richards*, 1846, 2 C. B. 569. The judges in this case were equally divided, Tindal, C.J., and Erle, J., thought the letter was not a libel. Coltman, J., and Cresswell, J., thought it was.

<sup>2</sup> *Procter v. Webster*, 1885, 16 Q. B. D. 112.

<sup>3</sup> Folkard's *Starkie*, ch. x. pp. 254-282.

<sup>4</sup> *Hunter v. Sharpe*, 1866, 4 F. & F. 983; *Merivale v. Carson*, 1887, 20 Q. B. C. 275; Folkard's *Starkie*, 278.

<sup>5</sup> Illustration (1).

<sup>6</sup> Illustrations (2), (3), and (4).

<sup>1</sup> Every person who takes part in any public dramatic performance, or other public entertainment, submits himself to public criticism to the extent to which he takes part in it.

### *Illustrations*

(1.) <sup>2</sup> A, by direction of the Lords of the Admiralty, published to the world at large an official report made to the Lords of the Admiralty by B, which report contained matter defaming the character of C as a naval architect. C, having submitted to the Lords of the Admiralty proposals and plans for converting wooden ships of war into armoured ships of war, and the official report being part of a collection of papers intended to give the public information as to the construction of ships of war, and the publication being made in good faith, A has not libelled C.

(2.) <sup>3</sup> A publishes a caricature of B, an author, intending to convey the impression that his books are dull and ridiculous. A has not libelled B.

(3.) <sup>4</sup> B exhibits a picture at the annual exhibition of the Royal Academy. A writes a criticism on the pictures so exhibited, and calls B's picture "a mere daub." If this expresses A's honest opinion, A has not libelled B.

(4.) <sup>5</sup> B publishes an advertisement about a bag sold by him and called "the Bag of Bags." A publishes a criticism on the advertisement, saying, "The title is very silly, very slangy, and very vulgar." This may be a libel if it is meant to convey an imputation of B's way of managing his business, but is not a libel if it is only an expression of A's honest opinion as to the title given by B to his bag.

<sup>1</sup> *Dibdin v. Bostock*, 1823, 1 Esp. 28.

<sup>2</sup> *Henwood v. Harrison*, 1872, L. R. 7 C. P. 606; but see too *Merivale v. Carson*, 1887, 20 Q. B. D. 275, where Bowen, L.J., disagrees with the ratio decidendi in the earlier case, so far as it turns on the existence of privilege. The value of the case as an illustration does not, however, seem to be affected.

<sup>3</sup> *Carr v. Hood*, 1808, 1 Camp. 354; *Folkard's Starkie*, 273; and see *Tabart v. Tipper*, 1808, 1 Camp. 350. *Carr v. Hood* is a strong case, because the caricature ridiculed not only the book but the author. It is one thing to say, "This book is absurd," another to say, "You are an absurd person because you have written this absurd book." This decision would cover (within limits) common political caricatures.

<sup>4</sup> *Thompson v. Shakell*, 1828, 1 M. & M. 187; *Folkard's Starkie*, 276.

<sup>5</sup> *Jenner v. A'Beckett*, 1871, L. R. 7 Q. B. 11; *Folkard's Starkie*, 277.

## ARTICLE 299.

## PARLIAMENTARY PROCEEDINGS AND FAIR COMMENTS THEREON.

<sup>1</sup> It is not a misdemeanor to publish such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published; or,

<sup>2</sup> any extract from or abstract of such report, paper, votes or proceedings, if it is shown by the party accused that such extract or abstract was published *bonâ fide* and without <sup>3</sup> malice; or

<sup>4</sup> a fair report of any debate in either House of Parliament, though any such publication may contain matter defamatory of the character of individuals; <sup>5</sup>[SUBMITTED] provided that the publisher is not actuated in making the publication by any indirect motive.

## ARTICLE 300.

## REPORTS IN NEWSPAPERS OF PROCEEDINGS OF TRIALS AND PUBLIC MEETINGS.

<sup>6</sup> A fair and accurate report in any newspaper of proceedings

<sup>1</sup> 3 & 4 Vict. c. 9, s. 1. The Act contains directions as to proof of the reports, &c.; see also *Stockdale v. Hansard*, 1839, 9 A. & E. 1. The existence of a narrower privilege than that conferred by the statute, viz., the privilege of publishing libellous papers to members of Parliament for their use, was never disputed; see *Lake v. King*, 1667, 1 Wms. Saunders, 132.

<sup>2</sup> 3 & 4 Vict. c. 9, s. 3.

<sup>3</sup> The word "malice" must have its popular sense. In this connection, however, it has almost no meaning. A publishes an abstract of a parliamentary paper, which destroys the character of his deadly enemy B. He rejoices in the prospect of ruining B's character, and so publishes both *bonâ fide* and with malice. It is absurd to say he is indictable, yet if he is not, what is the sense of the word "malice"? It seldom has any meaning except a misleading one. It refers not to intention, but to motive, and in almost all legal inquiries intention, as distinguished from motive, is the important matter. Another objection to it is that its popular meaning is not barely ill will but an ill will which it is immoral to feel. No one would describe legitimate indignation as "malice." The word is entirely avoided in the Indian Penal Code.

<sup>4</sup> *Wason v. Walter*, 1868, L. R. 4 Q. B. 73.

<sup>5</sup> Analogy of *Stevens v. Sampson*, 1879, 5 Ex. D. 53.

<sup>6</sup> 51 & 52 Vict. c. 64, s. 3.

publicly heard before any Court exercising judicial authority, if published contemporaneously with such proceedings, is privileged, provided that nothing in this Article authorises the publication of any blasphemous or indecent matter.

<sup>1</sup> A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any Commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in Quarter Sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, is privileged, unless it is proved that such report or publication was published or made maliciously; provided that nothing in this Article authorises the publication of any blasphemous or indecent matter:

provided also that the protection intended to be afforded by this Article is not available as a defence in any proceedings if it is proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same:

provided further that nothing in this Article contained is deemed or construed to limit or abridge any privilege which existed at the time of the passing of the Newspaper Libel Act, 1888, or to protect the publication of any matter not of

<sup>1</sup> 51 & 52 Vict. c. 64, s. 4.

public concern, the publication of which is not for the public benefit.

“Public meeting” means any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.

<sup>1</sup> No criminal prosecution may be commenced against any proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge at Chambers.

### ARTICLE 301.

#### PUBLICATION IN A COURT OF JUSTICE.

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

#### *Illustrations.*

(1.) <sup>2</sup> A, before justices of the peace, exhibits articles of the peace against B, containing false and scandalous charges against B, in order to cause B to be bound over to good behaviour. This is not a libel.

(2.) <sup>3</sup> A in an action between himself and B, falsely and maliciously swears an affidavit, charging C with fraud. The affidavit is not a libel.

(3.) <sup>4</sup> A, a military witness before a military court of inquiry as to the conduct of B, makes in reference to the subject of that

<sup>1</sup> 51 & 52 Vict. c. 64, s. 8.

<sup>2</sup> *Culler v. Dixon*, 1585, Co. Pt. 4, fo. 146.

<sup>3</sup> This is stated most strongly and explicitly in *Munster v. Lamb*, 1883, 11 Q. B. D. 588. *Henderson v. Broomhead*, 1859, 4 H. & N. 569, 576; see, too, *Dawkins v. Lord Rokeby*, 1873, L. R. 8 Q. B. 255, and authorities cited there. Compare *Seaman v. Netherclift*, 1876, 1 C. P. D. 540, for an illustration of the same principle as regards slander.

<sup>4</sup> *Dawkins v. Lord Rokeby*, 1875, L. R. 7 H. L. 744.



inquiry certain written statements affecting B, which are false to A's knowledge, and are intended to injure B. This is not a libel.

(4.) <sup>1</sup> A being the military superior of B, and being as such under a military duty to make a report on B's conduct to C, their common superior, makes a report which he knows to be false in order to injure B. The report is not a libel.

## ARTICLE 302.

### FAIR REPORTS OF PROCEEDINGS OF COURTS.

<sup>2</sup> The publication of a fair report of the proceedings of a Court of Justice is not a libel, merely because it defames the character of any private person; but such a publication may be an offence under Articles 96, 103, 179, or 191.

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

Reports of *ex parte* proceedings are within this Article if they are of a judicial nature, and proceedings before a magistrate under 11 & 12 Vict. c. 42, held with open doors, and with a view to the committal for trial of a suspected person, are judicial.

<sup>3</sup> Provided in all the cases aforesaid that the publisher is not actuated in making the publication by any indirect motive.

### *Illustrations.*

(1.) <sup>4</sup> A publishes in a newspaper a fair report of the examination of a debtor before the registrar of a Bankruptcy Court.

<sup>1</sup> *Dawkins v. Lord Paudet*, 1869, L. R. 5 Q. B. 94. Dissentiente Cockburn, C.J. I should doubt whether this law would be extended beyond the case of military duty.

<sup>2</sup> *Curry v. Walter*, 1796, 1 B. & P. 525; *Hoare v. Silverlock*, 1850, 9 C. B. 20; *Lewis v. Levy*, 1858, E. B. & E. 553. *Usill v. Hales*, 1878, 3 C. P. D. 319.

<sup>3</sup> *Sterens v. Sampson*, 1879, 5 Ex. D. 53.

<sup>4</sup> *Ryalls v. Leader*, 1866, L. R. 1 Ex. 296, 300.

The examination contains irrelevant statements defaming B, who is a stranger to the proceedings. This is not a libel on B.

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

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

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

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

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

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

## ARTICLE 303.

### PUNISHMENT FOR LIBEL.

<sup>7</sup> Every one is liable to three years imprisonment and hard labour who

- (a.) publishes, or threatens to publish, any libel ; or
- (b.) directly or indirectly proposes to abstain from, or offers

<sup>1</sup> *R. v. Carlisle*, 1819, 3 B. & A. 167.

<sup>2</sup> *Lewis v. Lery*, 1858, E. B. & E. 551.

<sup>3</sup> *Lewis v. Lery*, 1858, E. B. & E. 539.

<sup>4</sup> *Delegal v. Highley*, 1837, 3 Bing. N. C. 960, 961.

<sup>5</sup> *Lewis v. Lery*, 1858, E. B. & E. 537; see, on the other hand, *Duncan v. Thwaites*, 1824, 3 B. & C. 556.

<sup>6</sup> *McGregor v. Thwaites*, 1824, 3 B. & C. 24.

<sup>7</sup> 6 & 7 Vict. c. 96, s. 3.

to prevent the printing or publishing of any matter or thing touching any other person,

with intent

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

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

<sup>1</sup> Every one is liable to two years imprisonment, and to pay such fine as the Court directs, who maliciously publishes any defamatory libel knowing it to be false,

<sup>2</sup> or [if he does not know it to be false], to one year's imprisonment, and to pay such a fine as the Court may direct.

<sup>1</sup> 6 & 7 Vict. c. 96, s. 4.

<sup>2</sup> Ibid. s. 5. The words bracketed are not in the Act, but are required to complete the sense.

## \*PART VI.

<sup>1</sup> OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS.

CHAP. XXXIV.—PROPERTY—POSSESSION—ASPORTATION—BAILMENT.

CHAP. XXXV.—THINGS CAPABLE OR NOT OF BEING STOLEN.

CHAP. XXXVI.—THEFTING GENERAL  
CHAP. XXXVII.—EMBEZZLEMENT BY CLERKS AND SERVANTS.

CHAP. XXXVIII.—ROBBERY AND EXTORTION BY THREATS.

CHAP. XXXIX.—BURGLARY, HOUSEBREAKING, ETC.

CHAP. XL.—PUNISHMENTS FOR STEALING PARTICULAR THINGS AND RECEIVING GOODS UNLAWFULLY OBTAINED.

CHAP. XLI.—OBTAINING PROPERTY BY FALSE PRETENCES AND OTHER CRIMINAL FRAUDS, AND DEALINGS WITH PROPERTY.

CHAP. XLII.—FRAUDS BY AGENTS, TRUSTEES, AND OFFICERS OF PUBLIC COMPANIES—FALSE ACCOUNTING.

CHAP. XLIII.—RECEIVING.

CHAP. XLIV.—FORGERY IN GENERAL.

CHAP. XLV.—PUNISHMENT OF PARTICULAR FORGERIES.

CHAP. XLVI.—PERSONATION.

CHAP. XLVII.—OFFENCES RELATING TO THE COIN.

CHAP. XLVIII.—MALICIOUS INJURIES TO PROPERTY.

CHAP. XLIX.—OFFENCES RELATING TO GAME, WILD ANIMALS, AND FISH.

CHAP. L.—OFFENCES CONNECTED WITH TRADE AND BREACH OF CONTRACT.

<sup>1</sup> CHAPTER XXXIV.*PROPERTY—POSSESSION—ASPORTATION—BAILMENT.*

## ARTICLE 304.

## OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS.

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

\* 3 Hist. Cr. Law, ch. xxviii. 121—176.

<sup>1</sup> This and the following chapter have, I fear, a somewhat abstract appearance, but it is impossible to understand the provisions of the Larceny Act without a knowledge of the doctrines which it presupposes—that is to say, the doctrine as to the definition of theft, and as to things

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Such violation may be :

(1.) By taking away property from the owner without his consent

(a.) by violence to his person or habitation ;

(b.) without such violence.

(2.) By persuading the owner by fraud to transfer his rights of property.

(3.) By the misappropriation of property intrusted by the owner to the offender.

(4.) By acts calculated to defraud, whether they actually defraud or not ; that is to say—

(a.) forgery ;

(b.) personation ;

(c.) coining and uttering bad money.

(5.) By wilful and malicious mischief done to property.

(6.) By breaches of certain kinds of contract and interference in certain cases with freedom of trade.

## ARTICLE 305.

### PROPERTY IN MOVABLE THINGS.

<sup>1</sup> A person who has a right as against the world at large to do with or to any movable thing anything which the law does not specifically forbid him to do with or to it, and the right to prevent all other persons from doing therewith or thereto anything whatever which they are not specifically authorised to do, either by law or by his consent, is said to be the general owner of that thing, and that thing is said to be his property, although he may have limited the above-mentioned rights respecting it as regards particular persons by contract.

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capable of being stolen. The definition of theft turns on the doctrine of possession (see Note XI.), and this is unintelligible except in relation to the doctrine of property.

<sup>1</sup> 2 Austin, Jurisprudence, 876, 965.

<sup>1</sup> ARTICLE 306.

## POSSESSION.

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

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

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

If a servant receives anything for his master from a third person, not being a fellow-servant, he has the possession as distinguished from the custody of it, until he has put it into his master's possession, by putting it into a place or thing belonging to his master, or by some other act of the same sort, whether the servant himself has or has not the custody of that place or thing.

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

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

<sup>1</sup> See Note XI.

*Illustrations.*

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

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

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

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

(5.) <sup>5</sup> A is clerk to B, a banker, money is paid to A on B's account, A keeps it for a short time, and then puts it into the till. The money is in A's possession till it is put into the till, when it passes into B's possession, though A may have the custody of it.

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

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

(8.) <sup>8</sup> B sends his servant A with a cart of B's to fetch coals for B from C. A receives the coals from C, carries them in

<sup>1</sup> Founded on 1 Hale, P. C. 506.

<sup>2</sup> *R. v. Pratt*, 1854, D. & P. 360.

<sup>3</sup> *R. v. John Smith*, 1852, 2 Den. 449.

<sup>4</sup> *Cartwright v. Green*, 1803, 8 Ves. 405 ; *Merry v. Green*, 1841, 7 M. & W. 623.

<sup>5</sup> *Bazeley's Case*, 1799, 2 Leach, 835. This case led to the first Act against embezzlement by clerks and servants. No opinion was publicly delivered in it, but the judges seem to have considered that the act was not felony. Several similar cases are quoted in the argument.

<sup>6</sup> *R. v. Kay*, 1857, D. & B. 231. See Bramwell, B.'s, remarks on this case in *R. v. Middleton*, 1873, 2 C. C. R., at p. 58.

<sup>7</sup> *R. v. G. Thompson*, 1862, L. & C. 225.

<sup>8</sup> *R. v. Reed*, 1853, D. & P. 168, 257.

sacks on his back to the cart, puts them into the cart, and drives it back to B. The cart is throughout in B's possession, but in A's custody. The coals are in A's possession whilst he is carrying them on his back to the cart, but as soon as they are deposited in the cart they are in the possession of B, though both coals and cart continue to be in the custody of A.

(9.)<sup>1</sup> A, B's servant, obtains by false pretences B's money from C, another of B's servants. The money after such obtaining is still in B's possession.

(10.)<sup>2</sup> A, B's servant, obtains by false pretences from C, B's cashier, the property in coins which belonged to B till C gave them to A. The possession of the coins is in A.

(11.)<sup>3</sup> A, B, and C are all servants to D. D's customers pay money to C, who pays it to A, who pays it to B. B, A, and C each keep separate accounts of their receipts and payments, so as to be checks on each other. Money of D's paid by C to A is in A's possession, and not merely in his custody.

## ARTICLE 307.

### SPECIAL OWNER.

<sup>4</sup> Every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not divested if the special owner parts with the possession under a mistake.

## ARTICLE 308.

### POSSESSOR SPECIAL OWNER AS AGAINST STRANGER.

Every person who has obtained by any means the possession of any movable thing is deemed to be the special owner

<sup>1</sup> *R. v. Cooke*, 1871, 1 C. C. R. 295; and see *R. v. Robins*, 1854, Dear. 418.

<sup>2</sup> *R. v. H. Thompson*, 1862, L. & C. 233.

<sup>3</sup> *R. v. Masters*, 1848, 1 Den. C. C. 332. Mr. Greaves disapproves of this decision, and thinks that in such a case the money would be in the master's possession as soon as the first servant received it on his account. *R. v. Murray*, 1830, Moo. C. C. 276, perhaps favours this view, but the whole doctrine of possession is so arbitrary and unreal that it is hard to say that one view is better or worse than another.

<sup>4</sup> *R. v. Vincent*, 1852, 2 Den. 464.



thereof, as against any person who cannot show a better title thereto.

*Illustrations.*

(1.) <sup>1</sup> A finds a bezoar stone in the street and shows it to B, a jeweller, to ascertain its value. B keeps it. A has a right to the stone as against B.

(2.) <sup>2</sup> A steals B's watch. C picks A's pocket of the watch. C steals from A.

ARTICLE 309.

TAKING AND CARRYING AWAY.

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

*Illustrations.*

(1.) <sup>3</sup> A removes a parcel from one end of a waggon to another. This is a taking and carrying away.

(2.) <sup>4</sup> A lifts a sword partly out of its scabbard. A has taken and carried away the sword.

(3.) <sup>5</sup> A causes a horse to be led out of a stable for him to mount. A has led away the horse.

(4.) <sup>6</sup> A, a postman, instead of delivering a letter in due course, or bringing it back in his pouch, which would be his duty if he could not deliver it, puts it in his pocket intending to steal it. This is a taking and carrying away.

<sup>1</sup> *Armory v. Delamirie*, 1722, 1 S. L. C. 385.

<sup>2</sup> Founded on 1 Hale, P. C. 507.

<sup>3</sup> *Costel's Case*, 1782, 1 Lea. 236.

<sup>4</sup> *R. v. Walsh*, 1824, 2 Russ. Cr. 126 (from MS. of Bayley, J.), and 1 Moo. C. C. 14. An odd point would arise if the sword and scabbard were merely twisted round in the place which they occupied before they were touched. I suppose this would not be an asportation.

<sup>5</sup> *R. v. Pitman*, 1826, 2 C. & P. 423.

<sup>6</sup> *R. v. Poynton*, 1862, L. & C. 247.

(5.)<sup>1</sup> A snatches a diamond earring from a lady's ear, tearing it out of the ear; it drops from his hand into her hair, and is found there by her afterwards. A has taken and carried away the earring.

(6.)<sup>2</sup> Goods are tied to a string, one end of which is fastened to the bottom of a counter. A takes and carries them as far as the string will permit. A has not carried away the goods.

(7.)<sup>3</sup> A has gas-pipes in his house running through a meter, such pipes being his property. In order to prevent the gas from passing through the meter he puts a connecting pipe between the pipe leading to, and the pipe leading from, the meter, and so diverts the gas from its proper course. This is a taking and carrying away of the gas.

### ARTICLE 310.

#### BAILMENT DEFINED.

When one person delivers, or causes to be delivered, to another any movable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered, the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee.<sup>4</sup>

<sup>1</sup> *Lafrie's Case*, 1784, 1 Lea. 320; *R. v. Simpson*, 1854, D. & P. 421. In this case a watch and chain snatched out of one button-hole caught in another.

<sup>2</sup> 2 East, P. C. 556.

<sup>3</sup> *R. v. White*, 1853, D. & P. 203.

<sup>4</sup> *Coggs v. Bernard*, 1702, 2 S. L. C. 201, for bailment in general. For the application of the doctrine to criminal law, *R. v. Hassell*, 1861, L. & C. 58. It seems that a married woman may be a bailee: *R. v. Robson*, 1861, L. & C. 93. Since the Married Woman's Property Act (33 & 34 Vict. c. 93) it would seem clear that in many cases she can.

## ARTICLE 311.

OFFENCES RELATING TO PROPERTY COMMITTED BY AND  
AGAINST MARRIED WOMEN.

<sup>1</sup> Every married woman, whether married before, on, or after 1st January, 1883, has in her own name, against all persons whomsoever, including her husband, the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if such property belonged to her as a *feme sole*, provided that no criminal proceeding can be taken by any wife against her husband by virtue of the Married Woman's Property Act 1882, while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife.

<sup>2</sup> A wife doing any act with respect to the property of her husband which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife, under this article is in like manner liable to criminal proceedings by her husband.

<sup>1</sup> 45 & 46 Vict. c. 75, s 12.

<sup>2</sup> Ibid. s. 16 (see Article 327 below).

## CHAPTER XXXV

<sup>1</sup> *THINGS CAPABLE OR NOT OF BEING STOLEN.*

## ARTICLE 312.

## THINGS CAPABLE OF BEING STOLEN.

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

## ARTICLE 313.

## MOVABLE THINGS—LAND—THINGS FIXED TO LAND.

<sup>2</sup> All movable things are capable of being stolen, whether they are naturally movable or whether they were, before being severed therefrom, a part of, or built upon, or growing out of, or fixed in a permanent manner to, the soil of the earth.

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

Things growing out of, built upon, permanently attached to, or forming part of the soil, cannot be stolen whilst they continue to be so attached to it or to form part of it, or by the act of severance, <sup>3</sup> except in the cases provided for in Articles 352 and 353 (c) to (g).

## ARTICLE 314.

## TITLE-DEEDS AND CHOSSES IN ACTION.

<sup>4</sup> Documents which in any way relate to the title to real property, and documents which constitute evidence of any

<sup>1</sup> 3 Hist. Cr. Law, ch. xxix. pp. 121-176.

<sup>2</sup> 2 Russ. Cr. 209-210.

<sup>3</sup> See also Article 322, para. (3).

<sup>4</sup> 2 Russ. Cr. 217-219.

right of action against any person, are not capable of being stolen, unless they fall within the terms of Article 349 or the first paragraph of Article 354; but documents of title to chattels and tokens which represent them are capable of being stolen.

### *Illustrations.*

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

(2.)<sup>2</sup> A pawnbroker's ticket is capable of being stolen.

## ARTICLE 315.

### WATER—GAS—ELECTRICITY.

<sup>3</sup> Running or standing water is not capable of being stolen  
<sup>4</sup> unless [it seems] it is stored in pipes or reservoirs for the purpose of sale or use, in which case it is capable of being stolen, although money penalties are provided for an improper use of it.

<sup>5</sup> Gas is capable of being stolen.

<sup>6</sup> Electricity is capable of being stolen.

<sup>1</sup> *R. v. Watts*, 1854, D. & P. 326.

<sup>2</sup> *R. v. Morrison*, 1859, Bell, C. C. 158. It has been held that a railway ticket is capable of being stolen: *R. v. Boulton*, 1849, 1 Den. 508. In *R. v. Kilham*, 1870, 1 C. C. R. 261, it is said that "the reasons for this decision do not very clearly appear." It is, indeed, very hard to reconcile the decision with the established principle as to "choses in action," for what is a railway ticket except evidence of a contract by the railway to carry the holder?

<sup>3</sup> "Water is a movable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary transient usufructuary property therein" (Blackstone, 1 Steph. Com. 170-171, 11th ed.) As to water in standpipes, see *Ferens v. O'Brien*, 1883, 11 Q. B. D. 21.

<sup>4</sup> Would a man who drew a pail of water out of a reservoir covering many acres be guilty of theft? Hardly, I should think.

<sup>5</sup> *R. v. Firth*, 1869, L. R. 1 C. C. R. 172; *R. v. White*, 1853, D. & P. 203.

<sup>6</sup> 45 & 46 Vict. c. 56, s. 23, and see Art. 353 (*h*).

## ARTICLE 316.

## TAME ANIMALS AND WILD ANIMALS IN CAPTIVITY.

(a.) <sup>1</sup> The following animals are capable of being stolen at common law ;

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

hawks kept for sport ;

wild animals in a state of captivity kept for food or profit, <sup>2</sup> but not wild animals kept in a state of captivity for curiosity.

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

<sup>3</sup> dogs, birds, beasts, and other animals ordinarily kept in a state of confinement, or for any domestic purpose.

(c.) <sup>4</sup> Animals of a base nature are not capable of being stolen either at common law or by statute unless they are ordinarily kept in a state of confinement, or for any domestic purpose, in which case they are the subjects of larceny by statute.

<sup>4</sup> An animal capable of being stolen, whatever may be its nature, does not cease to be capable of being stolen because it is permitted at certain times to wander abroad.

*Illustrations.*

(1.) <sup>5</sup> The milk of a cow, the wool on a sheep's back, honey in a hive, are the subjects of larceny at common law.

<sup>1</sup> 2 Russ. Cr. 233-239.

<sup>2</sup> 2 Russ. Cr. 238.

<sup>3</sup> 24 & 25 Vict. c. 96, ss. 18 and 21. See Article 354.

<sup>4</sup> Coke, 3rd Inst. 108, 9 ; 2 Russ. Cr. 234-239. Ferrets, so far as I know, are the only animals to which (c) has been applied in modern times. In *R. v. Searing*, 1818, R. & R. 350, "It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoner for 9s. The judges were of opinion (in 1818) that ferrets though tame and saleable could not be the subject of larceny." I know not whether a ferret would fall within (b) or not. It is necessary to mark the distinction between animals which are the subject of larceny at common law and those which are the subject of larceny by statute, because it is recognised in several statutes. See 24 & 25 Vict. c. 96, ss. 21, 23, Oke's Synopsis, p. 406.

<sup>5</sup> 2 Russ. Cr. 233-4.

(2.)<sup>1</sup> Young partridges or pheasants reared under a domestic fowl are regarded as tame, and as such are the subjects of larceny at common law till they become wild.

(3.)<sup>2</sup> Deer in a paddock, rabbits in a hutch, are the subjects of larceny at common law. Bears or monkeys kept in dens are the subjects of larceny by statute.

(4.)<sup>3</sup> Young partridges reared under a common hen do not cease, so long as they are practically under the dominion of their owner, to be the subjects of larceny at common law because they are allowed to wander abroad.

(5.)<sup>4</sup> Pigeons in a dovecot are the subjects of larceny at common law although they are allowed to fly about.

### ARTICLE 317.

#### WILD ANIMALS LIVING AND DEAD.

<sup>5</sup> Living wild animals in the enjoyment of their natural liberty, whether they have escaped from confinement or not, are not capable of being stolen although they may be game, and although it may be an offence to pursue or kill them;<sup>6</sup> but the dead body of such an animal is capable of being stolen, and it becomes the property of the person on whose ground the animal dies.<sup>7</sup>

### ARTICLE 318.

#### DEAD BODIES.

<sup>8</sup> The dead body of a human being is not capable of being stolen.

<sup>1</sup> *R. Shickle*, 1868, 1 C. C. R. 158; *R. v. Cory*, 1864, 10 Cox, C. C. 23.

<sup>2</sup> 2 Russ. Cr. 234-238.

<sup>3</sup> *R. v. Shickle*, 1868, 1 C. C. R. 158.

<sup>4</sup> *R. v. Cheafor*, 1851, 2 Den. 361. It has not, however, been decided that pigeons can be stolen whilst actually flying about apparently at liberty. I suppose the question would turn on the knowledge of the offender that the pigeons were tame.

<sup>5</sup> 2 Russ. Cr. 236.

<sup>6</sup> See Chapter XLIX. Oysters are the subject of larceny by statute; see Art. 353 (g), but they can hardly be called "living wild animals."

<sup>7</sup> *Blades v. Higgs*, 1865, 11 H. L. C. 621; 34 L. J. (C.P.) 286. But see *R. v. Townley*, 1870, 1 C. C. R. 315, and Article 322, 3rd paragraph.

<sup>8</sup> *R. v. Haynes*, 2 East, P. C. 652. Can skeletons and anatomical preparations of parts of dead bodies, or which formerly formed parts of bodies when living, be stolen?—teeth, for instance, intended to be used as false teeth.

## ARTICLE 319.

## THINGS ABANDONED.

<sup>1</sup> Things of which the ownership has been abandoned are not capable of being stolen.

*Illustrations.*

(1.) <sup>2</sup> To convert treasure trove before office found is not theft.

(2.) <sup>3</sup> To convert wreck of the sea is not theft [if the owner is unknown].

(3.) <sup>4</sup> To convert goods absolutely lost to the owner, and as to which there is no reasonable ground for believing that the owner can be found, is not theft.

## ARTICLE 320.

## THINGS OF NO VALUE.

<sup>5</sup> Things of no value to any one are not capable of being stolen, but things valuable to no one but the owner are capable of being stolen.

*Illustration.*

<sup>6</sup> The paper and stamps of the notes of a firm of country bankers which have been paid by the London correspondent and which are capable of being reissued by the country bankers may be stolen, because they are valuable to the country bankers (as saving the expense of printing new notes), though to no one else.

<sup>1</sup> 2 East, P. C. 606-7.

<sup>2</sup> 3 Inst. 108. It is however a misdemeanor. See Article 371.

<sup>3</sup> 1 Hawk. P. C. 149, s. 38. This must be understood of wreck of the sea unclaimed, and not of wreck not forming part of or belonging to a vessel in distress, as to stealing which see Article 351 (g) and Oke's Synopsis, p. 682. Penalties for various offences as to wreck are contained in the Merchant Shipping Act, 1894, for the contents of which previous to consolidation see 1 Oke, p. 614.

<sup>4</sup> The law as to finding property is more fully stated in Article 328.

<sup>5</sup> *Clarke's Case*, 1809, 2 Lea. 1036.



## CHAPTER XXXVI.

## \* THEFT IN GENERAL.

## ARTICLE 321.

## DEFINITION OF THEFT.

<sup>1</sup> THEFT is the act of dealing, from any motive whatever, unlawfully and without claim of right with anything capable of being stolen, in any of the ways in which theft can be committed, with the intention of permanently converting that thing to the use of any person other than the general or special owner thereof. Provided that the offences defined in Articles 368 and 369 do not amount to theft.

The ways in which theft can be committed are specified in Articles 322 to 326, both inclusive. In those articles the word "convert" means such a conversion as is hereinbefore specified.

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

*Illustrations.*

(1.) <sup>2</sup> A takes B's horse from his stable and backs him down a coal-pit a mile off, in order to prevent the horse from being identified in the trial of C for stealing it. A steals B's horse.

(2.) <sup>3</sup> A, a post-office clerk, drops two letters down a water-closet in order that a mistake which he had made in sorting them might not be discovered. A steals the letters.

(3.) <sup>4</sup> A, a servant, gets B's letters from the post-office, and destroys one of them written to B by C, A's mistress, making inquiries of B as to A's character, delivering the rest. A steals the letter.

(4.) <sup>5</sup> A, a puddler, throws an iron axle into his furnace in order to increase the apparent amount of iron puddled therein,

\* 3 Hist. Cr. Law, ch. xxviii. pp. 121-176.

<sup>1</sup> *R. v. Holloway*, 1848, 1 Den. 370.

<sup>2</sup> *R. v. Cabbage*, 1815, R. & B. 292; 2 Russ. Cr. 205.

<sup>3</sup> *Wynn's Case*, 1848, 1 Den. 365.

<sup>4</sup> *R. v. Jones*, 1846, 1 Den. 188.

<sup>5</sup> *R. v. Richards*, 1844, 2 Russ. Cr. 207; 1 C. & K. 532. This case is not altogether easy to reconcile with *R. v. Webb*; see Illustration (9).

on which A's wages depend. The axle, worth 5s., is destroyed, though the iron of which it is composed, and which is much less valuable, remains for the owner. A has stolen the axle.

(5.)<sup>1</sup> A, without his master's leave, takes his master's corn to feed his master's horses. This was theft till the passing of 26 & 27 Vict. c. 103.

(6.)<sup>2</sup> A gleans corn, not having, but believing himself to have, a legal right to do so. This is not theft.

(7.)<sup>3</sup> B, a gamekeeper, takes snares set by A, a poacher, and a dead pheasant caught therein. A, honestly believing that the snares and pheasant were his property, and that he had a legal right to them, forces B by threats to return them. This is not robbery, and if no violence were used would not be theft.

(8.)<sup>4</sup> A, believing that B owes him £11, and seeing B receive £7, knocks down B and tries to get the £7 out of his pocket, saying, "Pay me the eleven sovereigns you owe me." This is not robbery, and if no violence were used would not be theft.

(9.)<sup>5</sup> The ore in a mine belongs to adventurers, and is to be excavated by tributers. One set of tributers are to be paid a larger sum in the pound than the other set for the ore excavated by them. The ore excavated by each set is placed in a heap by itself. A, one of the tributers, moves a quantity of ore from the heap to be paid for at the lower to the heap to be paid for at the higher rate. A has not stolen the ore.

(10.)<sup>6</sup> Workmen in the glove trade are paid according to the number of gloves finished by them. A (a workman) takes gloves from his master's warehouse and puts them in the place where the newly finished gloves are put to be counted, so as to increase the apparent number of newly finished gloves, and with intent fraudulently to obtain payment for the gloves so removed from the warehouse. This is not theft.

(11.)<sup>7</sup> B uses many bags in his trade, and is supplied with them by C. A, B's servant, takes old bags supplied by C to B from B's house and puts them in a place outside B's house,

<sup>1</sup> *R. v. Morfit*, 1816, R. & R. 307.

<sup>2</sup> 2 Russ. Cr. 203; commenting on Woodfall, Landlord and Tenant.

<sup>3</sup> *R. v. Hale*, 1828, 3 C. & P. 409.

<sup>4</sup> *R. v. Boden*, 1844, 1 C. & K. 395.

<sup>5</sup> *R. v. Webb*, 1835; 1 Moo. 431. By 24 & 25 Vict. c. 96, s. 39, which re-enacts an earlier Act passed in consequence of this decision, this is now felony; see Article 369.

<sup>6</sup> *R. v. Poole*, 1857, D. & B. 345; *R. v. Holloway*, 1848, 1 Den. 370, is similar in principle.

<sup>7</sup> *R. v. Manning*, 1852, D. & P. 21; *R. v. Hale*, 1848, 1 Den. 381, is very like this case.

where new bags were habitually put by C. C, by concert with A, claims payment for the bags from B as for bags newly supplied. A is guilty of theft, and C is an accessory before the fact.

## ARTICLE 322.

### THEFT BY TAKING AND CARRYING AWAY.

<sup>1</sup> Theft may be committed by taking and carrying away without the consent of the owner (even if he expects and affords facilities for the commission of the offence) anything which is not in the possession of the thief at the time when the offence is committed,<sup>2</sup> whether it is in the possession of any other person or not.

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

<sup>3</sup> If the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking and carrying away, and if the taking and carrying away is one continuous act, such taking and carrying away is not theft (except in the cases provided for in Articles 352, 353 (c), (d), (e), (f), (g), (h)). It seems that the taking and carrying away are deemed to be continuous if the intention to carry away after a reasonable time exists at the time of the taking.

### *Illustrations.*

(1.) <sup>4</sup> A finds lost property, knowing who the owner is, and converts it. This is theft.

<sup>1</sup> Cases in Illustrations.

<sup>2</sup> Property in no one's possession is said to be constructively in the possession of its owner: the object of this fiction is to satisfy a supposed necessity for showing that the taking in theft must be a taking out of some one's possession.

<sup>3</sup> *R. v. Townley*, 1870, 1 C. C. R. 315.

<sup>4</sup> See Article 328 on "Finding."

(2.) <sup>1</sup> A, a trespasser, finds a dead rabbit lying in a wood, of which he is not the owner, and converts it. This is theft.

(3.) <sup>2</sup> A carpenter finds nine hundred guineas in a bureau lent to him to repair, and converts them. This is theft.

(4.) <sup>3</sup> A finds iron dropped from some canal boat or other, at the bottom of a canal, from which the water has been let off, and converts it. This is theft.

(5.) <sup>4</sup> A instigates B, C's servant, to help A to steal money in C's desk. B tells his master, C. C, in order to detect A, tells B to go on with the business, and so arranges matters as to give A and B opportunities to break open the desk and take the money. This is theft in A.

(6.) <sup>5</sup> A snatches a bundle from B's hand, and runs away with it. This is theft, and not robbery, as the violence used was only to get possession of the bundle.

(7.) <sup>6</sup> A, at a mock auction, knocks down goods to B, who has not bid for them, pretending that she has. On B's offering to go, A says she shall not be allowed to go unless she pays for the goods knocked down to her, which she does. This is theft at least, and perhaps robbery.

(8.) <sup>7</sup> A snatches a sword worn by B. A and B struggle for the sword, and A gets it. This is robbery.

(9.) <sup>8</sup> A, in cutting the string by which a basket is tied, with intent to steal it, accidentally cuts the wrist of the owner, who

<sup>1</sup> *Blades v. Higgs*, 1865, 11 H. L. C. 621.

<sup>2</sup> *Cartwright v. Green*, 1803, 8 Ves. 405.

<sup>3</sup> *R. v. Rowe*, 1859, Bell, C. C. 93. In this case, Pollock, C.B., said the company had "sufficient possession to maintain an indictment for larceny." The "possession" in question could scarcely be called actual.

<sup>4</sup> *R. v. Egginton*, 1801, 2 East, P. C. 666. This was similarly decided by the Romans, "illud quaesitum est cum Titius servum Mævii sollicitaverit, ut quasdam res domino subriperet et ad eum perferret, et servus eas ad Mævium pertulerit. Mævius autem dum vult Titium in ipso delicto deprehendere permiserit servo quasdam res ad eum perferre, utrum furti an servi corrupti iudicio teneatur Titius an neutro? Et cum nobis super hac dubitatione suggestum est et antiquorum prudentium super hoc altercationes perspeximus quibusdam neque furti, neque servi corrupti actionem præstantibus, quibusdam furti tantummodo: nos huiusmodi calliditati obviam euntes per nostram decisionem sancimus non solum furti actionem sed et servi corrupti contra eum dari."—Institutes, iv. i. 8.

<sup>5</sup> Six cases all to this effect are collected in 2 Russ. Cr. 90.

<sup>6</sup> *R. v. McGrath*, 1869, 1 C. C. R. 205. The case of *R. v. Morgan*, 1854, D. & P. 395, is somewhat similar; see, too, *R. v. Lovell*, 1881, 8 Q. B. D. 185, which is to the same effect.

<sup>7</sup> *Davies' Case*, 1712, 2 East, P. C. 709.

<sup>8</sup> *R. v. Edwards*, 1843, 4 Cox, C. C. 32; 2 Russ. Cr. 91.

at the same moment tries to seize and keep it. The cut causes the owner to withdraw her hand, and A gets the basket. This is theft, but not robbery, because the actual violence was not intentional.

(10.) <sup>1</sup> A, B, and C surround D in such a way as to make resistance by D practically useless, and take his watch, without actual force or threat. This is robbery.

(11.) <sup>2</sup> A mob of seventy persons demands money of a person, threatening, if he refuses, to tear his mow of corn and level his house; he gives it. This is robbery.

(12.) <sup>3</sup> A compels B to give him money, by threatening to accuse A of an infamous crime. This is robbery.

(13.) <sup>4</sup> A rips lead off a church, to the roof of which it is fixed, and carries it away. This is not theft at common law, though it is by statute.

(14.) <sup>5</sup> A cuts down timber or growing crops and carries them away immediately. This is not theft at common law, though it is by statute.

(15.) <sup>6</sup> A, a poacher, kills a number of rabbits, hides them in a ditch on the ground of the owner of the soil on which they were killed, and returns several hours afterwards and carries them away, having all along intended to do so at his convenience. This is not theft.

## ARTICLE 323.

### THEFT BY A SERVANT. EMBEZZLEMENT.

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

<sup>7</sup> When a clerk, or servant, or person employed in the capacity of a clerk or servant, converts anything received by

<sup>1</sup> *Hughes's Case*, 1825, 1 Lewin, 301.

<sup>2</sup> *Simon's Case*, 1773, 2 East, P. C. 731.

<sup>3</sup> See cases collected in 2 Russ. Cr. 99-110. Some distinctions arise upon this which I do not notice, because this most odious crime is now dealt with specially by statute. See *post*, Article 340.

<sup>4</sup> See authorities collected 2 Russ. Cr. 209-10.

<sup>5</sup> *Ibid*.

<sup>6</sup> *R. v. Townley*, 1870, 1 C. C. R. 315.

<sup>7</sup> See Chapter XXXVII.

him from another person for his master or employer, he is deemed to have stolen it, but his offence is commonly called embezzlement, and is distinguished from theft for the purposes and in the manner mentioned in Chapter XXXVII.

*Illustrations.*

(1.)<sup>1</sup> A carter converts to his own use a cart which he is driving for his master. He commits theft.

(2.)<sup>2</sup> A is employed by B to take pigs to C to be looked at, and to bring them back to B, whether C wishes to buy them or not. A sells the pigs to some one else, and keeps the money. This is theft.

(3.)<sup>3</sup> A sheriff's officer, in possession of goods under a writ of fi. fa., sells part of them. This is theft, as such a person is in the position of a servant.

(4.)<sup>4</sup> A guest at a tavern carries off a piece of plate set before him to drink from. This is theft, because A had only a permission to use the plate for a special limited purpose.

## ARTICLE 324.

### THEFT BY A FALSE PRETENCE.

Theft may be committed by fraudulently obtaining from the owner a transfer of the possession of a thing, the owner intending to reserve to himself his property therein, and the offender intending, at the time when the possession is obtained, to convert the thing without the owner's consent to such conversion.<sup>5</sup>

*Illustrations.*

(1.)<sup>6</sup> A fraudulently persuades B to allow A to take two silver ewers to show to A's master, to choose one if he pleased. A sells the ewers and keeps the money. This is theft.

<sup>1</sup> *Robinson's Case*, 1755, 2 East, P. C. 565.

<sup>2</sup> *R. v. Harvey*, 1840, 9 C. & P. 353.

<sup>3</sup> *R. v. Eastall*, 1822, 2 Russ. Cr. 250.

<sup>4</sup> 1 Hale, P. C. 506.

<sup>5</sup> *R. v. Hollis*, 1883, 12 Q. B. D. 25, a case of "ringing the changes."

<sup>6</sup> *R. v. Davenport*, 1826, 2 Russ. Cr. 147.

(2.)<sup>1</sup> A, by pretending to be B, fraudulently obtains B's goods from C, a carrier, to whom they were intrusted by B. This is theft, as the carrier transferred the possession only.

(3.)<sup>2</sup> A fraudulently bargains with B for the purchase by A of goods for ready money, and fraudulently induces B to let A have the goods, pretending that he is then about to pay B the price. A then takes away the goods, and does not pay the price. This is theft, as in such cases the purchaser does not mean to transfer the property till the money is paid.

(4.)<sup>3</sup> A fraudulently agrees to sell a horse at a fair to B for £8 down and £15 on delivery; B pays A the £8, which A keeps though he never delivers the horse to B. This is theft in A, as B did not mean to part with his property in the £8 till the horse was delivered to him.

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

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

(7.)<sup>6</sup> B pays five shillings to A on a fraudulent assurance that A will pay forty shillings to B if a certain horse wins a race; while the race is being run A takes the money away. This is theft whether the horse wins or not.

(8.)<sup>7</sup> A pretends to put three shillings in a purse, and then sells the purse and its contents for one shilling. This is not theft.

• (9.)<sup>8</sup> A, B's wife, by a forged order gets money standing to

<sup>1</sup> *R. v. Loughsheith*, 1826, 2 Russ. Cr. 150; 1 Moo. C. C. 137. There are a great number of other cases to the same effect; e.g. *R. v. McKale*, 1868, 1 C. C. R. 125.

<sup>2</sup> Four cases to this effect are stated in 2 Russ. Cr. 157-159.

<sup>3</sup> *R. v. Russell*, 1892, 2 Q. B. 312.

<sup>4</sup> *R. v. Jackson*, 1826, 1 Moo. 119. The offence would be obtaining goods by false pretences.

<sup>5</sup> *R. v. Bunce*, 1859, 1 F. & F. 523.

<sup>6</sup> *R. v. Buckmaster*, 1887, 20 Q. B. D. 182.

<sup>7</sup> *R. v. Solomon*, 1890, 62 L. T. N. S. 672; 17 Cox, C. C. 93. The judges said that if any offence was committed it was obtaining money by false pretences, because the prosecutor intended to part with both the property in and the possession of his shilling. It seems doubtful whether A's trick amounts to a false pretence, as it also partakes of the nature of a wager that he can deceive B by his sleight of hand.

<sup>8</sup> *R. v. Prince*, 1868, 1 C. C. R. 150.

B's credit at B's bankers. This is not theft from the bankers, as the cashier had a general authority to part with the banker's money, and meant to do so.

## ARTICLE 325.

### THEFT BY TAKING ADVANTAGE OF A MISTAKE.

<sup>1</sup> Theft may be committed by <sup>1</sup> converting property which the general or special owner has given to the offender under a mistake which the offender has not caused, but which he knows to be such at the time when it is made, and of which he fraudulently takes advantage.

<sup>2</sup> But it is doubtful whether it is theft fraudulently to convert property given to the person converting it under a mistake of which that person was not aware when he received it.

### *Illustrations.*

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

<sup>1</sup> *R. v. Middleton*, 1873, 2 C. C. R. 38. Perhaps "by knowingly accepting with intent to convert" would be a more accurate way of expressing the effect of this case.

<sup>2</sup> *R. v. Ashwell*, 1885, 16 Q. B. D. 190, was reserved in consequence of the expression of doubt in the text. Keogh, meaning to lend Ashwell a shilling, put into his hand a coin which at the time each believed to be a shilling. It was a sovereign, and Ashwell found this out an hour afterwards and kept it. The question whether this was larceny or not was twice argued, the last time before fourteen judges, of whom I was one. Seven thought that it was, and seven that it was not larceny, and the result was that the conviction stood. In *R. v. Flowers*, 1886, 16 Q. B. D. 643, the facts of which appear to me not distinguishable from those in *R. v. Ashwell*, several of the judges who affirmed the conviction of Ashwell explained that they did not mean by that decision to throw doubt on the rule that an innocent taking succeeded by a fraudulent misappropriation is not larceny. *R. v. Ashwell* must therefore be regarded as at most an authority for a case precisely similar in all its circumstances, but even this is not clear. No doubt in *R. v. Windsor*, 1860, 8 H. L. Ca. 369, Lord Campbell treated *R. v. Millis* as an authority binding on the House, though it was decided in a case of equality of votes by the help of the maxim "*presumitur pro neganti*"; but I doubt whether this would apply to *R. v. Ashwell*. The Court being equally divided no judgment



(2.)<sup>1</sup> A gives a cabman a sovereign for a shilling. The cabman, seeing that it is a sovereign, keeps it. This is theft of the sovereign. If he does not discover the mistake at once, but subsequently, it is doubtful whether he commits theft or not.

(3.)<sup>2</sup> A receives a letter containing a cheque. The letter is addressed, and the cheque is payable, to another person of the same name as A. A receives the letter innocently, but on discovering the mistake made converts the cheque to his own use. This is not theft.

(4.)<sup>3</sup> A buys a bureau at a public auction, and finds in it property not intended to be sold, which he converts to his own use. This is theft.

## ARTICLE 326.

### THEFT BY BAILEES.

<sup>4</sup>Theft may be committed by the conversion by a bailee of the thing bailed, but this does not extend to any offence punishable on summary conviction.

<sup>5</sup>This article applies to bailments to infants incapable of entering into a contract of bailment by reason of infancy

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was given, and therefore the conviction was not quashed, but I do not see what more can be said. The maxim "*præsumitur pro neganti*," it might surely be argued, would apply, if at all, to the view which negatived Ashwell's guilt. For myself I doubt its application to the case. On the whole there is strong evidence of the correctness of my opinion that the matter is doubtful, and I have accordingly left my statement as it was.

<sup>1</sup> Per eight Judges, in *R. v. Middleton*, 1827, C. C. R. at p. 45.

<sup>2</sup> *R. v. Mucklow*, 1841, 1 Moo. C. C. 160; *R. v. Davies*, 1856, D. & P. 640.

<sup>3</sup> *Merry v. Green*, 1841, 7 M. & W. 623. There was a question in this case whether the bureau was not sold with its contents. *Cartwright v. Green*, 1803, 8 Ves. 405, is also precisely similar. I am unable to distinguish these cases from those on which Illustration (3) is founded. It is remarkable that in the judgments, and apparently in the argument (which is not reported), in *R. v. Middleton*, no notice is taken of any of these cases, nor are the cases about the bureaux referred to in *R. v. Davies*, which was decided, without argument, solely on the authority of *R. v. Mucklow*. *Cartwright v. Green* is not referred to in *R. v. Mucklow*, which was decided before *Merry v. Green*. *Merry v. Green* does not refer to *R. v. Mucklow*. The result is that the cases appear to contradict each other. This is also the view of Mr. Justice Cave in his judgment in *R. v. Ashwell*.

<sup>4</sup> 24 & 25 Vict. c. 96, s. 3. For an instance of this offence, see *R. v. Ozenham*, 1876, 46 L. J. (M. C.) 125. For a case in which it was doubtful whether or not there was evidence of a bailment, see *R. v. De Banks*, 1884, 13 Q. B. D. 29. See also *R. v. Ashwell* supra.

<sup>5</sup> *R. v. MacDonald*, 1885, 15 Q. B. D. 323.

[and it is submitted to bailments upon a void, and perhaps upon an illegal, consideration].

## ARTICLE 327.

## BY AND FROM WHOM THEFT MAY BE COMMITTED.

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

<sup>1</sup> Theft may be committed by a member of a <sup>2</sup> co-partnership, or by one of two or more beneficial owners of any money, goods, effects, bills, notes, securities, or other property, to the prejudice of the other co-partners or beneficial owners.

<sup>3</sup> Theft may be committed by a member of a corporation to the prejudice of that corporation upon a thing which is the property of the corporation.

<sup>4</sup> A married woman cannot (<sup>5</sup> so long as she lives with her husband) commit theft upon things belonging to her husband.

If any other person assists a married woman (<sup>5</sup> living with her husband) in dealing with things belonging to her husband in a manner which would amount to theft in the case of other persons, <sup>6</sup> such dealing is not theft <sup>7</sup> unless the person so assisting commits or intends to commit adultery with the woman, <sup>8</sup> in which case he, but not she (<sup>5</sup> unless she

<sup>1</sup> 31 & 32 Vict. c. 116, s. 1.

<sup>2</sup> A co-partnership means an association for profit. A Christian Young Men's Society is not a co-partnership, though its members may be joint beneficial owners. *R. v. Robson*, 1885, 16 Q. B. D. 140.

<sup>3</sup> Roscoe's Crim. Ev. 11th ed. 639. This is Mr. Roscoe's inference from Hale, P. C. 513, and appears to be correct.

<sup>4</sup> 1 Hale, P. C. 514.

<sup>5</sup> These parentheses seem to be required since 45 & 46 Vict. c. 75, s. 12 (The Married Woman's Property Act 1882). See Article 311.

<sup>6</sup> *Harrison's Case*, 1756, 2 East. P. C. 539.

<sup>7</sup> *R. v. Avery*, 1859, Bell, 150.

<sup>8</sup> *R. v. Tolfree*, 1829, Mood. 243; *R. v. Thompson*, 1850, 1 Den. 549; *R. v. Tollett*, 1841, Car. and Mar. 112; *R. v. Featherstone*, 1854, D. & P. 369; *R. v. H. Muttons*, 1865, L. & C. 511. A note to this case, 516-19, collects and reviews all the authorities on the subject. These cases were all decided before the Married Woman's Property Act 45 and 46 Vict. c. 75, ss. 12, 16.

intends to desert her husband), commits theft. <sup>1</sup> But this exception does not apply to the case of an adulterer or person intending to commit adultery, who assists a married woman to carry away her own wearing apparel only from her husband.

<sup>2</sup> It is doubtful whether the mere presence and consent of a married woman on an occasion when some person deals with her husband's goods in a way which would otherwise amount to theft excuses such person if he acts as a principal in the matter, and not as her assistant.

#### *Illustrations.*

(1.) <sup>3</sup> A bails goods to B for exportation, upon which A would become entitled to an exemption from a duty on the goods of 2s. 6d. a pound. B gives a bond to the Crown for exportation, and sends the goods in his barge to a ship to be exported. A, to get the goods duty free, takes them from B's barge. A has stolen the goods from B, and it seems it would have been larceny if no bond had been given by B.

(2.) <sup>4</sup> A gives his servant goods to carry to a certain place. A then disguises himself and robs his servant in order to charge the hundred with the robbery. This is robbery.

### ARTICLE 328.

#### <sup>5</sup> FINDING GOODS.

A finder of lost goods who converts them commits theft if at the time when he takes possession of them he intends

<sup>1</sup> *R. v. Fitch*, 1837, D. & B. 187.

<sup>2</sup> *R. v. Arery*, 1859, Bell, 153. I submit that the wife's presence and consent in such a case would be no excuse. See the history of the growth of the doctrine in the note to *R. v. Malters*.

<sup>3</sup> *R. v. Wilkinson*, 1821, 2 Russ. Cr. 243, R. & R. 470.

<sup>4</sup> *Foster*, 123-4. I have not met with any case in which a man has been convicted of theft for stealing a pledge (his own property) from a pawnbroker; but no doubt such an act would be theft. Before 31 & 32 Vict. c. 116, s. 1, a case occurred in which a part owner was convicted of stealing money from another part owner, in whose special custody it was, and who was solely responsible for its safety, the money being the property of a co-operative store: *R. v. Webster*, 1861, L. & C. 77. The same point was decided, as to the property of a friendly society, in *R. v. Burgess*, 1863, L. & C. 299.

<sup>5</sup> 3 Hist. Cr. Law, 170.

to convert them; knowing who the owner is, or having reasonable grounds to believe that he can be found;

Such a conversion is not theft

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

(b.) if he does not intend to convert the goods at the time when he takes possession of them, whether he has such knowledge or grounds of belief or not at any time.

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

#### *Illustrations.*

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

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

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

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

(5.) <sup>5</sup> A finds a bank-note in the road, with no mark upon it, and no circumstance to indicate who is the owner, or that he

<sup>1</sup> *R. v. Moore*, 1861, L. & C. 1.

<sup>2</sup> *Cartwright v. Green*, 1803, 8 Ves. 405; see, too, *Merry v. Green*, 1841, 7 M. & W. 623.

<sup>3</sup> *R. v. Rowe*, 1859, Bell, C. C. 93. This case was decided on the question of the possession of the canal company, but it illustrates the principle of finding also.

<sup>4</sup> *R. v. Glyde*, 1868, 1 C. C. R. 139.

<sup>5</sup> *R. v. Thurborn*, 1849, 1 Den. 387.

might be found. Next day he hears who the owner is, and after that changes the note and keeps the money. This is not theft.

(6.)<sup>1</sup> A finds a bank-note in the road with the owner's name upon it, and takes it, intending at the time to return it to the owner, but afterwards changes his mind and keeps it for himself. This is not theft.

(7.)<sup>2</sup> A finds an apple, which appears to have been thrown away in a road, and eats it. If A reasonably believes that the apple had been abandoned by its owner, this is not theft.

## ARTICLE 329.

### CONVERSION AFTER A TAKING AMOUNTING TO TRESPASS.

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

#### *Illustrations.*

(1.)<sup>3</sup> A, having a flock of lambs in a field, drives them out, and negligently drives away with them a lamb belonging to B which happens to be there. At the time of driving away the lamb A does not intend to convert it, but afterwards, on discovering what has happened, he sells the lamb and keeps the money. This is theft.

<sup>1</sup> *Preston's Case*, 1851, 2 Den. 353. The illustration does not represent the actual facts in *Preston's Case*, but a state of facts which the Court said might have existed and upon which the jury might have convicted him under the terms in which the very able judge who tried the case (the late M. D. Hill, Recorder of Birmingham) directed them.

<sup>2</sup> Per Rolfe, B., in *R. v. Peters*, 1843, 1 C. & K. 245; and see the summing up of Cockburn, C.J., in *R. v. Glyde*, 1868, 1 C. C. R. 140-1. In some of the cases on this subject a distinction is taken between property absolutely lost and property only mislaid; see *R. v. West*, 1854, D. & P. 402. It would appear, however, that the only real difference is that in the latter case the finder must know that the owner may be found. The distinction was useful as a step towards modifying the generality of the rule laid down by the old text writers: see e.g. 1 Hawkins, P. C. 142. "One who finds such goods as I have lost, and converts them to his own use, *animo furandi*, is no felon."

<sup>3</sup> *R. v. Riley*, 1853, D. & P. 149.

(2.) <sup>1</sup> A takes home B's umbrella from a club by mistake, and having afterwards found out that it is B's, converts it. A commits theft.

### ARTICLE 330.

#### CONVERSION AFTER INNOCENT TAKING.

If a person innocently in any way not referred to in any of the preceding Articles has the possession of any chattel, and converts such chattel, he does not commit theft, although such chattel may have been intrusted to him by the owner, or may be the proceeds of something which was intrusted to him by the owner for the owner's benefit, or for the benefit of some person other than the person so intrusted, unless such conversion falls within the provisions of Chapter XLII. or Article 335.

#### *Illustrations.*

(1.) <sup>2</sup> A assigns his goods by deed to trustees for the benefit of his creditors. The trustees do not take possession, but leave A's possession undisturbed. A makes away with the goods, intending to deprive his creditors of them. This is not theft.

(2.) <sup>3</sup> B's house being on fire, A takes B's goods to A's house for protection, B acquiescing as to some of them. A's intention at the time is to keep them for B, but A afterwards changes his mind and converts them. This is not theft.

(3.) <sup>4</sup> B gives his broker A a cheque to buy Exchequer bills. A buys Exchequer bills for B with part of the proceeds of the cheque and absconds with the rest. This is not theft.

(4.) <sup>5</sup> B, a boy unable to read, finds a cheque and gives it to A, asking A to tell him what it is. A, on various false pretences,

<sup>1</sup> Per Pollock, C.B., and Parke, B., in *Riley's Case*, p. 156; see the question of Martin, B., in *Preston's Case*, 1851, 2 Den. 359.

<sup>2</sup> *R. v. Pratt*, 1854, Dear. 360.

<sup>3</sup> *Leigh's Case*, 1800, 2 East. P. C. 694-5. This case seems to show that if A were to find a bank-note for £1000, which he knew to be B's, and were to take it up intending to give it to B, and were afterwards to be tempted to go to a gaming house, and were there to stake and lose it, he would not commit theft, and I believe that such is the law.

<sup>4</sup> *Walsh's Case*, 1812, 2 Lea. 1054. *Walsh's Case* was the occasion of the first of a series of statutes now represented by 24 & 25 Vict. c. 96, ss. 75-79. See *post*, Chapter XLII.

<sup>5</sup> *R. v. Gardner*, 1862, L. & C. 243.

withholds it from B in hopes of getting a reward from the owner. A has not stolen the cheque.

(5.) <sup>1</sup> A, the acting treasurer of a local Church Missionary Society, whose duty it is to deposit or invest the moneys received by him on account of the society, converts them. This is not theft.

(6.) <sup>2</sup> A is the treasurer of a money club, the nature of which is that certain persons deposit a weekly sum and are liable to fines in default. Loans may be made on interest to the members at A's discretion. The total amount, including interest on the loans, but subject to small deductions, to be divided amongst the members at the end of the year. A converts the balance in his hands at the end of the year. This is not theft.

#### ARTICLE 331.

##### OBTAINING BY FALSE PRETENCES NOT THEFT.

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

#### ARTICLE 332.

##### TEMPORARY TAKING IS NOT THEFT.

<sup>3</sup> It is not theft to deal with anything in any of the ways in which theft can be committed with the intention only to obtain the temporary use thereof, and not with the intention to convert it permanently to the use of some person other than the owner; but if a thing is so dealt with with the intention of totally depriving the owner of his property in it, the returning of the goods after a tempor-

<sup>1</sup> *R. v. Garrett*, 1860, 8 Cox, C. C. 368, and 2 Russ. Cr. 136-7. This would not even now be an offence. As the offender had not to pay over or return the specific coins intrusted to him, he was not a bailee; and as there was no express trust of the money created by an instrument in writing he was not within the fraudulent trustee clauses of the Larceny Act.

<sup>2</sup> Nor is it any offence at all. *R. v. Hassell*, 1861, 1 L. & C. 58.

<sup>3</sup> See Illustrations, and for the latter part of the Article note to *R. v. Phetheon*, 1840, 9 C. & P. 554, and *R. v. Trebilcock*, 1858, D. & B. 453.

ary use of them will not prevent the act from amounting to larceny.

*Illustrations.*

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

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

ARTICLE 333.

TAKING TAME ANIMAL WANDERING NOT THEFT.

<sup>3</sup> It seems that it is not theft to take and carry away an animal which, though really tame, is wandering at a distance from its habitation as if it were wild, and when it is not known to be tame by the person who takes and carries it away.

ARTICLE 334.

EVIDENCE AS TO THEFT.

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

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

<sup>1</sup> 1 Hale, P. C. 509.

<sup>2</sup> *R. v. Phillips*, 1801, 2 East, P. C. 662; *R. v. Addis*, 1844, 1 Cox, C. C. 78, is to the same effect.

<sup>3</sup> 1 Hawkins, P. C. p. 149, ch. 19, s. 40.



*Illustration.*

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

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<sup>1</sup> *R. v. Burton*, 1853, D. & P. 282. In this case Maule, J., characteristically remarked, "If a man go into the London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed."

As to the rule as to recent possession of stolen goods, many cases have been decided on the subject (see 2 Russ. Cr. 275-283), but they seem to me to come to nothing but this, that every case depends on its own circumstances, and that the nature of the thing stolen, the length of the interval between the theft and the possession, and the behaviour of the accused may all vary the force of the evidence indefinitely. The unexplained possession of a single stolen coin by a shopkeeper doing a large business in whose till it was found ten minutes after the theft, would prove nothing. The finding of a lost will ten years after its loss, locked up in the strong box of a careful person deeply interested in its temporary concealment, and peculiarly jealous of his strong box, would prove a great deal. Between these extremes there may be infinite degrees in the weight of such evidence.

## CHAPTER XXXVII

<sup>1</sup> EMBEZZLEMENT BY CLERKS AND SERVANTS

## ARTICLE 335.

EMBEZZLEMENT BY CLERKS AND SERVANTS—WHO ARE  
SERVANTS.

<sup>2</sup> WHEN a clerk or servant, or person employed in the capacity of a clerk or servant, commits theft by converting any chattel, money, or valuable security delivered to or received, or taken into possession by him for or in the name or on account <sup>3</sup> of his master or employer, his offence is called embezzlement.

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

<sup>4</sup> It is a question for a jury whether a person accused of embezzlement is a clerk or servant or not.

<sup>5</sup> A clerk or servant is a person bound either by an express contract of service or by conduct <sup>6</sup> implying such a contract to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact.

A man may be a clerk or servant

<sup>7</sup> although he was appointed or elected to the employ-

<sup>1</sup> 3 Hist. Cr. Law, 151-6. Cf. Draft Code, ss. 249, 250, 258.

<sup>2</sup> Founded on 24 & 25 Vict. c. 96, s. 68. See Art. 351 (h).

<sup>3</sup> For an instance in which money was received in the name of one person and on the account of another, see *R. v. Thorpe*, 1858, D. & B. 562.

<sup>4</sup> Bramwell, B., doubted as to this in *Walker's Case*, 1858, D. & B. at p. 602; but see *R. v. Negus*, 1873, 2 C. C. R. 34; *R. v. Tite*, 1861, L. & C. 29; *R. v. May*, 1861, L. & C. 13.

<sup>5</sup> *R. v. Negus*, sup. at p. 37 (judgment of Blackburn, J.); *R. v. Tite*, sup. at p. 33.

<sup>6</sup> *R. v. Foulkes*, 1875, 2 C. C. R. 152.

<sup>7</sup> Illustration (1).

ment in respect of which he is a clerk or servant by some other person than the master whose orders he is bound to obey ;

<sup>1</sup> although he is paid for his services by a commission or in the profits of a business ;

<sup>2</sup> although he is a member of any co-partnership, or is one of two or more beneficial owners of the <sup>3</sup>property embezzled ;

<sup>4</sup> although he is a director of a company which he serves ;

<sup>5</sup> although he is the clerk or servant of more masters than one ;

<sup>6</sup> although he acts as clerk or servant only occasionally, or only on the particular occasion on which his offence is committed.

<sup>7</sup> But an agent or other person who undertakes to transact business for another, without undertaking to obey his orders, is not necessarily a servant

because he receives a salary, or

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

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

<sup>8</sup> It seems that in order that a clerk or servant may be within the meaning of this Article it is necessary that the objects of his service should not be criminal, but a man may be such a clerk or servant although the objects of his service are in part illegal as being contrary to public policy.

<sup>1</sup> Illustrations (2) and (3).

<sup>2</sup> 31 & 32 Vict. c. 116, s. 1.

<sup>3</sup> "Money, goods, or effects, bills, notes, or securities, or other property."

<sup>4</sup> Illustration (4).

<sup>5</sup> Illustration (3).

<sup>6</sup> Illustration (5).

<sup>7</sup> Illustrations (7), (11), (12), (14), (15).

<sup>8</sup> Illustrations (15), (16).

*Illustrations.*

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

(2.) <sup>2</sup> A was cashier and collector to B at a salary of £150 a year, besides  $12\frac{1}{2}$  per cent. on the profits of the business. A was not to be responsible for losses and had no control over the management of the business. A was servant to B.

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

(4.) <sup>4</sup> A, a director of S. & Co. (Limited) canvassed, superintended bill-posting for the company, collected money due to them and paid it over to the cashier. A was the servant of S. & Co. (Limited).

(5.) <sup>5</sup> A was employed by B to go on messages when A had nothing else to do, and B was to give A whatever B chose. A was B's servant.

(6.) <sup>6</sup> A, a drover, was employed by B, a farmer, on one single occasion to drive a cow and calf to a person to whom they were sold, and to bring back the money. A was B's servant.

(7.) <sup>7</sup> A, the master of a charity school, on one particular occasion consents to get a subscription to the funds of the school, at the request of B, the treasurer of the committee of management by which A was appointed, and which managed the school. It was no part of A's duty as master to collect any subscriptions. In getting the subscription A was not the servant of B.

(8.) <sup>8</sup> A, a drover, is employed by B, a grazier, to drive oxen

<sup>1</sup> *R. v. Callahan*, 1837, 8 C. & P. 154. See now 12 & 13 Vict. c. 103, s. 15, which applies also to assistant overseers; *R. v. Cullum*, 1873, 2 C. C. R. 29; and see *R. v. Jenson*, 1835, 1 Moo. C. C. 434.

<sup>2</sup> *M'Donald's Case*, 1861, L. & C. 85.

<sup>3</sup> *R. v. Carr*, 1811, R. & R. 198. A doubt was expressed as to the last point referred to in this illustration in *R. v. Goodbody*, 1838, 8 C. & P. 665; but *R. v. Batty*, 1842, 2 Moo. C. C. 257, and *R. v. Tite*, 1861, L. & C. 29, uphold *R. v. Carr* and recognise the principle that a man may be servant to several persons at once.

<sup>4</sup> *R. v. Stuart*, 1894, 1 Q. B. 310.

<sup>5</sup> *R. v. Spencer*, 1815, R. & R. 299.

<sup>6</sup> *R. v. Hughes*, 1832, Moo. C. C. 370.

<sup>7</sup> *R. v. Nettleton*, 1830, 1 Moo. C. C. 259.

<sup>8</sup> *R. v. Goodbody*, 1838, 8 C. & P. 665. The difference between this case and *R. v. Hughes* in Illustration (6) lies in the power of sale.

to London, to sell them on the road, if possible, and to take those remaining unsold to a salesman in Smithfield. A is not B's servant.

(9.)<sup>1</sup> B engaged A, who kept a refreshment house at Birkenhead, to get orders for manure manufactured by B. A was not bound to give any definite amount of time or labour to the purpose. The manure was sent to stores under A's control, of which he was tenant, though B paid the rent, and was forwarded by A to the customers. A was paid £1 a year salary and a commission. A was B's agent, not his servant.

(10.)<sup>2</sup> A is employed by B to get orders and collect money when and where he thinks proper; A is not B's servant.

(11.)<sup>3</sup> A was engaged by B to solicit orders. He was to be paid by commission. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other person than B. A was not B's servant.

(12.)<sup>4</sup> The treasurer of a friendly society under 18 & 19 Vict. c. 63, is not the servant of the trustees of the society, though by sect. 22 he is bound before seven days after being required by the trustees (in whom the money is vested by sect. 18) to account to the trustees.

(13.)<sup>5</sup> A parish clerk is not a servant, because he is not under the orders of any particular person.

(14.)<sup>6</sup> The chamberlain of the commons of a corporation chosen and sworn in at a court, but whose duty it is to superintend the commons and to receive certain duties which he kept till the end of the year, when his accounts were audited and the balance paid over to his successor, is not a servant, because he holds a distinct office, and is not bound to pay at any time.

(15.)<sup>7</sup> The servant of a trade union may be convicted of the

<sup>1</sup> *R. v. Walker*, 1858, D. & B. 600.

<sup>2</sup> *R. v. Bowers*, 1866, 1 C. C. R. 41, and *R. v. Harris*, 1893, 17 Cox C. C. 656.

<sup>3</sup> *R. v. Negus*, 1873, 2 C. C. R. 34.

<sup>4</sup> *R. v. Tyree*, 1869, 1 C. C. R. 177. A treasurer would appear, as a rule, to be rather a banker than a servant, but every case depends on its special circumstances. In *R. v. Murphy*, 1850, 4 Cox, C. C. 101, the prisoner was both clerk and treasurer (see the explanation of this case given in *R. v. Tyree*). In *R. v. Welch*, 1846, 1 Den. 199, the circumstances were very similar to those of *R. v. Tyree*, and Coleridge, J., appears to have been satisfied that the prisoner was a servant, and did not reserve the point. It is singular that this case is not referred to in *R. v. Tyree*.

<sup>5</sup> *R. v. Burton*, 1829, 1 Moo. 237, explained in *Williams v. Stott*, 1833, 3 Tyrw. 688.

<sup>6</sup> *Williams v. Stott*, 1833, 3 Tyrw. 688.

<sup>7</sup> *R. v. Stainer*, 1870, 1 C. C. R. 230, and see *R. v. Tankard* (1894), 1 Q. B. 548. In the argument on the former case both sides assumed

embezzlement of its funds, although some of its rules are void as being in restraint of trade.

(16.)<sup>1</sup> The servant of a society, the members of which took an unlawful oath under 37 Geo. 3, c. 123, and 52 Geo. 3, c. 104, cannot be convicted of embezzlement for misappropriating the funds of the society.

#### ARTICLE 336.

##### THE PROPERTY EMBEZZLED MUST BE THE MASTER'S.

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

##### *Illustrations.*

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

(2.)<sup>3</sup> A railway company contracted with B to deliver the railway's coals in the railway's carts, B finding horses and carmen, but the terms of the contract were such as to make the carmen, after receiving the money, answerable to the railway.

that if the society was criminal the conviction could not be sustained. Cockburn, C.J., said, "It is unnecessary to consider how far the criminal purposes of a society might affect its title to property." As stolen property may be stolen from the thief who stole it (1 Hale, P. C. 507), the question might deserve consideration if it ever arose. *R. v. Hunt*, in the next illustration, is in point, but it is only a *nisi prius* decision,

<sup>1</sup> *R. v. Hunt*, 1838, 8 C. & P. 642, by Mirehouse (Com. Serj.), after consulting Bosanquet and Coleridge, JJ.

<sup>2</sup> *R. v. Glover*, 1864, L. & C. 466.

<sup>3</sup> *R. v. Beaumont*, 1854, O. & P. 270. The circumstances of this case are at first sight identical with those of *R. v. Thorpe*, 1858, D. & B. 562, in which the conviction was affirmed; but the special terms of the contract, I suppose, make the difference. It is singular that *R. v. Beaumont* is not referred to in *R. v. Thorpe*, otherwise than in a note by the reporter at the end of the case.

A, a carman, received money for coals and appropriated it. This was not embezzlement, as the money was not the money of B, but of the railway company.

(3.)<sup>1</sup> A, a bargeman, was forbidden by B, his master, to take a cargo on his barge on part of a particular voyage. A took the cargo, appropriated the freight to himself, and denied the receipt of it when questioned by his master. The person from whom he took the cargo and freight knew of no one in the transaction except A. This was not embezzlement, as the freight did not belong to B.

(4.)<sup>2</sup> A, intrusted with a cheque for B, gets it cashed by a friend, and not, as was the regular course, at a bank, and appropriates the proceeds. This is embezzlement.

### ARTICLE 337.

#### DISTINCTION BETWEEN EMBEZZLEMENT AND OTHER KINDS OF THEFT.

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

#### *Illustrations.*

(1.)<sup>3</sup> A, B's servant, has authority to take orders, but none to send out goods from B's shop. A takes an order for pickles and treacle, enters in his master's book an order for pickles only, takes from the shop and delivers to the customer both pickles and treacle, and keeps the price of the treacle. This is a theft of the treacle, as A had no authority to deliver it, but it is not an embezzlement of the price, as it was not received on B's account, but in fraud.

(2.)<sup>4</sup> A, a clerk to a navy tailor goes on board a man-of-war

<sup>1</sup> *R. v. Cullum*, 1873, 2 C. C. R. 28.

<sup>2</sup> *R. v. Gale*, 1876, 46 L. J. (M. C.) 134.

<sup>3</sup> *R. v. Wilson*, 1839, 9 C. & P. 27. The prisoner having been indicted for embezzlement escaped.

<sup>4</sup> *R. v. Hawkins*, 1850, 1 Den. C. C. 584.

with clothes delivered to him by his master to sell to the marine artillerymen on board. He afterwards enters as a seaman on another ship, carrying off the clothes. A commits theft, and not embezzlement.

(3.)<sup>1</sup> A, the manager of a branch bank, has in his office a safe, the property of the bank, and of which the bank manager keeps the key at the head office. A's duty is to put money received during the day into this safe. He takes part of it out of the safe and applies it to his own purposes. This is theft, and not embezzlement.

(4.)<sup>2</sup> A's duty is to get bills accepted and discounted for his master. A having got a bill accepted for his master, lays it with other bills on his master's desk. He then takes it from his master's desk, gets it cashed, and appropriates the money. This is theft.

(5.)<sup>3</sup> A receives from his master B, dock warrants enabling him to get property from the docks, and is induced by B to carry the property to London. A on the road appropriates part of the property. This is theft.

(6.)<sup>4</sup> A, B's servant, is sent by B to fetch 240 quarters of oats, which B has purchased, and which are lying on a vessel in the Thames. Whilst the oats are being measured into B's barge, A causes five quarters to be put up in sacks and set aside, the rest being loose. A then sells the sacks of oats for his own benefit from the vessel, and before they were put into the barge. This is theft.

(7.)<sup>5</sup> A, B's servant, gets plate for his master from a silversmith, puts it in B's plate-chest, and then takes it out and appropriates it. This is theft. [<sup>6</sup> If he appropriates it before he puts it into the plate-chest, he commits embezzlement.]

(8.)<sup>7</sup> A, B's servant, receives from C, a fellow-servant, £3 of B's money, and appropriates 10s. to his own use. This is not embezzlement [but is theft.]

(9.)<sup>8</sup> A, a banker's clerk, whose business it is to receive notes

<sup>1</sup> *R. v. Wright*, 1858, D. & B. 431.

<sup>2</sup> *Chipchase's Case*, 1795, 2 Lea. 699.

<sup>3</sup> *R. v. Norval*, 1844, 1 Cox, C. C. 95.

<sup>4</sup> *Abraham's Case*, 1798, 2 East, P. C. 569; 2 Russ. Cr. 313.

<sup>5</sup> Per Coleridge, J., in *R. v. Watts*, 1850, 2 Den. at p. 19.

<sup>6</sup> A dictum of Wilde, C.J., in *R. v. Watts* seems to say the opposite, but if this were so, the whole distinction between embezzlement and theft would be taken away (as no doubt it ought to be as a matter of common sense). See Mr. Greaves' remarks on Wilde, C.J.'s dictum and on the whole case of *R. v. Watts*, 2 Russ. Cr. 323, notes (s) and (t).

<sup>7</sup> *R. v. Murray*, 1830, 2 Russ. Cr. 314; 5 C. & P. 145; 1 Moody, 276.

<sup>8</sup> *Bazeley's Case*, 1799, 2 Lea. 835; 2 East, P. C. 571. This case



over the counter and put them in a drawer, receives a note for £100 from the servant of a customer, and appropriates it to himself without putting it into the drawer. This is not theft at common law, but is embezzlement.

## ARTICLE 338.

### EVIDENCE AS TO EMBEZZLEMENT.

<sup>1</sup> The inference that a prisoner has embezzled property by fraudulently converting it to his own use, may be drawn from the fact that he has not paid the money or delivered the property in due course to the owner, or

from the fact that he has not accounted for the money or other property which he has received, or

from the fact that he has falsely accounted for it, or

from the fact that he has absconded, or

<sup>2</sup> from the fact that upon the examination of his accounts there appeared a general deficiency unaccounted for;

<sup>3</sup> but none of these facts constitutes in itself the offence of embezzlement, nor is the fact that the alleged offender rendered a correct account of the money or other property intrusted to him inconsistent with his having <sup>4</sup> embezzled it.

occasioned the passing of the 39 Geo. 3, c. 85, now re-enacted in substance by 24 & 25 Vict. c. 96, s. 68.

<sup>1</sup> These facts are the common evidence of embezzlement given in every instance, and require no illustration. That the non-payment is only by way of delay, the false accounting a mistake, &c., are common topics of defence.

<sup>2</sup> *R. v. Grove*, 1835, 1 Moody 447; 2 Russ. Cr. 377-380. The authority of this case, decided by eight judges to seven, has been doubted. See *R. v. Moah*, 1856, D. & P. 626, 639: see, too, *R. v. Lambert*, 1847, 2 Cox, C. C. 309; *R. v. Lloyd Jones*, 1838, 8 C. & P. 288; *R. v. Chapman*, 1843, 1 C. & K. 119; *R. v. King*, 1871, 12 Cox, C. C. 73.

<sup>3</sup> *R. v. Hodgson*, 1828, 3 C. & P. 422; *R. v. Winnall*, 1851, 5 Cox, C. 326. Mr. Greaves' note, 2 Russ. Cr. p. 371, on this case disapproves of the summing-up of Erle, J., on what appears to me to be a misconception of its purport. Mr. Greaves' view that the fraudulent conversion constitutes the offence, and that everything else is only evidence of it is obviously correct; but I think that Erle, J., did not mean to say anything inconsistent with this. Wilful false accounting is now a substantive offence. See 38 & 39 Vict. c. 24, s. 2, and Article 381, *post*.

<sup>4</sup> *R. v. Guelder*, 1860, Bell, C. C. 284; *R. v. Lister*, 1856, D. & B. 118.

## CHAPTER XXXVIII

<sup>1</sup> ROBBERY AND EXTORTION BY THREATS<sup>2</sup> ARTICLE 339.

## ROBBERY.

EVERY one is guilty of felony and is liable upon conviction thereof, to be kept in penal servitude in the case of the offences defined in clauses (a.) and (b.) for life, in the case of the offence defined in clause (c.) for fourteen years, and in the case of the offence defined in clause (d.) for five years, who does any of the following things (that is to say),

(a.) <sup>3</sup> who, being armed with any offensive weapon or instrument, robs any person, or

being together with any person or persons, robs or assaults with intent to rob any person, or

(b.) <sup>3</sup> who robs any person, and at the time of, or immediately before, or immediately after such robbery, wounds, beats, strikes, or uses any other personal violence to any person, or

(c.) <sup>4</sup> who robs any person, or

(d.) <sup>5</sup> who assaults any person with intent to rob.

## ARTICLE 340.

## EXTORTION BY THREATS.

Every one commits felony and is liable upon conviction

<sup>1</sup> 3 Hist. Cr. Law, 149-150. Draft Code, Part XXVII., ss. 288-296.

<sup>2</sup> For definition of robbery, and illustrations as to the nature of the fear and violence involved, see Article 322.

<sup>3</sup> 24 & 25 Vict. c. 96, s. 43. Offenders against this section are liable, if males, to be thrice privately whipped in addition to the other punishments above specified. 26 & 27 Vict. c. 44, s. 1. As to the manner of inflicting this punishment, see Article 12 (d.), *ante*.

<sup>4</sup> 24 & 25 Vict. c. 96, s. 40.

<sup>5</sup> *Ibid.* s. 42.

thereof to penal servitude for life in cases *a. i.*, *a. ii.*, *b* and *c*, for ten years in case *a. iii.*, and five years in case *d*, who

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

(i.) <sup>1</sup> demanding any valuable thing of any person with menaces, and without any reasonable and probable cause;

(ii.) <sup>2</sup> accusing, or threatening to accuse, any other person of any crime punishable by law with death or penal servitude for not less than <sup>3</sup> seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any <sup>4</sup> infamous crime, with a view or intent to extort or gain any valuable thing from any person by means of such letter or writing;

(iii.) <sup>5</sup> threatening to burn or destroy any house, barn, or other building, or any grain, hay, or straw, or other agricultural produce in a rick or stack, or in or under any building, or any ship, or vessel, or to kill, maim, or wound any cattle; or

(*b.*) <sup>6</sup> who accuses, or threatens to accuse, any person whatever of any of the crimes specified in *a. ii.*, with the view or intent to extort or gain any valuable thing from any person whatever, or

(*c.*) <sup>7</sup> who, with intent to defraud or injure any other person, compels or induces any person to deal with any valuable security in any of the manners mentioned in note 8,<sup>8</sup>

<sup>1</sup> 24 & 25 Vict. c. 96, s. 44, W. See *ante*, p. 256, Article 322, Illustration (7).

<sup>2</sup> *Ibid.* s. 46, W.

<sup>3</sup> This must mean penal servitude for seven years or more. There is no crime for which penal servitude for seven years is a minimum punishment.

<sup>4</sup> i.e. buggery, committed either with mankind or beast, every assault with intent to commit the same, every attempt or endeavour to commit the same, every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the same (*Ibid.* c. 96, s. 46).

<sup>5</sup> 24 & 25 Vict. c. 97, s. 50, W.

<sup>6</sup> 24 & 25 Vict. c. 96, s. 47, W. An intent to compel a person by threats to buy a mare is within this section. *R. v. Redman*, 1865, 1 C. C. R. 12.

<sup>7</sup> *Ibid.* s. 48, S.

<sup>8</sup> "Execute, make, accept, indorse, alter, or destroy the whole or any

by any unlawful violence to, or restraint of the person of another, or by any threat of such violence or restraint, or

by accusing, or threatening to accuse, any person of treason or felony, or any such crime as is mentioned in clause *a. ii.* : or

(*d.*)<sup>1</sup> who, with menaces or force, demands any valuable thing of any person with intent to steal the same (<sup>2</sup> whether the thing demanded is received or not).

<sup>3</sup> It is immaterial whether the menaces or threats mentioned in clauses *a. i.*, *a. ii.*, *b.*, *c.*, and *d.* be of violence, injury, or accusation to be caused or made by the offender or by any other person.

The expression "valuable thing" in this article means any property, chattel, money, valuable security, or other valuable thing.

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

<sup>1</sup> 24 & 25 Vict. c. 96, s. 45, C. *R. v. Ogden, R. v. Walton*, 1863, L. & C. 288, shows what sort of menaces fall within this section. A obtained five shillings from B by pretending to be a bailiff, and threatening to distrain. It was held that his guilt depended on the question whether or not he made the threat in such a way as to unsettle B's mind, "and take away from his acts that element of free, voluntary action which alone constitutes consent."

<sup>2</sup> *R. v. Robertson*, 1864, L. & C. 483. In that case it was held that a policeman who said he would lock a man up for speaking to a prostitute unless he received five shillings used a "menace," notwithstanding his having no power to do so.

<sup>3</sup> 24 & 25 Vict. c. 96, s. 49. There is no similar section in the Act relating to offences against the person (see Article 255) (*a.*), or in the Act relating to malicious injuries to property, from which *a. ii.* and *a. iii.* are taken. I think, however, both on authority and on principle, that those clauses would be construed as if there were. The language of the sections on which this Article is founded has been condensed and rearranged, but it will be found on examination that the Article accurately represents the seven sections which it embodies. As to threats to publish libels with intent to extort, see Art. 303, p. 240.

## CHAPTER XXXIX

<sup>1</sup> BURGLARY, HOUSEBREAKING, ETC.

## ARTICLE 341.

## DEFINITIONS.

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

<sup>2</sup> Night means the interval between nine of the clock at night and six of the morning.

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

<sup>3</sup> If a building is so constructed as to consist of several parts having no internal communication between each other and if these parts are occupied and habitually slept in by different tenants, they may constitute separate dwelling-houses.

<sup>4</sup> A building occupied with and within the same curtilage with any dwelling-house, is deemed to be part of the said dwelling-house if there is between such building and dwelling-house a communication either immediate or by means of a covered and inclosed passage leading from the one to the other, but not otherwise.

The word "break" means

(a.) the breaking of any part, internal or external, of the building itself, or the opening by any means whatever (including lifting, in the case of things kept in their places by their own weight) of any door, window, shutter, cellar flap,

<sup>1</sup> 3 Hist. Cr. Law, 150. Draft Code, Part XXVIII., ss. 297-308.

<sup>2</sup> 24 & 25 Vict. c. 94, s. 1; the time here referred to must be taken to be Greenwich time, see 43 & 44 Vict. c. 9.

<sup>3</sup> The cases and authorities on this subject are collected in Archbold, 569-572, but there is so little principle in the matter, and each case depends so much on its peculiar circumstances, that I have not thought it advisable to give illustrations.

<sup>4</sup> 24 & 25 Vict. c. 96, s. 53.

or other thing intended to cover openings to the house, or to give passage from one part of it to another, and getting down the chimney ;<sup>1</sup>

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

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

*Illustration.*

<sup>2</sup> A opens a sash window, puts a crowbar under a shutter three inches inside the window, and tries to break open the shutter, but does not come within the sash window. Here there is a breaking, but no entry.

ARTICLE 342.

ROBBING PLACES OF WORSHIP—BURGLARY.

Every one commits felony, and is liable upon conviction thereof to penal servitude for life, who

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

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

<sup>1</sup> As to what constitutes breaking see the cases collected in Archbold, pp. 576-8 : the text will be found to be a correct summary of the law so formed. Collins, J., at the Cardiff Assizes in November 1893, told the jury that breaking into a house meant entering it in any way except by an open door or window, and allowed a man to be convicted for burglary who entered a house through a swing door.

<sup>2</sup> *R. v. Rust*, 1828, 1 Moo. 183 ; and see *R. v. Roberts*, 1702, 2 East, P. C. 487.

<sup>3</sup> 24 & 25 Vict. c. 96, s. 50.

<sup>4</sup> *Ibid.* s. 52, for punishment ; 2 Russ. Cr. 2, for definition.

## ARTICLE 343.

## HOUSEBREAKING AND COMMISSION OF FELONY.

<sup>1</sup> Every one commits felony and is liable, upon conviction thereof, to fourteen years penal servitude, who breaks and enters and commits any felony in any dwelling-house, or any building being within the curtilage of a dwelling-house and occupied therewith (but not being part thereof within Article 341), or any schoolhouse, shop, warehouse, or counting-house.

## ARTICLE 344.

## ENTERING DWELLING-HOUSE WITH INTENT.

<sup>2</sup> Every one commits felony, and is liable upon conviction thereof to seven years penal servitude who breaks and enters any of the buildings mentioned in Articles 342 or 343, or who by night enters any dwelling-house with intent in either case to commit felony therein.

## ARTICLE 345.

## BREAKING OUT AFTER COMMITTING FELONY.

<sup>3</sup> Every one who, being in any of the buildings mentioned in Articles 342 or 343, commits a felony therein, and breaks out of the same, commits felony, and is liable to the same punishment as if he had broken in and committed felony therein. If such building is a dwelling-house, and the offence is committed at night, the offender commits burglary.

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

<sup>1</sup> 24 & 25 Vict. c. 96, ss. 55 and 56.

<sup>2</sup> Ibid. ss. 54 and 57.

<sup>3</sup> Ibid. ss. 50, 51, 55, 56. These sections are re-arranged.

## ARTICLE 346.

BEING FOUND IN POSSESSION OF HOUSEBREAKING  
INSTRUMENTS.

<sup>1</sup> Every one commits a misdemeanor, and is liable for the first offence to a punishment of five, or if he has been previously convicted of felony or of such misdemeanor, of ten years penal servitude;

<sup>2</sup> who is found by night armed with any dangerous or offensive weapon or instrument whatever with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein;

or is found by night having in his possession, without lawful excuse (the proof of which excuse lies upon him), any picklock key;<sup>2</sup> crow, jack, bit, or other instrument of house-breaking;

or is found by night having his face blackened or otherwise disguised with intent to commit any felony;

or is found by night in any dwelling-house or other building whatsoever, with intent to commit any felony therein.

<sup>1</sup> 24 & 25 Vict. 96, c. ss. 58 and 59.

<sup>2</sup> A common key may be such an instrument. *R. v. Oldham*, 1852, 2 Den. 472. Maule and Cresswell, JJ., were both of opinion that there should be a comma between "picklock" and "key." *R. v. Oldham*, however, makes this unimportant



## CHAPTER XL

***PUNISHMENTS FOR STEALING PARTICULAR THINGS AND  
RECEIVING GOODS UNLAWFULLY OBTAINED*****ARTICLE 347.****PUNISHMENT FOR STEALING THINGS FOR WHICH NO SPECIAL  
PUNISHMENT IS PROVIDED.**

<sup>2</sup> EVERY one commits felony and is liable upon conviction thereof to five years penal servitude who steals anything capable of being stolen, and for the stealing of which no specific punishment is hereinafter provided.

<sup>3</sup> If the conviction takes place after a previous conviction for felony, either upon an indictment or under 8 & 9 Vict. c. 126, the maximum punishment is increased to ten years penal servitude.

If the conviction takes place after a previous conviction for any misdemeanor indictable under 24 & 25 Vict. c. 96, or

if the conviction takes place after two summary convictions under 24 & 25 Vict. c. 96, or 24 & 25 Vict. c. 97, or any Act mentioned in the footnote hereto,

the maximum punishment is increased to seven years penal servitude.

**ARTICLE 348.****KILLING ANIMALS WITH INTENT TO STEAL EQUIVALENT TO  
STEALING.**

<sup>4</sup> Every one who wilfully kills any animal with intent to

<sup>1</sup> 3 Hist. Cr. Law, 146-60. Draft Code, Part XXV.

<sup>2</sup> 24 & 25 Vict. c. 96, s. 4, W. Thefts falling under this Article appear to be the "simple larceny" referred to in 24 & 25 Vict. c. 96, ss. 33 and 36 (Article 353 (e.) and (f.)). Hale means by "simple larceny" larceny without violence.

<sup>3</sup> 24 & 25 Vict. c. 96, ss. 7, 8, 9, W. The statutes are 7 & 8 Geo. 4, cc. 29, 30; 9 Geo. 4, cc. 55, 56; 10 & 11 Vict. c. 82; 11 & 12 Vict. c. 59; 14 & 15 Vict. c. 92. These are earlier Acts on the same subjects as the two Consolidation Acts.

<sup>4</sup> 24 & 25 Vict. c. 96, s. 11.

steal the carcase, skin, or any part of the animal so killed, commits felony, and is liable upon conviction thereof to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed is felony.

#### ARTICLE 349.

##### STEALING AND CONCEALING VALUABLE SECURITIES.

<sup>1</sup> Every one who steals, or for any fraudulent purpose destroys, cancels, or obliterates the whole or any part of any <sup>2</sup> valuable security, other than a document of title to land, commits felony of the same nature and in the same degree, and punishable in the same manner as if he had stolen any chattel of the like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security.

Provided that no person who commits any offence against this Article or clause (a.) of the next succeeding Article, is liable to be convicted of any such offence by any evidence whatever in respect of any act done by him, if previously to being charged with such offence, he first discloses such act on oath in consequence of any compulsory process of any Court which, on the 6th of May, 1861, was a Court of law or equity, in any action, suit, or proceeding *bonâ fide* instituted by any party aggrieved, or if he first discloses the

<sup>1</sup> 24 & 25 Vict. c. 96, s. 27.

<sup>2</sup> Sect. 1. Valuable security includes, "any order, Exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods" as defined in Article 353, note 3.

same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.

### ARTICLE 350.

#### THEFTS PUNISHABLE WITH PENAL SERVITUDE FOR LIFE.

Every one commits felony and is liable upon conviction thereof to penal servitude for life, and in respect of the offences defined in clause (b.) or (c.), to an alternative term of imprisonment with hard labour for four years, who does any of the following things (that is to say):

(a.) <sup>1</sup> who, either during the life of the testator, or after his death, steals, or for any fraudulent purpose destroys, cancels, obliterates, or conceals the whole or any part of any will, codicil, or other testamentary instrument, whether it relates to real or personal estate, or to both;

(b.) <sup>2</sup> or who being employed under the Post Office steals or destroys a post-letter containing any chattel or money whatsoever or any valuable security;

(c.) <sup>3</sup> or who steals a post letter-bag, or a <sup>4</sup> post letter from a post letter-bag, or from a post office, or from an office of the post office, or from a mail;

<sup>1</sup> 24 & 25 Vict. c. 96, s. 29.

<sup>2</sup> 7 Will. 4 & 1 Vict. c. 36, s. 26, as to punishment see ss. 41, 42, and for definitions s. 47.

<sup>3</sup> Ibid. ss. 27, 28, for punishments, ss. 41, 42, and for definitions, s. 47.

<sup>4</sup> "Post letter" means any letter or packet transmitted by the post under the authority of the Postmaster-General from the time of its being delivered to a post office letter-carrier, or other person authorised to receive letters, to the time of its being delivered to the person to whom it is addressed, or to his house or office, or to his servant or agent, or other person considered to be authorised to receive the letter, according to the usual manner of delivering that person's letters. A letter not posted in the proper course, but put amongst the letters so posted for a sorter to sort is not a post letter. *R. v. Shepherd*, 1856, D. & P. 606.

"Post letter-bag" includes a mail bag, or box, or package or parcel or other envelope or covering in which post letters are conveyed, whether it contains post letters or not.

"Mail" includes every conveyance by which post letters are carried, every person or horse employed in conveying or delivering post letters, every vessel employed by or under the Post Office or the Admiralty for the transmission of post letters, or not regularly so employed but under con-

or any chattel, money, or valuable security, from or out of a post-letter;

or who stops a mail with intent to rob or search the same;

(*d.*) <sup>1</sup> or who secretes, embezzles, or runs away with any of the things mentioned below,<sup>2</sup> or any part of any such thing, being an officer or servant of the Governor and Company of the Bank of England, or of the Bank of Ireland, and being intrusted with any such thing lodged or deposited with the said governor and company,<sup>3</sup> or with him as an officer or servant of the said governor and company.

#### ARTICLE 351.

#### THEFTS PUNISHABLE WITH PENAL SERVITUDE FOR FOURTEEN YEARS.

Every one commits felony, and is liable, upon conviction thereof to fourteen years penal servitude, and in respect of offence (*j*) to an alternative term of imprisonment with hard labour for three years who does any of the following things (that is to say):

(*a.*) <sup>4</sup> who steals any horse, mare, gelding, colt, filly, bull, cow, ox, heifer, calf, ram, ewe, sheep, or lamb, or wilfully kills any such animal with intent to steal the carcase, skin, or any part thereof; or

(*b.*) <sup>5</sup> who steals any chattel, money, or valuable security from the person of another; or

tract for the conveyance of post letters, and every ship of war or vessel in the service of Her Majesty so employed.

"Valuable security" is defined in sect. 47 in nearly the same terms as in sect. 1 of the Larceny Act: see above. The only difference of much importance is that the definition in the Post Office Act includes any warrant or order for the delivery or transfer of any goods or valuable thing (s. 47).

<sup>1</sup> 24 & 25 Vict. c. 96, s. 73.

<sup>2</sup> "Any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity, or interest, or money, or any security, money, or other effects of any other person, or body politic or corporate."

<sup>3</sup> This must mean "either of the said governors and companies."

<sup>4</sup> 24 & 25 Vict. c. 96, ss. 10, 11.

<sup>5</sup> Ibid. s. 40.

(c.) <sup>1</sup> who steals in any dwelling-house any chattel, money, or valuable security, if the value of the property stolen is in the whole £5 or more, or if the offender puts any one, being in such dwelling-house, in bodily fear by any menace or threat; or

(d.) <sup>2</sup> who steals to the value of ten shillings any of the <sup>3</sup> goods mentioned below, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place; or

(e.) <sup>4</sup> who steals any goods or merchandise in any vessel, barge, or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal; or

(f.) <sup>4</sup> who steals any goods or merchandise from any dock, wharf, or quay, adjacent to any such haven, port, river, canal, creek, or basin, as is mentioned in the last clause; or

(g.) <sup>5</sup> who <sup>6</sup> plunders or steals any part of any ship or vessel in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to any such ship or vessel; or

(h.) <sup>7</sup> who being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, steals any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, or fraudulently embezzles any chattel, money, or valuable security delivered to or received and taken into possession by the offender, for or in the name or on the account of his master or employer; or

<sup>1</sup> 24 & 25 Vict. c. 96, ss. 60, 61.

<sup>2</sup> *Ibid.* s. 62.

<sup>3</sup> "Any woollen, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca, or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material."

<sup>4</sup> 24 & 25 Vict. c. 96, s. 63.

<sup>5</sup> *Ibid.* s. 64.

<sup>6</sup> I do not know that this word has any special legal signification.

<sup>7</sup> 24 & 25 Vict. c. 96, ss. 67, 68, W.

(i.) <sup>1</sup> who, being employed in the public service of Her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, steals, embezzles, or in any manner fraudulently applies for his own benefit, or for any purpose except the public service, the whole or any part of any chattel, money, or valuable security belonging to or in the possession or power of Her Majesty, or intrusted to the offender or received or taken into possession by him in virtue of his employment; or

(j.) <sup>2</sup> who steals a post letter bag sent by a post office packet, or takes a letter out of such bag,  
or unlawfully opens such bag.

#### ARTICLE 352.

##### **THEFTS PUNISHABLE WITH PENAL SERVITUDE FOR SEVEN YEARS.**

<sup>3</sup> Every one commits felony, and is liable upon conviction thereof to seven years penal servitude, who steals any chattel or fixture of the value of more than £5, let to be used by him or her in or with any house or lodging, whether the contract was entered into by the offender or his wife, or her husband, or by any person on his or her, or on her husband's, behalf.

If the value of the thing stolen do not exceed £5, the offender is liable to two years imprisonment and hard labour.

<sup>4</sup> Every one commits a felony and is liable on conviction thereof to penal servitude for seven years or imprisonment for three years who being employed under the Post Office steals or destroys a post-letter.

<sup>1</sup> 24 & 25 Vict. c. 96, ss. 69, 70.

<sup>2</sup> 7 Will. 4 & 1 Vict. c. 36, s. 29; for punishment see ss. 41, 42, and for definitions s. 47.

<sup>3</sup> 24 & 25 Vict. c. 96, s. 74, W.

<sup>4</sup> 7 Will. 4 & 1 Vict. c. 36, s. 26.

## ARTICLE 353.

## THEFTS PUNISHABLE WITH PENAL SERVITUDE FOR FIVE YEARS.

Every one commits felony, and is liable upon conviction thereof to five years penal servitude, who does any of the following things (that is to say):

(a.)<sup>1</sup> who steals or for any fraudulent purpose destroys, cancels, obliterates, or conceals the whole or any part of any<sup>2</sup> document of title to lands; or

(b.)<sup>3</sup> who steals or for any fraudulent purpose takes from its place of deposit for the time being, or from any person having the lawful custody thereof,<sup>4</sup> or unlawfully and maliciously cancels, obliterates, injures, or destroys the whole or any part of any of the judicial or official documents mentioned below; <sup>5</sup> or

(c.)<sup>6</sup> who steals, rips, cuts, severs, or breaks, with intent to steal, any glass or woodwork belonging to any building

<sup>1</sup> 24 & 25 Vict. c. 96, s. 28.

<sup>2</sup> The term "document of title to lands" includes "any deed, map, paper, or parchment written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate" (Ibid. s. 1).

<sup>3</sup> Ibid. s. 30.

<sup>4</sup> Taking a warrant of execution from a county court bailiff, under the impression that his authority depends on its possession, is "a taking for a fraudulent purpose," but is not stealing under this section: *R. v. Bailey*, 1872, 1 C. C. R. 347.

<sup>5</sup> Any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney. Any original document whatsoever belonging to any Court of record, or relating to any matter civil or criminal begun, depending, or terminated in any such Court. Any bill, petition, answer, interrogatory, deposition, affidavit, order or decree, or any original document whatsoever of or belonging to any Court of Equity, or relating to any cause or matter begun, depending, or terminated in any such Court. Any original document in anywise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any Court of Justice, or in any of Her Majesty's castles, palaces or houses, or in any government or public office.

<sup>6</sup> 24 & 25 Vict. c. 96. s. 31, S., as in case of simple larceny. The words "burial ground" were added to do away with a doubt expressed by Baron Bramwell in *R. v. Jones*, 1858, D. & B. 555, as to whether a churchyard was a "public place" within 7 & 8 Geo. 4, c. 29, s. 44. The other

whatsoever, or any <sup>1</sup> metal, or any utensil or fixture of whatsoever material, fixed in or to any building whatsoever, or

anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or

in any square or street, or in any place dedicated to public use or ornament, or

in any burial ground; or

(*d.*) <sup>2</sup> who steals, or cuts, breaks, roots up, or otherwise destroys or damages with intent to steal the whole or any part of any tree, sapling, or shrub, or any underwood, if the value of the article or articles stolen, or the amount of the injury done exceeds £5, or exceeds the value of £1, if the article or articles stolen or damaged grow in any park, pleasure ground, garden, orchard, or avenue, or in ground adjoining or belonging to any dwelling-house; or

(*e.*) <sup>3</sup> who steals, or cuts, breaks, roots up, or otherwise destroys, or damages, with intent to steal the whole or any part of any tree, sapling, or shrub, or any underwood, the value of the thing stolen, or the amount of the damage done, being a shilling at the least after being twice summarily convicted of such offence; or

(*f.*) <sup>4</sup> who steals, or destroys, or damages with intent to steal any plant, root, fruit, or vegetable production, growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse, or conservatory after having been summarily convicted of such offence; or

(*g.*) <sup>5</sup> who steals any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any

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judges did not share this doubt. The present enactment does not absolutely remove it, as there are many churchyards which are not burial grounds. However, the case of *R. v. Jones* distinctly decided the point.

<sup>1</sup> "Lead, iron, copper, brass, or other metal."

<sup>2</sup> 24 & 25 Vict. c. 96, s. 32, W. The section is rearranged for the sake of brevity, and the word "grow" substituted for "grows" to meet the grammar. The change also represents the sense, for it has been held that in estimating the damage done the value of several trees injured at the same time may be put together: *R. v. Shepherd*, 1868, 1 C. C. R. 118.

<sup>3</sup> *Ibid.* s. 33.

<sup>4</sup> *Ibid.* s. 36.

<sup>5</sup> *Ibid.* s. 26.



other person and sufficiently marked out and known as such; or

(*h.*)<sup>1</sup> who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity.

<sup>2</sup> Every one who commits any of the offences specified in clauses (*c.*), (*d.*), (*f.*), or (*g.*), after being previously convicted of any misdemeanor indictable under 24 & 25 Vict. c. 96, or after two previous summary convictions under 24 & 25 Vict. c. 96, or c. 97, or any Act mentioned in note (2) to Article 347, is liable to seven years penal servitude.

#### ARTICLE 354.

##### THEFTS PUNISHABLE WITH IMPRISONMENT.<sup>3</sup>

<sup>4</sup> Every one is guilty of felony and is liable to two years imprisonment with hard labour, who steals or severs with intent to steal the ore of any metal or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal from any mine, bed, or vein thereof respectively.

<sup>5</sup> Every one is guilty of misdemeanor and is liable to fine and imprisonment with hard labour who fraudulently retains,

<sup>1</sup> 45 & 46 Vict. c. 56, s. 23, declares that every such person shall be "guilty of simple larceny and punishable accordingly." "Electricity" is defined in s. 32 as meaning "Electricity, electric current or any like agency." Probably the latter applies only to electricity used commercially. It would hardly apply to a person who in order to spoil a philosophical experiment maliciously caused electricity to be wasted.

<sup>2</sup> 24 & 25 Vict. c. 96, s. 8, W., makes this provision as to all offences punishable under the Act as simple larceny. It can hardly have been intended to make (*e*) punishable with seven or five years penal servitude, though this seems to be its effect if it is to be taken literally. The offences in question are created by ss. 26, 31, 32, 33, 36. The case of a conviction of one of these offences after a previous conviction for felony is provided for, I suppose, by 7 & 8 Geo. 4, c. 28, s. 11. See Article 19, *ante*.

<sup>3</sup> Other similar offences punishable summarily will be found in Oke's Synopsis under the title Larceny in Vol. I. In the last edition of this work they were set out in Art. 328.

<sup>4</sup> 24 & 25 Vict. c. 96, s. 38.

<sup>5</sup> 7 Will. 4 & 1 Vict. c. 36, s. 31. See s. 43 as to hard labour, and s. 47 for definitions.

or wilfully secretes, keeps or detains, or being required to deliver up by an officer of the Post Office, neglects or refuses to deliver up, a post letter which ought to have been delivered to any other person, or a post letter bag, or a post letter which has been sent whether found by him or another person.

<sup>1</sup> Every one commits a misdemeanor and is liable to eighteen months imprisonment and hard labour who steals any dog, or unlawfully has in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen, or such skin to be the skin of a stolen dog, after having been convicted summarily of any such offences respectively.

#### ARTICLE 355.

##### OPENING LETTERS.

<sup>2</sup> Every one is guilty of a misdemeanor and is liable to a fine of £50 or imprisonment with <sup>3</sup> hard labour for six months who, not being in the employment of the Postmaster-General wilfully and maliciously with intent to injure any other person opens, or causes to be opened, any <sup>4</sup> letter which ought to have been delivered to the other person ; or

does any act or thing whereby the due delivery of such letter to such other person is prevented or impeded ;

provided that this Article does not apply to any parent or person in the position of a parent or guardian of the person to whom the letter is addressed.

#### ARTICLE 356.

##### UNLAWFULLY DREDGING FOR OYSTERS.

<sup>5</sup> Every one is guilty of a misdemeanor and is liable to

<sup>1</sup> 24 & 25 Vict. c. 96, ss. 18, 19.

<sup>2</sup> 54 & 55 Vict. c. 46, s. 10 ; the prosecution of this offence must be by the direction of the Postmaster-General.

<sup>3</sup> As to hard labour, see *Ibid.* s. 12 (2) and 7 Will. 4 & 1 Vict. c. 36, s. 42.

<sup>4</sup> For a definition, see 54 & 55 Vict. c. 46, s. 10 ; 38 Vict. c. 22, s. 10 ; 47 & 48 Vict. c. 76, ss. 19, 20.

<sup>5</sup> 24 & 25 Vict. c. 96, s. 26.

imprisonment with hard labour for three months who unlawfully and wilfully uses any dredge or any net, instrument, or engine whatsoever, within the limits of any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken; or unlawfully and wilfully drags upon the ground or soil of any such fishery, with any net, instrument, or engine.

#### ARTICLE 357.

#### SOLICITING TO COMMISSION OF OFFENCES UNDER THE POST OFFICE ACTS.

<sup>1</sup>Every one commits a misdemeanor and is liable to imprisonment with hard <sup>2</sup>labour for two years, who solicits or endeavours to procure any other person to commit a felony or misdemeanor punishable by the Post Office Acts.

<sup>1</sup> 7 Will. 4 & 1 Vict. c. 36, s. 36.

<sup>2</sup> Ibid. s. 42.

## CHAPTER XLI

***1 OBTAINING PROPERTY BY FALSE PRETENCES AND  
OTHER CRIMINAL FRAUDS AND DEALINGS WITH  
PROPERTY***

## ARTICLE 358.

## OBTAINING GOODS, ETC., BY FALSE PRETENCES.

EVERY one commits a misdemeanor, and is liable upon conviction thereof to five years penal servitude, who

(a.)<sup>2</sup> by any false pretence obtains from any other person any chattel, money, or valuable security with intent to defraud, or who,

(b.)<sup>3</sup> with intent to defraud or injure any other person by any false pretence, fraudulently causes or induces any other person to <sup>4</sup>execute any valuable security, or to write, impress, or affix his name, or the name of any other person,<sup>5</sup> upon any paper or parchment, in order that the same may afterwards be made or converted into, or used or dealt with as, a valuable security.

It is not an offence to obtain by false pretences any chattel which is not the subject of larceny at common law, but it is immaterial whether such a chattel so obtained is or is not in existence at the time when the false pretence is made if the thing when made is obtained by the false pretence.

It is not an offence to obtain credit in a partnership account by false pretences as to the amount which a partner is entitled to charge against the partnership funds.

<sup>1</sup> 3 Hist. Cr. Law, 160-2.

<sup>2</sup> 24 & 25 Vict. c. 96, s. 88, as explained by the cases.

<sup>3</sup> Ibid. s. 90. This section was meant to cover such cases as *R. v. Danger*, 1857, 7 Cox, C. C. 303; D. & B. 307, and greatly extends the old law on the subject. See Mr. Greaves's note to the section in his edition of the Acts.

<sup>4</sup> "Make, accept, endorse, or destroy the whole or any part of."

<sup>5</sup> "or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society."

*Illustrations.*

(1.) <sup>1</sup> A obtains two pointers worth £5 each by a false pretence. This is not an offence within this Article.

(2.) <sup>2</sup> A orders a van from B, and gets it made and delivered by falsely pretending to be agent to a company. This is an offence, although the van was not in existence when the pretence was made.

(3.) <sup>3</sup> A travels as agent for his partners, and obtains commission from them by falsely pretending he has received orders. His commission would form a charge on the partnership funds. This is not an offence within this Article.

## ARTICLE 359.

## DEFINITION OF "FALSE PRETENCE."

The expression "false pretence," in Article 358, means a false representation made either by words, by writing, or by conduct, that some fact exists or existed, and such a representation may amount to a false pretence, although a person of common prudence might easily have detected its falsehood by inquiry, and although the existence of the alleged fact was in itself impossible.

But the expression "false pretence" does not include

(a.) a promise as to future conduct not intended to be kept, unless such promise is based upon or implies an existing fact falsely alleged to exist; or,

(b.) such untrue commendation or untrue depreciation of an article which is to be sold as is usual between sellers and buyers, unless such untrue commendation or untrue depreciation is made by means of a definite false assertion as to some matter of fact capable of being positively determined.

*Illustrations.*

(1.) <sup>4</sup> A, not being a member of the University of Oxford,

<sup>1</sup> *R. v. Robinson*, 1859, Bell, 34.

<sup>2</sup> *R. v. Martin*, 1867, 1 C. C. R. 56.

<sup>3</sup> *R. v. Evans*, 1862, L. & C. 755. I am unable to follow the reasoning of this judgment.

<sup>4</sup> *R. v. Barnard*, 1837, 7 C. & P. 784. The defendant said he was a

represents himself to be such by wearing a student's cap and gown, and thereby obtaining a pair of straps from a tradesman in Oxford. This is a false pretence by conduct.

(2.) <sup>1</sup> A presents a note for £5 as a good note for that amount, knowing that the bank by which it was issued had stopped. This is a false pretence by conduct.

(3.) <sup>2</sup> A gives a cheque in discharge of a debt. This is a representation that A has authority to draw upon the bank for the amount of the cheque, and that the cheque is a good and valid order for the payment of money. If these representations are untrue to the knowledge of A, and if he intends to defraud and obtain goods by making them, he commits the offence of obtaining goods by false pretences, but the mere giving of a cheque is not necessarily a representation that the drawer has funds at the bank to meet it.

(4.) <sup>3</sup> The secretary of an Odd Fellows' lodge tells a member that he owes the lodge 13s. 6d. and thereby obtains that sum from him, whereas in fact he owed only 2s. 2d. This is a false pretence, though an inquiry might easily have been made.

(5.) <sup>4</sup> A represents to B that A has power to bring back B's husband (who has run away) over hedges and ditches, and that a certain stuff which A has is sufficient and effectual for that purpose, and thereby obtains from B a dress and two sixpences. This is a false pretence, although the alleged fact is impossible.

(6.) <sup>5</sup> A tells B that A is going to pay his rent on the 1st of March, and wants £10 to make up his rent, whereby he obtains £10 from B. This statement though false is not a false pretence, as it relates to something intended to be done at a future time.

member of Magdalen College, but Bolland, B., said he would have left the case to the jury on the mere wearing of the dress if nothing had been said.

<sup>1</sup> *Per Compton, J.*, in *R. v. Evans*, 1859, Bell, C. C. 192. The rest of the Court seemed to be of the same opinion.

<sup>2</sup> *R. v. Hazleton*, 1874, 2 C. C. R. 134. See, too, *R. v. Jackson*, 1813, 3 Camp, 370; *R. v. Parker*, 1837, 2 Moo. 1. There was some slight difference of opinion (or rather of expression) amongst the judges in this case. The judges were anxious to point out that to give a cheque on a bank where the drawer has no balance is not necessarily an offence, as he may have a right to overdraw or a reasonable expectation that if he does his drafts will be honoured. These considerations would seem to affect not the falseness of the pretence, but the defendant's knowledge of its falsehood and his intent to defraud.

<sup>3</sup> *Woolley's Case*, 1850, 4 Cox, C. C. 251; 1 Den. 559. See, too, *R. v. Jenner*, 1858, D. & B. 442.

<sup>4</sup> *R. v. Giles*, 1865, L. & C. 502.

<sup>5</sup> *Lee's Case*, 1863, L. & C. 309.

(7.)<sup>1</sup> A falsely tells B that A has bought skins, and wants £4 10s. to fetch them by the railway, and that he will sell them to B if B will let A have the £4 10s. on account, which B does, partly because B believes that A has bought the skins, and partly because B believes that A will sell the skins to B. This is a false pretence, as part of it alleges falsely an existing fact.

(8.)<sup>2</sup> A obtains money from B by promising to marry her, and to furnish a house with the money, representing himself to be an unmarried man. A in fact is married. The representation that A was unmarried is a false pretence, though the promises based upon it would not have been false pretences without it.

(9.)<sup>3</sup> A tells B that A is prepared to give him £100 on his signing a document; on his doing so A refuses to give him more than £60. A's statement is a false pretence, because it is equivalent to a statement that the money was ready for B on his signing the paper.

(10.)<sup>4</sup> A induces B to lend him money by saying that certain spoons are of the best quality, that they are equal to Elkington's A (a description known in the trade), that the foundation is of the best material, and that they have as much silver in them as Elkington's A. These words being construed as mere exaggeration of the quality of the spoons, and not as containing a statement of a definite fact as to the quality of silver in the spoons, are not a false pretence.

(11.)<sup>5</sup> A induces B to buy a chain by saying, "It is 15-carat gold, and you will see it stamped fine on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth £5 to sell as old gold." The chain had on every

<sup>1</sup> *R. v. West*, 1858, D. & B. 575.

<sup>2</sup> *R. v. Jennison*, 1862. L. & C. 157.

<sup>3</sup> *R. v. Gordon*, 1889, 23 Q. B. D. 354.

<sup>4</sup> *R. v. Bryan*, 1857, D. & B. 265. This, I think, is the true view of the case. Willes, J., and Bramwell, B., thought the conviction should be sustained on the ground that the representation that the spoons had as much silver on them as Elkington's A was a specific false pretence as to an existing fact. Ten other judges (Campbell, C.J., Cockburn, C.J., Pollock, C.B., Coleridge, Cresswell, Erle, Crompton, Crowder, JJ., and Watson and Channel, BB.) all said in different words that the language used was mere puffery. The principle does not appear to have been doubted. The case is often, but I think wrongly, supposed to decide that a misrepresentation as to quality cannot be a false pretence. This depends on the further question whether the representation is made by means of alleging the existence of a fact which does not exist. *R. v. Foster*, 1877, 2 Q. B. D. 301, is a later illustration of the principle of *R. v. Bryan*.

<sup>5</sup> *R. v. Ardley*, 1871, 1 C. C. R. 301.

link the mark 15-ct. The chain in fact was 6-carat gold, worth in all £3 0s. 3d. This is a false pretence.

## ARTICLE 360.

## OF "OBTAINING."

<sup>1</sup> The word "obtains," in Article 358, means an obtaining by the offender from the owner, with an intent on the part of the offender to deprive the owner permanently and entirely of the thing obtained, and it includes cases in which things are obtained by a contract which is obtained by a false pretence, unless the obtaining under the contract is remotely connected with the false pretence.

<sup>2</sup> Whoever, by any false pretence, causes or procures any money to be paid, or any chattel or valuable security to be delivered to any other person for the use or benefit, or on account of the person making such false pretence, or of any other person, with intent to defraud, is deemed to have obtained such money, chattel, or valuable security within the meaning of Article 358.

<sup>3</sup> If the person from whom anything is obtained by a person making a false pretence is not deceived by such false pretence, but delivers the thing intended to be obtained by it, knowing the pretence to be false, such thing is not deemed to have been obtained by such pretence.

<sup>4</sup> If a thing is obtained by the joint effect of several false pretences, any one of which is a false pretence within the meaning of the last Article, and if the thing would not have been obtained without that false pretence, it is deemed to have been obtained by such false pretence.

*Illustrations.*

(1.) <sup>5</sup> A draws a bill upon B in London and gets it discounted

<sup>1</sup> Illustrations (1)-(6).

<sup>2</sup> 24 & 25 Vict. c. 96, s. 89.

<sup>3</sup> Illustration (7).

<sup>4</sup> Illustration (8).

<sup>5</sup> *R. v. Garrett*, 1853, D. & P. 232.



by C in Russia by falsely pretending, by means of a forged authority, that he is authorised to draw upon B for the amount of the bill. A does not attempt to obtain money by false pretences from B, though he meant that C should forward the draft to B, and should obtain payment of the amount, and though his act if done in England would have been an obtaining by false pretences from C.

(2.)<sup>1</sup> A by a false pretence obtains from B, a livery stable keeper, the use of a horse for the day, for which he would have been charged 7s. This is not obtaining goods by false pretences, as the horse was returned.

(3.)<sup>2</sup> A, by false pretences, induces B to enter into partnership with him, and to advance £500 as part of the capital of the concern. B treats the partnership as an existing one, and endeavours to dispose of his interest in it. A has not obtained £500 by false pretences, as B, as partner, retained his interest in it.

(4.)<sup>3</sup> A induces B to buy a cheese at a higher price than it is worth, by inserting in it a taster of superior quality to the rest of the cheese, and so making B believe that the whole cheese was of the same quality as the taster. This is obtaining money by a false pretence.

(5.)<sup>4</sup> A induces B to lend him £100 on a deposit of title-deeds to land, by falsely pretending that a house has been built upon it worth £300. This is obtaining £100 by a false pretence.

(6.)<sup>5</sup> A, by falsely pretending to be a naval officer, induces B to enter into a contract to board and lodge him at a guinea a week, and under this contract is supplied with food for a week. This is not obtaining food by false pretences, as the supply of food in consequence of the contract is too remotely the result of the false pretence to become the subject of an indictment.

(7.)<sup>6</sup> A makes a false pretence to B to obtain money, which pretence is false to B's knowledge. B pays A the money and prosecutes him for obtaining it by a false pretence. This is not obtaining money by a false pretence.

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<sup>1</sup> *R. v. Kilham*, 1870, 1 C. C. R. 261.

<sup>2</sup> *R. v. Watson*, 1857, D. & B. 348. The judges guarded in their judgment against the notion that fraudulently inducing a man to enter into a partnership could in no case be within the statute, as, for instance, in the case of the alleged existence of any trade which was a false pretence.

<sup>3</sup> *R. v. Abbott*, 1847, 1 Den. 273.

<sup>4</sup> *R. v. Burgon*, 1856, D. & B. 11.

<sup>5</sup> *R. v. Gardner*, 1856, D. & B. 40.

<sup>6</sup> *R. v. Mills*, 1857, D. & B. 205. It was, however, an attempt to obtain money by a false pretence.

(8.) A falsely pretends to B, 1, that he is an unmarried man ; 2, that he will marry B ; 3, that if B will give him £8 he will furnish a house for himself and her to live in after marriage. By these false pretences he obtains the £8. He is deemed to have obtained the £8 by the false pretence that he is an unmarried man, which is a false representation as to an existing fact.

## ARTICLE 361.

## INTENT TO DEFRAUD.

An intent to defraud, in the case of offences against Article 358, is consistent with an intent to undo the effect of the fraud if the offender should be able to do so.

*Illustration.*

<sup>1</sup> A by false pretences induces B to let him have some carpets, intending to pay for them if he should be able to do so. This is an intent to defraud.

## ARTICLE 362.

## CHEATING AT PLAY.

<sup>2</sup> Every one is deemed guilty of obtaining money or a valuable thing by a false pretence with intent to cheat or defraud, and is liable to be punished accordingly, who wins from any other person to himself or any other or others, any sum of money or valuable thing by any fraud or unlawful device, or ill practice in playing at or with cards, dice tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise.

<sup>1</sup> *R. v. Naylor*, 1865, 1 C. C. R. 4.

<sup>2</sup> 8 & 9 Vict. c. 109, s. 17. See *R. v. Hudson*, 1860, Bell, C. C. 263, for an illustration of what does not amount to a "game." As to "winning," it has been doubted whether the money, &c., must be actually obtained, or whether winning the game by a false pretence would be within the section if the loser refused to pay the money: *R. v. Moss*, 1856, D. & B. 104.

## ARTICLE 363.

## OBTAINING CREDIT, ETC., BY FALSE PRETENCES.

<sup>1</sup> Every one commits a misdemeanor, and is liable upon conviction thereof to twelve months imprisonment and hard labour, who,

(a.) in incurring any debt or liability, obtains credit under false pretences, or by means of any other fraud; or,

(b.) with intent to defraud his creditors or any of them makes or causes to be made any gift, delivery, or transfer of or any charge on his property; or,

(c.) with intent to defraud his creditors, conceals or removes any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

## ARTICLE 364.

## CONCEALING DEEDS AND INCUMBRANCES.

<sup>2</sup> Every one commits a misdemeanor and is liable, upon conviction thereof, to two years imprisonment and hard labour, who, being a seller or mortgagor of land, or of any chattels, real or personal, or chases in action conveyed or assigned to a purchaser, <sup>3</sup> or mortgagee, or, being the solicitor or agent of any such seller or mortgagor,

conceals from the purchaser any settlement, deed, will, or other instrument material to the title, or any incumbrance, or,

<sup>1</sup> 32 & 33 Vict. c. 62, s. 13: The Debtors Act, 1869. This section applies to all debtors and not merely to bankrupts and liquidating debtors. *R. v. Rowlands*, 1882, 8 Q. B. D. 530.

<sup>2</sup> 22 & 23 Vict. c. 35, s. 24. The Attorney-General's consent is necessary to a prosecution for this offence. Wilfully making an affidavit under the Land Transfer Act 1875, containing a statement false in any material particular, is a misdemeanor punishable with two years imprisonment with hard labour, 38 & 39 Vict. c. 87, s. 101. As to certain frauds on the registration of titles, see 25 & 26 Vict. c. 53, ss. 105, 138; and 25 & 26 Vict. c. 67, ss. 44, 45.

<sup>3</sup> The words "or mortgagee" were added by 23 & 24 Vict. c. 38, s. 8.

falsifies any pedigree on which the title does or may depend,

in order to induce him to accept the title offered or produced to him, and with intent to defraud.

### ARTICLE 365.

#### CONSPIRACY TO DEFRAUD OR EXTORT.

Every one commits the misdemeanor of conspiracy who agrees with any other person or persons to do any act with intent to defraud the public, or any particular person, or class of persons, or to extort from any person any money or goods. Such a conspiracy may be criminal although the act agreed upon is not in itself a crime.

<sup>1</sup> An offender convicted of this offence may be sentenced to hard labour.

#### *Illustrations.*

The following are instances of conspiracies with intent to defraud.

<sup>2</sup> A conspiracy to defraud the public by a mock auction.

<sup>3</sup> A conspiracy to raise the price of the funds by false rumours.

<sup>4</sup> A conspiracy to defraud the public by issuing bills in the name of a fictitious bank.

<sup>5</sup> A conspiracy to induce a person to buy horses by falsely alleging that they were the property of a private person and not of a horse dealer.

<sup>6</sup> A conspiracy to induce a man to take a lower price than that for which he had sold a horse, by representing that it had been discovered to be unsound and re-sold for less than had been given for it.

<sup>7</sup> A conspiracy to defraud a partner by false accounts, the fraud not being in itself criminal when it was committed.

<sup>1</sup> 14 & 15 Vict. c. 100, s. 29.

<sup>2</sup> *R. v. Lewis*, 1869, 11 Cox, C. C. 404.

<sup>3</sup> *R. v. De Berenger*, 1814, 3 M. & S. 67.

<sup>4</sup> *R. v. Hovey*, 1782, 2 East, P. C. 858.

<sup>5</sup> *R. v. Kenrick*, 1843, 5 Q. B. 49.

<sup>6</sup> *Carlisle's Case*, 1854, D. & P. 337.

<sup>7</sup> *R. v. Warburton*, 1870, 1 C. C. R. 274

<sup>1</sup> A conspiracy to defraud generally by getting a settling day for shares of a new company.

#### ARTICLE 366.

##### PRETENDING TO EXERCISE WITCHCRAFT.

<sup>2</sup> Every one commits a misdemeanor and must upon conviction thereof, be imprisoned for a year, and may be obliged to give sureties for his good behaviour in such sum and for such time as the Court thinks fit, who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.

#### ARTICLE 367.

##### CHEATING.

Every one commits the misdemeanor called cheating, who fraudulently obtains the property of another by any deceitful practice not amounting to felony, which practice is of such a nature that it directly affects, or may directly affect, the public at large. But it is not cheating within the meaning of this Article to deceive any person in any contract or private dealing by lies unaccompanied by such practices as aforesaid.

##### *Illustrations.*

(1.) The following are instances of cheating :—

<sup>3</sup> Selling by a false weight or measure even to a single person.

<sup>4</sup> Selling clothing with the alnager's seal forged upon it.

<sup>1</sup> *R. v. Aspinall*, 1876, 1 Q. B. D. 730.

<sup>2</sup> 9 Geo. 2, c. 5, s. 4. Would it be a good defence to an indictment for this offence to prove that the defendant not only "pretended," but actually practised witchcraft? As to witchcraft, see 2 Hist. Cr. Law, 430-6.

<sup>3</sup> *R. v. Young*, 1789, 3 T. R. 104.

<sup>4</sup> 2 Russ. Cr. 516.

<sup>1</sup> Selling a picture by means of an imitation of the name of a well-known artist inscribed upon it.

<sup>2</sup> Maiming oneself in order to have a pretext for begging.

<sup>3</sup> Selling unwholesome bread as if it were wholesome.

(2.) The following cases are instances of frauds not amounting to cheating :—

<sup>4</sup> Delivering short weight of bread, no false weights or tokens being used.

<sup>5</sup> Receiving barley to grind and delivering a mixture of oat and barley meal.

<sup>6</sup> Selling as a Winchester bushel a sack of corn which is not a Winchester bushel, but greatly deficient.

## ARTICLE 368.

### SERVANTS FEEDING HORSES, ETC., AGAINST ORDERS.

<sup>7</sup> Every servant who, contrary to the orders of his master takes from his possession any corn, pulse, roots or other food for the purpose of giving the same, or of having the same given, to any horse or other animal belonging to or in the possession of his master is guilty of misdemeanor, and the commission of such offence does not amount to larceny.

If upon the trial of any servant for feloniously taking from his master any corn, pulse, roots or other food consumable by horses or other animals he alleges that he took the same under such circumstances as would constitute the said misdemeanor and satisfies the jury thereof, they may return a verdict accordingly, and thereupon the Court may award imprisonment with hard labour for three months or may inflict a penalty not exceeding five pounds, in case of non-payment of which imprisonment with hard labour for three months may be imposed unless the penalty be sooner paid.

<sup>1</sup> *R. v. Clow*, 1858, D. & B. 460.

<sup>2</sup> 1 *Hawk.* P. C. 108 ; 2 *Russ. Cr.* 515.

<sup>3</sup> 2 *East* P. C. 822 ; *R. v. Dixon*, 1814, 3 M. & S. 11.

<sup>4</sup> *R. v. Eagleton*, 1854, D. & P. 376, 515.

<sup>5</sup> *R. v. Haynes*, 1815, 4 M. & S. 214.

<sup>6</sup> *Pinckney's Case*, 1733, 2 *East*, P. C. 818.

<sup>7</sup> 26 & 27 *Vict. c.* 103, s. 1. This offence is also punishable summarily, see *Oke's Synopsis*, p. 444.

## ARTICLE 369.

## FRAUDULENTLY CONCEALING ORE.

<sup>1</sup> Every one commits felony and is liable upon conviction thereof to two years imprisonment and hard labour,

who, being employed in or about any mine, takes, removes, or conceals any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found, or being in such mine with intent to defraud any proprietor of, or any adventurer in, any such mine, or any workman or miner employed therein.

## ARTICLE 370.

## TAKING MARKS FROM PUBLIC STORES.

<sup>2</sup> Every one commits felony, and is liable upon conviction thereof to seven years penal servitude,

who, with intent to conceal Her Majesty's property in any stores under the care, superintendence, or control of a Secretary of State, or the Admiralty, or any public department or office, or of any person in the service of Her Majesty, takes out, destroys or obliterates wholly or in part any mark described in the first schedule to the Public Stores Act, 1875 (38 & 39 Vict. c. 25), or any mark whatsoever denoting the property of Her Majesty in any stores.

## ARTICLE 371.

## CONCEALING TREASURE TROVE.

<sup>3</sup> Every one commits a misdemeanor who conceals from the knowledge of our Lady the Queen the finding of any treasure,

<sup>1</sup> 24 & 25 Vict. c. 96, s. 39. Re-enacting earlier provisions. Passed in consequence of decision in *R. v. Webb*, 1835, 1 Moo. 431.

<sup>2</sup> 38 & 39 Vict. c. 25, s. 5. See, too, *ante*, Art. 68; this Act constitutes many offences triable summarily, as to which see Oke's Synopsis, p. 568.

<sup>3</sup> 3rd Inst. 132. And see *R. v. Thomas*, 1863, L. & C. 313.

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that is to say, of any gold or silver in coin, plate, or bullion, hidden in ancient times, and in which no person can show any property. It is immaterial whether the offender found such treasure himself or received it from a person who found it, but was ignorant of its nature.



## CHAPTER XLII

*<sup>1</sup> FRAUDS BY AGENTS, TRUSTEES, AND OFFICERS OF  
PUBLIC COMPANIES—FALSE ACCOUNTING*

## ARTICLE 372.

## PUNISHMENT OF MISDEMEANORS IN THIS CHAPTER.

EVERY one who commits any of the misdemeanors defined in this chapter is liable, upon conviction thereof, to seven years penal servitude.

## ARTICLE 373.

## “ MISAPPROPRIATE ” DEFINED.

<sup>2</sup> In this chapter the word “misappropriate” means converting any of the things in respect of which the offences defined in it are committed to the use or benefit of the offender, or to the use or benefit of any person other than the person by or for whom the offender was intrusted therewith. In regard to each of the offences defined in Articles 374, 375, and 376, it is immaterial whether the offender was intrusted with the thing in respect of which the offence was committed solely, or jointly with any other person.

## ARTICLE 374.

## MISAPPROPRIATIONS BY BANKERS, MERCHANTS, ETC.

<sup>3</sup> Every banker, merchant, broker, solicitor, or <sup>4</sup> other agent commits a misdemeanor,

<sup>1</sup> 3 Hist. Cr. Law, 150-160.

<sup>2</sup> This Article is simply a drafting abridgment from the sections referred to in the following Articles.

<sup>3</sup> 24 & 25 Vict. c. 96, s. 75.

<sup>4</sup> i.e. other agent like a banker, merchant, broker, or solicitor. The section is aimed at those classes who carry on the occupations or similar occupations to those mentioned in the section, and not at those who carry on no such occupation, but who may happen from time to time to undertake some fiduciary position whether for money or otherwise: *R. v. Portugal*, 1885, 16 Q. B. D. 487, 491.

(a.) who, having been intrusted as such with any money or security for the payment of money, with any direction in <sup>1</sup> writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds, or any part of the proceeds of such security, for any purpose or to any person specified in such direction, misappropriates the same in violation of good faith and contrary to the terms of such direction; or

(b.) <sup>2</sup> who, being intrusted as such with any chattel or valuable security, or any power of attorney for the sale or transfer of any <sup>3</sup> stock, for safe custody or for any special purpose, and without any authority to sell, negotiate, transfer, or pledge the same, sells, negotiates, transfers, pledges, or misappropriates the same, or the proceeds of the same, or any part thereof, or the share or interest to which such power of attorney relates or any part thereof, in violation of good faith and contrary to the object or purpose for which it was intrusted to him; or

(c.) <sup>4</sup> who, being intrusted as such with the property of any other person for safe custody, with intent to defraud, sells, negotiates, transfers, pledges or misappropriates the same or any part thereof.

<sup>5</sup> Clause (b.) does not extend

to an agent who disposes of a chattel, valuable security, or power of attorney according to unwritten instructions given to him, and subsequently misappropriates the proceeds thereof, unless (possibly) he is proved to have had an intention to misappropriate the proceeds at the time when he disposed of the chattel, valuable security, or power of attorney; nor

<sup>6</sup> to a solicitor who being intrusted with money to lay out

<sup>1</sup> As to what amounts to a direction in writing, see *R. v. Christian*, 1873, 2 C. C. R. 94.

<sup>2</sup> 24 & 25 Vict. c. 96, s. 75.

<sup>3</sup> Stock means "any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society."

<sup>4</sup> 24 & 25 Vict. c. 96, s. 76.

<sup>5</sup> This seems to be the effect of *R. v. Tatlock*, 1876, 2 Q. B. D. 157, and *R. v. Cooper*, 1874, 2 C. C. R. 123. In *R. v. Tatlock* the judges were not altogether unanimous.

<sup>6</sup> *R. v. Newman*, 1882, 8 Q. B. D. 706; *R. v. Fullagar*, 1879: 14 Cox, 370.

on mortgage for his client misappropriates it, unless it appears specifically that he was to keep it with him for safe custody until it could be so invested.

<sup>1</sup> Clause (b.) extends to every one who, being authorised to receive money to arise from the sale of any annuities or securities purchased or transferred under the provisions of Part V. of the Municipal Corporation Act 1882 or under any Act repealed by that Act, or any dividends thereon, or any other such money, appropriates the same otherwise than as directed by that Act or by the Treasury in pursuance thereof.

### ARTICLE 375.

#### MISAPPROPRIATION UNDER POWER OF ATTORNEY.

<sup>2</sup> Every one commits a misdemeanor who, being intrusted with any power of attorney for the sale or transfer of any property, fraudulently sells or transfers, or misappropriates the same, or any part thereof.

### ARTICLE 376.

#### MISAPPROPRIATION BY FACTORS OR AGENTS.

<sup>3</sup> Every factor or agent intrusted, for the purpose of sale or otherwise, with the possession of any <sup>4</sup> goods, or of any docu-

<sup>1</sup> 45 & 46 Vict. c. 50, s. 117; authorising the application of securities contrary to sect. 124 of the same Act is a misdemeanor punishable as the Court awards. Ibid. s. 124.

<sup>2</sup> 24 & 25 Vict. c. 96, s. 77.

<sup>3</sup> Ibid. s. 78.

<sup>4</sup> Any factor or agent intrusted as mentioned above, "and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title;"

a factor or agent is deemed to be in possession of goods whether the same are in his actual custody or held by any other person subject to his control, or for him or on his behalf;

a factor or agent in possession of such goods or documents is taken to have been intrusted therewith by the owner thereof unless the contrary is shown. Ibid. s. 79.

ment of title to goods, commits a misdemeanor who, contrary to or without the authority of his principal and for the use or benefit of himself or any person other than the person by whom the goods were intrusted to him, and in violation of good faith,

(a.) <sup>1</sup> makes any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him as and by way of a pledge, lien, or security for any money or valuable security thereon borrowed or received, or intended to be thereafter borrowed and received by him; or

(b.) <sup>2</sup> accepts any advance of any money or valuable security on the faith of any <sup>3</sup> contract or agreement to consign, deposit, transfer or deliver any such goods or document of title.

<sup>3</sup> Provided, in each case, that the amount for which such goods or documents are made security in any of the ways aforesaid exceeds the amount justly due to such agent from his principal at the time when the security is given, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent.

#### ARTICLE 377.

##### CLERKS, ETC., ASSISTING IN PROCURING ADVANCES.

<sup>4</sup> Every clerk, or other person, who knowingly and wilfully

<sup>1</sup> "Every contract, pledging, or giving a lien upon such document of title as aforesaid is deemed to be a pledge of and lien upon the goods to which the same relates." 24 & 25 Vict. c. 96, s. 79.

<sup>2</sup> Where any loan or advance is *bona fide* made to any such factor or agent on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title, and such goods or documents of title are actually received by the person making the loan or advance without notice of the factor's or agent's want of authority, the loan or advance is deemed to be made on the security of the goods, though the goods or documents of title are not actually received by the person making the advance till "the period subsequent thereto," *Ibid.* s. 79. The necessity for this explanation, which is taken from part of s. 79, is not very obvious, nor do I understand what particular period is referred to by the concluding words.

<sup>3</sup> Any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, is deemed to be a contract or agreement with such factor or agent, *Ibid.*, s. 79. Of course it is.

<sup>4</sup> *Ibid.*, s. 78.

acts and assists in making any <sup>1</sup> security, or accepting or procuring any advance mentioned in Article 376, commits a misdemeanor.

## ARTICLE 378.

### FRAUDULENT TRUSTEES.

<sup>2</sup> Every <sup>3</sup> trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, who with intent to defraud misappropriates the same, or otherwise disposes of or destroys such property or any part thereof, commits a misdemeanor.

A public purpose is such a purpose as would be recognized as public in a court of law, and not a purpose the execution of which is a matter of public importance.

### *Illustrations.*

<sup>4</sup> The trustees of a savings bank, which has printed rules, one of which directs the manner in which the funds are to be invested, are trustees on an express trust created by an instrument in writing, but not for a public purpose.

<sup>5</sup> The purposes of an institution exempted from liability to the poor-rate would be public.

## ARTICLE 379.

### FRAUDS BY DIRECTORS AND PUBLIC OFFICERS.<sup>6</sup>

Every director or public officer of any body corporate or public company commits a misdemeanor who

<sup>1</sup> "Any such consignment, deposit, transfer, or delivery."

<sup>2</sup> 24 & 25 Vict c. 96, s. 80.

<sup>3</sup> "Trustee" means a "trustee on some express trust created by some deed, will, or instrument in writing, and shall include the heir or personal representative of any such trustee and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present (6 Aug. 1861) or future Act relating to joint stock companies, bankruptcy, or insolvency": *Ibid.* s. 1.

<sup>4</sup> *R. v. Fletcher*, 1862, L. & C. 180.

<sup>5</sup> *Ibid.* L. & C. at p. 203.

<sup>6</sup> The following frauds similar to, but more special than, those mentioned in the text are punished as follows:—A director, officer, or

(a.)<sup>1</sup> fraudulently takes, or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company; or

(b.)<sup>2</sup> as such receives or possesses himself of any of the property of such body corporate or public company, otherwise than in payment of a just debt and demand, and, with intent to defraud, omits to make, or to cause and direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company; or

(c.)<sup>3</sup> with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, or valuable security belonging to the body corporate or public company: or

makes or concurs in the making of any false entry: or

omits or concurs in omitting any material particular in any book of account or other document; or

(d.)<sup>4</sup> makes, circulates or publishes, or concurs in making, circulating or publishing, any written statement or account which he knows to be false in any material particular with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company;

or with intent to induce any person to become a share-

contributory of a company wound up under the Companies Act, 1862, destroying, &c., or falsifying books, &c., or securities, or making false entries in a register of the company with intent to defraud any person, misdemeanor, two years hard labour, 25 & 26 Vict. c. 89, s. 166;—an actuary, &c., or other person holding any situation in a savings bank receiving money from a depositor, &c., and not duly accounting for it, misdemeanor, 26 & 27 Vict. c. 87, s. 9;—a railway company delivering a mortgage deed, bond, or certificate without a declaration as required by the Act thereon, and any officer of the company permitting the delivery thereof without the declaration, misdemeanor, fine and imprisonment, 29 & 30 Vict. c. 108, s. 15;—any director or registered officer of a company signing a declaration, account or statement under the Act which he knows to be false, misdemeanor, fine and imprisonment, 29 & 30 Vict. c. 108, s. 16; any person making a false entry in a contract for a sale of shares of a joint stock banking company, misdemeanor, 31 & 32 Vict. c. 119, s. 5; any person signing any statement, &c., or report required by the Regulation of Railways Act 1868, which is false to his knowledge, misdemeanor, fine and imprisonment, 31 & 32 Vict. c. 119, s. 5; the like as to any return required by the Regulation of Railways Act 1871, 34 & 35 Vict. c. 78, s. 10.

<sup>1</sup> 24 & 25 Vict. c. 96, s. 81.

<sup>2</sup> *Ibid.* s. 82.

<sup>3</sup> *Ibid.* s. 83.

<sup>4</sup> *Ibid.* s. 84.

holder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof.

The offences defined in clauses (a.) and (c.) may be committed by members, and the offences defined in clauses (b.), (c.), and (d.) by managers of bodies corporate and public companies, as well as by the directors or public officers thereof.

### ARTICLE 380.

#### RULE OF EVIDENCE.

<sup>1</sup> No one is entitled to refuse to make a full and complete discovery by answer to any statement of claim for discovery, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy, upon the ground that his doing so might tend to show that he had committed any of the offences defined in Articles 374 to 379, both inclusive.

No one is liable to be convicted of any such misdemeanor by any evidence whatever in respect of any act done by him if he has at any time, previous to his being charged with such offence, <sup>2</sup> first disclosed such act on oath in consequence of any compulsory process of any Court which, in 1861, was a Court of either law or equity, in any action, suit, or proceeding *bond fide* instituted by any party aggrieved, or if he has <sup>2</sup> first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.

### ARTICLE 381.

#### FRAUDULENT FALSE ACCOUNTING.

<sup>3</sup> Every one commits a misdemeanor who, being a clerk officer or servant, or employed or acting in the capacity of a

<sup>1</sup> 24 & 25 Vict. c. 96, s. 85.

<sup>2</sup> On this word, which was not in the earlier Act, 5 & 6 Vict. c. 39, s. 6, see *R. v. Skeen*, 1859, Bell, C. C. 97.

<sup>3</sup> 38 & 39 Vict. c. 24, s. 1.

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clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates, or falsifies any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer ;

or wilfully and with intent to defraud, makes or concurs in making any false entry in, or omits or alters, or concurs in omitting or altering any material particular from or in any such book, or any document or account.



## CHAPTER XLIII

## RECEIVING

## ARTICLE 382.

## RECEIVING DEFINED.

<sup>1</sup> A PERSON is said to receive goods improperly obtained as soon as he obtains control over them from the person from whom he receives them.

Where goods are received by a wife or servant, in the husband's or master's absence, with a guilty knowledge on the part of such wife or servant, the husband or master does not become a receiver only by acquiring a guilty knowledge of the receipt of the goods by such wife or servant, and passively acquiescing therein, but he does become a receiver with a guilty knowledge if, having such knowledge, he does any act approving of the receiving of the goods.

Property ceases to be stolen or otherwise improperly obtained within the meaning of this Article as soon as it comes into the possession of the general or special owner, and if such general or special owner delivers it to some one who delivers it to a person who receives it knowing of the previous theft or other obtaining, such receiving is not an offence within this Article.

<sup>1</sup> *R. v. Wiley*, 1850, 2 Den. 37. In this case the thieves carried stolen fowls into a stable belonging to the receiver's father. The receiver lighted them in, and was taken in the act of bargaining for them as they lay on the ground between the three men. Eight judges to four held that the conviction must be quashed; substantially they all agreed in the proposition given in the text, but they differed on the question whether, under the circumstances, the receiver had the control of the fowls or not. There was also some difference as to the effect of the terms in which the question had been left to the jury by the chairman of sessions who stated the case. For these reasons I have not attempted to turn the case into an illustration. The case of *R. v. T. Smith*, 1855, D. & P. 494, is somewhat similar. See, too, *R. v. Hill*, 1849, 1 Den. 453. In *R. v. Müller*, 1854, 6 Cox, C. C. 353, a person was found guilty of receiving who had never had possession of the goods except by a servant.

*Illustrations.*

(1.)<sup>1</sup> A's wife in A's absence receives stolen potatoes knowing them to be stolen. The jury finds that A "afterwards adopted his wife's receipt." This finding is not sufficient to sustain a verdict of guilty, as it is consistent with A's having passively consented to what his wife had done without taking any active part in the matter.

(2.)<sup>2</sup> A's wife in A's absence receives stolen goods and pays the thief 6*d.* on account. The thief then tells A, who strikes a bargain with the thief, and pays him the balance. A has received stolen goods knowing them to be stolen.

(3.)<sup>3</sup> B steals C's property. C finds it in B's pocket, restores it to B, and tells B to sell it at the same place where he has sold other property of C's. B sells it to A, who knows that it has been stolen. A commits no offence, as the property after being stolen has got into the owner's hands.

(4.)<sup>4</sup> B steals goods from a railway to which they have been bailed. B then sends the goods to A by the same railway. A receives them, knowing them to have been stolen, from the railway porter knowing them to have been stolen. A policeman employed by the railway discovers whilst the goods are in transit that they have been stolen, and causes them to be delivered to A in order to detect them. A has committed no offence under this Article.

## ARTICLE 383.

## RECEIVING PROPERTY UNLAWFULLY OBTAINED.

Every one commits an offence amounting, in cases (*a.*), (*b.*), and (*d.*), to felony, and in case, (*c.*) to misdemeanor, and is liable upon conviction thereof, to penal servitude for life in case (*a.*), and to penal servitude for fourteen years in case (*b.*), and to penal servitude for seven years in cases (*c.*) and (*d.*), who does any of the following things (that is to say):—

<sup>1</sup> *R. v. Dring*, 1857, D. & B. 329.

<sup>2</sup> *R. v. Woodward*, 1822, L. & C. 122. A husband can receive from a wife who steals on her own account in his absence: *R. v. M'Athey*, 1862, L. & C. 250.

<sup>3</sup> *R. v. Dolan*, 1855, D. & P. 436.

<sup>4</sup> *R. v. Schmidt*, 1866, 1 C.C. R. 15. Erle, C.J., and Mellor, J., dissented, on the ground that the company were the innocent agent of the thieves, and that the policeman merely looked at the goods, and took no possession of them.

(a.) <sup>1</sup> who receives any post letter or post letter-bag, or any chattel, or money, or valuable security, the stealing, taking, embezzling, or secreting whereof is referred to in Article 350, clause (b.), knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post; or

(b.) <sup>2</sup> who receives any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof is a felony, either at common law or by the 24 & 25 Vict. c. 96 (<sup>3</sup> but not by 31 & 32 Vict. c. 116), knowing the same to have been so dealt with; or

(c.) <sup>4</sup> who, knowing the same to have been so dealt with, receives any chattel, money, valuable security, or other property which may have been stolen, taken, obtained, converted, or disposed of in such a manner as to amount to a misdemeanor by 24 & 25 Vict. c. 96; or

(d.) <sup>5</sup> who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, stolen, taken, obtained, extorted, embezzled, converted, or disposed of by any felony or misdemeanor prohibited by 24 & 25 Vict. c. 96, unless he uses all due diligence to cause the offender to be brought to trial for the same.

<sup>1</sup> 7 Will. 4 & 1 Vict. c. 36, s. 30.

<sup>2</sup> 24 & 25 Vict. c. 96, s. 91.

<sup>3</sup> Which makes stealing by a partner, &c., felony, see *supra*, Art. 327 : *R. v. Smith*, 1870, 1 C. C. R. 266, an instructive, but I think a most unfortunate, decision. It is exactly in the same spirit as *R. v. Sadi*, 1787, 1 Lea. 468, in which it was held that to receive a bank-note knowing it to be stolen was not felony, because bank-notes are not the subject of larceny at common law. See, too, *R. v. Robinson*, 1859, Bell C. C. 34, Art. 358, Illustration (1).

<sup>4</sup> 24 & 25 Vict. c. 96, s. 95.

<sup>5</sup> *Ibid.* s. 101, W. (in the case of males under eighteen. In all other cases whipping is confined to males under sixteen).

## CHAPTER XLIV

<sup>1</sup> FORGERY IN GENERAL

## ARTICLE 384.

## DEFINITION OF FORGERY—INTENT TO DEFRAUD.

FORGERY is making a false document, as defined in Article 385, with intent to defraud.

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact; nor by the fact that he had, or thought he had, a right to the thing to be obtained by the false document.

The presumption may be rebutted by proof that at the time when the false document was made there was no person who could be reasonably supposed by the offender to be capable of being defrauded thereby; but it is not necessarily rebutted by proof that there was no person who could in fact be defrauded thereby.

It is uncertain whether, in the absence of any evidence as to the existence of any person who can be defrauded by a false document, an intent to defraud will or will not be presumed from the mere making of the document.

An intent to deceive the public or particular persons, but not to commit a particular fraud or specific wrong upon any particular person, is not an intent to defraud within the meaning of this Article.

*Illustrations.*

(1.) <sup>2</sup> A makes a false receipt, the effect of which, if the receipt were genuine, would be to render B accountable to C for a larger

<sup>1</sup> 3 Hist. Cr. Law, 180–188.

<sup>2</sup> *R. v. Boardman*, 1838, 2 Moo. & Rob. 147.

sum than B has in fact received on C's account. A is presumed to have intended to defraud, although the receipt was not used in fact, and was probably not intended to be used in fact for the purpose of increasing B's liability.

(2.)<sup>1</sup> A imitates a Bank of England note with intent to defraud any person to whom it may be passed, but without specially intending to defraud the Bank of England. This is an intent to defraud.

(3.)<sup>2</sup> A makes a false acceptance to a bill of exchange, and puts it in circulation, intending to take it up, and actually taking it up before the bill is presented to the acceptor for payment. This is forgery with intent to defraud.

(4.)<sup>3</sup> A being directed by his master to fill up a blank cheque with an amount to be ascertained, and to take up a bill with the proceeds, fills it up for a larger amount and keeps the difference on a claim that it was due to him for salary. Here there is an intent to defraud.

(5.)<sup>4</sup> A pays to his credit at a bank a false promissory note. The bank hold guarantees for a much larger amount. Notwithstanding this the inevitable conclusion is that he meant to defraud.

(6.)<sup>5</sup> A signs B's name without his authority to two deeds of transfer of railway shares, by one of which the shares purport to be transferred by C to B, and by the other to be transferred from B to D. <sup>6</sup>The circumstances are such that no one can be defrauded by these deeds. This rebuts the presumption of an intent to defraud raised by the writing of B's name.

(7.)<sup>7</sup> A imitates a cheque in B's handwriting and name on a bank at which, to A's knowledge, B had long ceased to keep an

<sup>1</sup> 24 & 25 Vict. c. 98, s. 12, would now apply in terms to such a case. In *R. v. Mazagora*, 1815, R. & R. 291, the judges held that the jury ought in such a case to have found an intent to defraud the Bank of England.

<sup>2</sup> *R. v. Geach*, 1840, 9 C. & P. 499; and in the case stated by Coleridge, J., in *R. v. Todd*, 1843, 1 Cox, C. C. 57.

<sup>3</sup> *R. v. Wilson*, 1847, 1 Den. 284.

<sup>4</sup> Compare *R. v. James*, 1838, 7 C. & P. 553, with *R. v. Cooke*, 1838, 8 C. & P. 582-5. I have taken the very words of Patterson, J. "Inevitable conclusion" is a little less strong and distinct than "conclusive presumption of law," an expression which the judge seems to have shrunk from.

<sup>5</sup> This is a barely possible supposition, though Cresswell, J., held that it was so in *R. v. Marcus*, 1846, 2 C. & K. 356. Rolfe, B., held otherwise in *R. v. Hoatson*, 1847, 2 C. & K. 777, see note.

<sup>6</sup> *R. v. Marcus*, 1846, 2 C. & K. 356.

<sup>7</sup> This Illustration is founded on the dictum of Maule, J., in *R. v. Nash*, 1852, 2 Den. C. C. 499.

account. The jury may infer from this an absence of intent to defraud.

(8.)<sup>1</sup> A imitates a cheque in B's name on a bank from which B had, without A's knowledge, withdrawn his balance the day before. Here the fact that no one could be defrauded by the false cheque does not rebut the presumption of an intent to defraud.

(9.)<sup>2</sup> A makes a false will. It does not appear whether there was or was not any person who could be defrauded by it. It is uncertain whether an intent to defraud is or is not to be presumed.

(10.)<sup>3</sup> A forges a diploma of the College of Surgeons, intending to induce a belief that the document is genuine, and that he is a member of the College of Surgeons, and shows it to two persons with intent to induce that belief in them. This is not an intent to defraud within the meaning of this Article, though it is an intent to deceive.

## ARTICLE 385.

### MAKING A FALSE DOCUMENT DEFINED.

To make a false document is

(a.)<sup>4</sup> to make a document purporting to be what in fact it is not;

(b.)<sup>5</sup> to alter a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document;

(c.)<sup>6</sup> to introduce into a document without authority, whilst it is being drawn up, matter which, if it had been authorized, would have altered the effect of the document;

(d.) to sign a document

<sup>1</sup> This illustration is founded on the dictum of Maule, J., in *R. v. Nash* 1852, 2 Den. C. C. 499.

<sup>2</sup> *Tuff's Case*, 1848, 1 Den. C. C. 319. The Court were equally divided on a question which, I submit, was substantially the one stated.

<sup>3</sup> *R. v. Hodgson*, 1856, D. & B. 3. It would, however, be an offence under the Medical Act, 21 & 22 Vict. c. 90, s. 40. This Act was passed in 1858, two years after the decision of *R. v. Hodgson*. The offence is "falsely pretending to be, &c., a surgeon, &c.," and the penalty recoverable on summary conviction is £20. The forgery of a diploma would seem to deserve more severe punishment.

<sup>4</sup> Illustration (1).

<sup>5</sup> Illustrations (2) and (3).

<sup>6</sup> Illustrations (4) and (5).

(i.) in the name of any person without his authority, whether such name is or is not the same as that of the person signing ;

<sup>1</sup> (ii.) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing ;

<sup>2</sup> (iii.) in a name represented as being the name of a different person from that of the person signing it, and intended to be mistaken for the name of that person ;

<sup>3</sup> (iv.) in a name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.

But it is not making a false document,

<sup>4</sup> to procure the execution of a document by fraud ;

<sup>5</sup> to omit from a document being drawn up matter which would have altered its effect if introduced, and which might have been introduced, <sup>6</sup> unless the matter omitted qualifies the matter inserted ;

<sup>7</sup> to sign a document in the name of a person personated by the person who signs it, or in a fictitious name, provided that the effect of the instrument does not depend upon the maker's identity with the person personated, or on the correctness of the name assumed by him.

<sup>8</sup> It is not essential to the making of a false document that the false document should be so framed that if genuine it would have been valid or binding, provided that in cases in which the forgery of any particular instrument is made a specific offence by any statute, the false document must, in order that the offence may be completed, fall within the description given in the Act.

<sup>1</sup> Illustrations (6) and (7).

<sup>2</sup> Illustration (8).

<sup>3</sup> Illustration (9).

<sup>4</sup> Illustrations (10), (11).

<sup>5</sup> Illustration (12).

<sup>6</sup> Illustration (13).

<sup>7</sup> Illustration (14).

<sup>8</sup> Illustrations (15) (17).

<sup>1</sup> The fact that a document is made to resemble that which it purports to be and is not, is evidence for the consideration of the jury of an intent to defraud, but is not essential to the making of a false document.

<sup>2</sup> Provided that in cases in which the forgery of any particular instrument is made a specific offence by any statute, the false document must have such a resemblance to the document which it is intended to resemble as to be likely to deceive a common person.

### *Illustrations.*

(1.) <sup>3</sup> A conveys land to B in fee. Afterwards A and C draw up and execute a deed purporting to be of earlier date than the conveyance to B, by which the same land purports to be let to C for a term of 999 years. The second deed is a false document, though executed by A and C.

(2.) <sup>4</sup> A obtains a blank acceptance from B, with authority to fill it up for any amount not exceeding £200. A fills it up for £500. This is a false document.

(3.) <sup>5</sup> A persuades his servant, William Wilkinson, to write his name across a stamped paper, so as to appear to be the name of the acceptor of a bill of exchange. A then fills up the bill and addresses it to Mr. William Wilkinson, Halifax, so as to make the bill appear as if it had been drawn upon and accepted by a different William Wilkinson. This is a false document.

(4.) <sup>6</sup> A gets B to sign a receipt, and afterwards makes additions to it, so as to make it appear that a larger sum was paid to B than had actually been paid. The altered receipt is a false document.

(5.) <sup>7</sup> A, employed to draw up B's will, inserts in it legacies out of his own head. The will is a false document.

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<sup>1</sup> Illustration (18).

<sup>2</sup> Illustration (19).

<sup>3</sup> *R. v. Ritson*, 1869, 1 C. C. R. 200, and in 1 Hawk. P. C. 264.

<sup>4</sup> *R. v. Hart*, 1836, 1 Moo. 486; 7 C. & P. 652. In this case the words "£200" were written in the corner of the blank acceptance, and erased. Littledale, J., however, told the jury that the filling up the acceptance for a greater amount than that which was authorized was forgery: *R. v. Bateman*, 1845, 2 Russ. Cr. 623; 1 Cox, C. C. 186, is to the same effect.

<sup>5</sup> *R. v. Blenkinsop*, 1847, 1 Den. C. C. 276; 2 Russ. Cr. 632.

<sup>6</sup> *R. v. Griffiths*, 1858, D. & B. 584. It is not easy to say why this case was reserved.

<sup>7</sup> 1 Hawk. P. C. 264.



(6.)<sup>1</sup> Sheppard signs a draft in the name of H. Turner, Junior, of Noah's Row, Hampton Court, there being no such place or person. The note is a false document.

(7.)<sup>2</sup> Thomas Brown authorizes B to sign a promissory note in the name of Thomas Brown, in order that it might be used as the note of a different and entirely fictitious Thomas Brown. This is a false document, whether B knew or not of the use for which the note was intended.

(8.)<sup>3</sup> B agrees to give A time for the payment of a debt, if A will get his mother-in-law, C. Watters (whose Christian name is unknown to B) to execute a promissory note. A gets his wife to sign the note in her maiden name, "A. Watters," and produces the note to B as the note of his mother-in-law. This is a false document.

(9.)<sup>4</sup> A, personating the Hon. A. A. Hope, the brother of the Earl of Hopetoun, draws a bill of exchange in the name of A. A. Hope on a person to whom he was known by that name, and who would have paid it if A had really been A. A. Hope, the brother of the Earl of Hopetoun. The bill is a false document, though the person on whom it was drawn knew and gave credit to the person who drew it.

(10.)<sup>5</sup> A gets B to make his mark to a deed by representing it to be a requisition to a person to stand for a seat in Parliament. A does not make a false document.

(11.)<sup>6</sup> A reads B a document by which an action is agreed to be settled for £9. B agrees to sign it and pays the £9. A, before B signs it, alters the 9 to 12. A does not make a false document.

(12.)<sup>7</sup> In drawing up B's will, A omits legacy to C. A does not make a false document.

(13.)<sup>7</sup> In drawing up B's will, A omits a devise of an estate for life to C, whereby the will operates to give D an estate in possession, and not in remainder, on B's death. A makes a false document.

<sup>1</sup> *Sheppard's Case*, 1781, 1 Lea. 226.

<sup>2</sup> *R. v. Parkes*, 1796, 2 Lea. 775.

<sup>3</sup> *R. v. Mahoney*, 1854, 6 Cox, C. C. 487; 2 Russ. Cr. 635.

<sup>4</sup> *R. v. Hadfield*, 1803, 2 Russ. Cr. 640. This is the well-known case of the man who married the girl known as the Beauty of Buttermere.

<sup>5</sup> *R. v. Collins*, 1843, 2 M. & R. 461. But see Mr. Greaves' remarks (2 Russ. Cr., 718, 4th ed. note). Mr. Greaves suggests, I think rightly, that this was a case of forgery by an innocent agent, B.

<sup>6</sup> *R. v. Chadwick*, 1844, 2 M. & R. 545, and see 2 Russ. Cr. 626. The case was decided on circuit by Rolfe, B. It is inconsistent with (b) and (c) above, and seems unsatisfactory in itself.

<sup>7</sup> 1 Hawkins, P. C. 265. The distinction seems idle, as every omission of a legacy must increase the residue.

(14.)<sup>1</sup> A, personating B, draws a cheque in his assumed name of B, on a bank with which in his assumed name he had opened a genuine account by the actual payment of money to his credit. A does not make a false document.

(15.)<sup>2</sup> A with intent to defraud, counterfeits the will of a living person. A is guilty of forgery.

(16.)<sup>3</sup> A, with intent to defraud, counterfeits a bill of exchange on unstamped paper, a stamp being necessary to the validity of such a bill. A commits forgery.

(17.)<sup>4</sup> If a person is indicted for forging a bill of exchange, it must be shown that the document forged is a bill of exchange.

(18.)<sup>5</sup> A is charged with forging a Bank of England note. If the resemblance of the forged to the real note is sufficient to deceive a common person, the conviction will not be quashed, because in certain important particulars the two documents differ.

(19.)<sup>6</sup> A forges a note in these words, "I promise to pay for self and company of my bank in England." A cannot be convicted of forging a Bank of England note.

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<sup>1</sup> Such, I submit, would be the law, though I know of no case in which the precise question has been determined. If the law is otherwise, a person passing by a false name would go half way to forgery every time he signed it. If a man passing by a false name drew many bills and regularly provided for them, and at last drew one for which he could not and ought to have known that he could not provide, I do not think he would be guilty of forgery any more than if he had used his own name. The use of a false name is no doubt a fact from which an intent to defraud may often be inferred, but which is a different matter. See the observations of Sir E. H. East on *Aickles' Case*, 1787, 2 East, P. C. 969. Since the first edition of this work was published the case of *R. v. Martin*, 1879, 5 Q. B. D. 34, has been decided, which, without going quite as far as Illustration (14), confirms the view suggested by it. In that case, *Robert Martin*, for some reason which did not appear, drew in payment for a pony a cheque in the name of William Martin on a bank where he had ceased to have an account. This was held not to be forgery, though it was obtaining the pony by a false pretence. See, too, *R. v. Dunn*, 1765, 1 Leach, C. C. 59.

<sup>2</sup> *Murphy's Case*, 1787, 2 East, P. C. 949.

<sup>3</sup> *Hawkenood's Case*, 1783, 2 East, P. C. 955.

<sup>4</sup> See several cases collected in 2 Russ. Cr. 659-665, all of which turn on the question whether peculiarly worded instruments answer the statutory description given in the indictment.

<sup>5</sup> *Elliot's Case*, 1777, 2 East, P. C. 951.

<sup>6</sup> *Jones's Case*, 2 East, P. C. 952. He might however be convicted, if he changed such a document, of obtaining goods by false pretences.

## ARTICLE 386.

## "DOCUMENT."

The word document in Articles 384 and 385 does not include trade-marks or other signs, though they may be written or printed.

*Illustrations.*

(1.)<sup>1</sup> A paints a picture, and intending to represent that it was painted by an eminent artist, writes that artist's name in the corner. This may be a cheat, but is not forgery.

(2.)<sup>2</sup> A prints a number of wrappers imitating advertisements in which egg powders were wrapped for sale by B their maker. He incloses spurious egg powders in the wrappers, and sells them. This is not forgery though it is obtaining money by false pretences.

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<sup>1</sup> *R. v. Cross*, 1858, D. & B. 460.

<sup>2</sup> *R. v. Smith*, 1858, D. & B. 566. It would seem as if in this case the element wanting to complete the offence was the intent to defraud by means of the document, rather than the absence of a document capable of being forged; the offence lay in selling spurious as real powders. The wrappers without the powders could have no effect whatever. The essence of a forgery is, that the document itself should be made the instrument of fraud.

## CHAPTER XLV

<sup>1</sup> PUNISHMENT OF PARTICULAR FORGERIES

## ARTICLE 387.

“UTTER,” “RESEMBLE,” “FORGE.”

<sup>2</sup> IN this chapter the word “utter” includes “offer, dispose of and put off;” and when it is stated that any uttering is an offence, uttering with knowledge of the character of the thing uttered is intended.

The word “resembling” means “made or apparently intended to resemble.”

The word “forge” includes “alter.”

<sup>3</sup> “Having in possession” includes knowingly and wilfully having

(a.) in the possession or custody of any other person,

(b.) in any place for the use or benefit of the possessor or any other person.

<sup>1</sup> 3 Hist. Cr. Law, 180-8. The following forgeries among others have been made penal by the following statutes:—Forging certificates relating to quarantine, F. 6 Geo. 4, c. 78, s. 25; forging stamps on plate, F. 7 & 8 Vict. c. 22, s. 2; forging a seal, &c., purporting to be sealed, &c., under this Act, F. 8 & 9 Vict. c. 113, s. 4; forging a certificate under the Crown Cases Act, 1848, F. 11 & 12 Vict. c. 78, s. 6; forging a proclamation or certificate annexed thereto, &c., F. 31 & 32 Vict. c. 37, s. 4; forging certificates of transfer of stocks from England to Ireland, F. 33 & 34 Vict. c. 58, s. 6; forging a licence, &c., under the Explosives Act, 1875, M. 38 Vict. c. 17, s. 81; forging a statement in a certificate of competency under the Coal Mines Regulation Act, 1887 50 & 51 Vict. c. 58, s. 32.

<sup>2</sup> These are mere drafting abridgments. In the Act the words “utter, offer, dispose of, and put off,” “resembling and made, or apparently intended to resemble,” and “forge and utter” are invariably coupled together. The meaning of the word “utter” was much discussed in *R. v. Ion*, 1852, 2 Den. 475, in which it was held to be an uttering to produce a forged receipt for inspection, and in order to lead the person to whom it was produced to believe that the person producing it had paid his rents.

<sup>3</sup> 24 & 25 Vict. c. 98, s. 45, much abridged.

## ARTICLE 388.

## FORGERIES PUNISHABLE WITH PENAL SERVITUDE FOR LIFE.

Every one commits felony, and is liable upon conviction thereof to penal servitude for life, who

(a.) <sup>1</sup> forges, counterfeits, or utters any of the seals mentioned in the note <sup>2</sup> hereto; or

forges or counterfeits the stamp or impression of any such seal; or

utters any document or instrument whatsoever having thereon or affixed thereto:

(i.) the stamp or impression of any such forged or counterfeited seal; or

(ii.) any forged or counterfeited stamp or impression resembling the stamp or impression of any of the seals mentioned in the note hereto; or

forges or utters any document or instrument having any of the said stamps or impressions thereon or affixed thereto; or

(b.) who forges or utters with intent to defraud,

<sup>3</sup> any transfer of any <sup>4</sup> stock mentioned in the note, any power of attorney for transferring any share or interest in any such stock, or for receiving dividends thereon;

<sup>5</sup> any India bond, or any bond, debenture, or security issued or made under the authority of any Act of Parliament relating to India, or any indorsement thereon or assignment thereof;

<sup>1</sup> 24 & 25 Vict. c. 98, s. 1.

<sup>2</sup> The Great Seal of the United Kingdom, Her Majesty's Privy Seal, any Privy Signet of Her Majesty, Her Majesty's Royal Sign Manual, any of Her Majesty's seals appointed by the 24th Article of the Union between England and Scotland, to be kept, used, and continued in Scotland, the Great Seal of Ireland and the Privy Seal of Ireland.

<sup>3</sup> 24 & 25 Vict. c. 98, s. 2.

<sup>4</sup> "Any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament."

<sup>5</sup> 24 & 25 Vict. c. 98, s. 7.

<sup>1</sup>any exchequer bill, exchequer bond, or exchequer debenture, any endorsement thereon or assignment thereof, or any receipt or certificate accruing thereon;

<sup>2</sup>any <sup>3</sup>bank-note or any endorsement thereon or assignment thereof;

<sup>4</sup>any stock certificate or coupon, or any document purporting to be a stock certificate or coupon issued in pursuance of Part V. of the National Debt Act, 1870 (33 & 34 Vict. c. 71), or of any former Act;

<sup>5</sup>any register, certificate, transfer, &c., under the Act enabling commissioners to grant annuities;

<sup>6</sup>any deed, bond or writing obligatory, or any assignment thereof at law or in equity, or any name, handwriting, or signature purporting to be that of any attesting witness thereto;

<sup>7</sup>any will, codicil, or testamentary instrument;

<sup>8</sup>any bill of exchange or promissory note, or any acceptance, endorsement, or assignment of either respectively;

<sup>9</sup>any undertaking, order, warrant, authority, or request, for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or security for the

<sup>1</sup> 24 & 25 Vict. c. 98, s. 8. "Exchequer Bill" includes "Treasury Bill": see 40 Vict. c. 2, s. 10.

<sup>2</sup> Ibid. s. 12.

<sup>3</sup> "Any note or bill of exchange of the Governor and Company of the Bank of England, or the Governor and Company of the Bank of Ireland, or of any other body corporate, company, or persons carrying on the business of bankers, commonly called a bank-note, a bank bill of exchange, or a bank post bill."

<sup>4</sup> 33 & 34 Vict. c. 58, s. 3 (incorporated with 24 & 25 Vict. c. 98); and see ss. 4-6, as to personation of owners of stock, engraving plates for certificates, and forgery of certificates of transfer.

<sup>5</sup> 2 & 3 Will. 4, c. 59, s. 19.

<sup>6</sup> 24 & 25 Vict. c. 98, s. 20.

<sup>7</sup> Ibid. s. 21.

<sup>8</sup> Ibid. s. 22. A agrees to pay B for goods by his, A's, acceptance, and that he, A, will accept it, and procure its endorsement by C. B sends a form for acceptance accordingly, but with no drawer's name. A accepts it and forges C's endorsement to it. He cannot be indicted under this section, but probably might be convicted of a common law forgery: *R. v. Harper*, 1881, 7 Q. B. D. 78.

<sup>9</sup> Ibid. s. 23. As to what is not a receipt, see *R. v. French*, 217; 1870, 1 C. C. R. 217. An I O U may be an undertaking for payment of money: *R. v. Chambers*, 1871, 1 C. C. R. 341. A turnpike ticket is a receipt: *R. v. Fitch*, 1862, L. & C. 159. A bank pass book is an account-

payment of money, or for procuring or giving credit, or any endorsement on or assignment of any such document, any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any endorsement on or assignment of any such accountable receipt ;

<sup>1</sup> any court roll, or copy of any court roll, relating to any copyhold or customary estate ; or

(c.) <sup>2</sup> who obliterates, adds to, or alters the crossing on any cheque or draft crossed with the name of a banker, or with two transverse lines with the words "and Company," or any abbreviation thereof, or utters any cheque or draft so dealt with, knowing that it is so dealt with ; or

(d.) <sup>3</sup> who does any of the following things to any register of births, baptisms, marriages, deaths, or burials authorized or required by law for the time being to be kept (that is to say) :

(i.) destroys, defaces, or injures any such register, or causes or permits any such register to be so dealt with ; or

(ii.) forges, or fraudulently alters, in any such register, any entry relating to any birth, baptism, marriage, death, or burial ; or

(iii.) does any of the things above mentioned to any part of any such register, or to any certified copy of any such register, or to any part of any such certified copy ; or

(iv.) knowingly and unlawfully inserts, or causes or permits to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any such fact, or gives any false certificate relating thereto ; or

(v.) certifies any writing to be a copy or extract from any such register, knowing such writing, or the part of the

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able receipt : *R. v. Smith*, 1862, L. & C. 168 : *R. v. Moody*, 1862, L. & C. 173. A guarantee against negligence and dishonesty is an "undertaking for the payment of money" : *R. v. Joyce*, 1865, L. & C. 576. A pawnbroker's ticket is a warrant for the delivery of goods : *R. v. Morrison*, 1859, Bell, C. C. 158.

<sup>1</sup> 24 & 25 Vict. c. 98, s. 30.

<sup>2</sup> *Ibid.* s. 25.

<sup>3</sup> *Ibid.* s. 36.

register of which it is a copy, to be false in any material particular ; or

(vi.) who forges the seal of or belonging to any register office or burial board ; or

(vii.) who utters any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or any copy of any entry in any register, knowing the entry to be forged ; or

(e.) <sup>1</sup> who does any of the following things to any copy of any register required by law to be transmitted to any registrar or other officer (that is to say):

(i.) knowingly and wilfully inserts, or causes or permits to be inserted therein, any false entry of any matter relating to any <sup>2</sup> baptism, marriage, or burial ;

(ii.) forges or utters any such copy ;

(iii.) knowingly and wilfully signs or verifies any such copy, knowing any part of it to be false ;

(iv.) unlawfully destroys, defaces, or injures any such copy ;

(v.) unlawfully and for a fraudulent purpose takes any such copy from its place of deposit, or conceals it ; or

(f.) <sup>3</sup> who demands or endeavours to have any share or interest in <sup>4</sup> stock transferred, or to receive any dividend or money payable in respect thereof, by virtue of any forged power or authority, knowing it to be forged ; or

<sup>5</sup> demands or endeavours to obtain or receive any share or interest of or in any stock, as defined in the National Debt Act, 1870 (33 & 34 Vict. c. 71), or to receive any dividend or money payable in respect thereof, by virtue of any forged or altered certificate or coupon, knowing it to be forged ; or

(g.) <sup>6</sup> who commits any felony which was punishable by death before the 1 Will. 4, c. 66, and which is not otherwise

<sup>1</sup> 24 & 25 Vict. c. 98, s. 37.

<sup>2</sup> The word " birth " seems to be wanted here.

<sup>3</sup> 24 & 25 Vict. c. 98, s. 2.

<sup>4</sup> See definition in clause (b.).

<sup>5</sup> 33 & 34 Vict. c. 58, s. 3.

<sup>6</sup> 24 & 25 Vict. c. 98, s. 48. This section is exceedingly verbose, and is not likely to be put in force. I have therefore greatly abridged it. To judge from the Index to the Revised Statutes, it can apply only to



punishable under the 24 & 25 Vict. c. 98, and which consists in forging or uttering any document, or acting under a forged document or personation, or making or being in possession of instruments for making any kind of paper, or other offence of the same nature.

### ARTICLE 389.

#### FORGERIES PUNISHABLE WITH FOURTEEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction thereof to fourteen years penal servitude, who with intent to defraud <sup>1</sup> forges or utters :

(a.) <sup>2</sup> any debenture issued under any lawful authority either within Her Majesty's dominions or elsewhere ;

(b.) <sup>3</sup> any <sup>4</sup> document made under any Act in force for the time being relating to the registry of deeds, or the seal or any impression of the seal of any office for the registry of deeds, or anything purporting to be the name, handwriting, or signature of any person to any such document required to be signed by the law for the time being ; or

any document mentioned in (b) having thereon any such forged stamp, impression, name, handwriting, or signature ;

(c.) <sup>5</sup> any <sup>6</sup> instrument made, or purporting or appearing to be made, by <sup>7</sup> any of the officers mentioned in the note

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52 Geo. 3, c. 143, s. 6, referring to forging certificates, &c., of redemption of the land tax where the punishment was originally death, and was reduced to transportation for life by 1 Will. 4, c. 66, s. 1.

<sup>1</sup> 24 & 25 Vict. c. 98, s. 26, "shall fraudulently forge or alter or shall" utter ; s. 31, "shall forge or fraudulently alter or shall" utter ; s. 33, "whoever with intent to defraud shall forge or alter," &c. I see no difference in the meaning of these phrases, nor do I understand why they are varied. The word "forge" in itself implies an intent to defraud.

<sup>2</sup> 24 & 25 Vict. c. 98, s. 26.

<sup>3</sup> Ibid. s. 31.

<sup>4</sup> any memorial, affidavit, affirmation, entry, certificate, endorsement, document or writing.

<sup>5</sup> 24 & 25 Vict. c. 98, s. 33.

<sup>6</sup> "certificate, report, entry, endorsement, declaration of trust, note, direction, authority, instrument, or writing."

<sup>7</sup> The Accountant-General, or any other the officers of the Court of Chancery in England and Ireland, any judge or officer of the Landed

hereto, or the name, handwriting, or signature of any such officer; or

(*d.*) <sup>1</sup> who <sup>2</sup> draws any bill of exchange or order for the delivery or transfer of <sup>3</sup> goods by procuration or otherwise for, in the name, or on the account of any other person without lawful authority or excuse, or utters any such bill or order knowing it to be so drawn; or

(*e.*) <sup>4</sup> who <sup>5</sup> demands or obtains any <sup>6</sup> property whatsoever, under, upon, or by virtue of any forged instrument whatsoever, knowing it to be forged, or under, upon, or by virtue of any probate or letters of administration, knowing the <sup>7</sup> will on which such probate or such letters of administration were obtained to have been forged, or knowing the probate of letters of administration to have been obtained by any false oath, affirmation, or affidavit.

<sup>8</sup> (*f.*) or who forges a die or stamp; or

<sup>8</sup> (*g.*) knowingly sells or exposes for sale, or utters, or uses any forged stamp, or any stamp which has been fraudulently printed or impressed from a genuine die <sup>9</sup>; or

(*h.*) causes or procures to be done, or knowingly aids, abets, or assists in doing any of the acts mentioned in (*f.*) and (*g.*).

Estates Court in Ireland, every officer of every Court in England or Ireland, every cashier or other officer or clerk of the Governor and Company of the Bank of England or Ireland.

<sup>1</sup> 24 & 25 Vict. c. 98, s. 24.

<sup>2</sup> "draw, make, sign, accept, or indorse."

<sup>3</sup> "any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money." A document which is in form a receipt may be in substance a warrant, &c. *R. v. Kay*, 1870, 1 C. C. R. 29.

<sup>4</sup> 24 & 25 Vict. c. 98, s. 38.

<sup>5</sup> "demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour" to do any such thing.

<sup>6</sup> "chattel, money, security for money, or other property whatsoever."

<sup>7</sup> "testament, codicil, or testamentary writing."

<sup>8</sup> 54 & 55 Vict. c. 38, s. 13 (1) and (8); see note 2 *post* p. 348 for definition of "forge" "stamp" &c.

<sup>9</sup> Any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, found in possession of forged stamps, is deemed, until the contrary is proved, to be guilty of this offence. *Ibid.* s. 18.

## ARTICLE 390.

## FORGERIES PUNISHABLE WITH SEVEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction thereof to seven years penal servitude, who

(a.)<sup>1</sup> forges the seal of any Court of record ; or

(b.)<sup>2</sup> forges or utters any process of any Court of justice whatever, or

serves or enforces any such forged process knowing it to be forged, or delivers, or causes to be delivered, to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any Court of law or equity, or a copy thereof, or

acts, or professes to act, under any such false process knowing (in any such case) such process to be false ; or

(c.)<sup>3</sup> forges or utters any copy or certificate of any record, or utters any such copy or certificate having thereon any forged name, handwriting, or signature ; or

(d.)<sup>4</sup> forges or utters<sup>5</sup> any original document whatever of any Court which, on the 6th of August, 1861, was a Court of record, of equity, or of Admiralty in England or Ireland, or any document, or copy of a document, used, or intended to be used, as evidence in any such Court ; or

<sup>1</sup> Clause (a.) represents part of 24 & 25 Vict. c. 98, s. 28, which occurs in the middle of the section. The statute says nothing in this case of forging the stamp or impression of such seals.

<sup>2</sup> Clause (b.) represents the effect of that part of sect. 27, which makes it an offence, *inter alia*, to forge the process of certain Courts named, combined with that part of sect. 28 which makes it an offence to forge the process of any other Court than those mentioned in sect. 27, and to serve the forged process of any Court whatever. These sections are singularly cumbrous and ill-arranged, besides being intolerably wordy.

<sup>3</sup> 24 & 25 Vict. c. 98, s. 28.

<sup>4</sup> *Ibid.* s. 27.

<sup>5</sup> "record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, *cognovit actionem*, or warrant of attorney, or any original document whatsoever of or belonging to any Court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever" of the other Courts named. As the Courts of Equity and Admiralty in England now form divisions of the High Court, the distinction between the different classes of documents would seem to have ceased to exist.

(e.)<sup>1</sup> who, being the clerk of any Court or other officer, or deputy of the clerk or officer having custody of the records of any Court, utters a false copy or certificate of any record; or

(f.)<sup>2</sup> who, not being such officer or deputy, signs or certifies any copy of any record or certificate as such officer or deputy; or

(g.)<sup>3</sup> who forges or utters any instrument, whether written or printed in whole or in part, made evidence by any Act of Parliament in force for the time being, and not mentioned specifically in any other Article of this chapter; or

<sup>4</sup> any license of or certificate for marriage; or

<sup>5</sup> the <sup>6</sup>signature of a witness attesting the execution of any power of attorney or other authority to transfer any interest in any stock mentioned in the first paragraph of Article 388 (b.) or (f.), or to receive any dividend or money payable in respect thereof;

(h.)<sup>7</sup> who, being a clerk, officer, or servant or other person employed by the Bank of England or Ireland, knowingly and with intent to defraud makes out or delivers any dividend warrant or warrant for the payment of any annuity, interest, or money payable at either of the said banks for an amount greater or less than that to which the person on whose behalf such warrant is made out is entitled;

(i.)<sup>8</sup> who forges the seal or any process of a County Court, or who serves or enforces such forged process, knowing the same to be forged, or delivers or causes to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the said Court knowing the same to be false, or acts or professes to act under any false

<sup>1</sup> 24 & 25 Vict. c. 98, s. 28.

<sup>2</sup> Ibid. s. 28.

<sup>3</sup> Ibid. s. 29.

<sup>4</sup> Ibid. s. 35.

<sup>5</sup> Ibid. s. 4.

<sup>6</sup> "any name, handwriting, or signature purporting to be the name, &c., of."

<sup>7</sup> 24 & 25 Vict. c. 98, s. 6.

<sup>8</sup> 51 & 52 Vict. c. 43, s. 180.

colour or pretence of the process or authority of the said Court ;

<sup>1</sup> (*k.*) who forges, counterfeits, or fraudulently alters the seal or signature of any person authorized by or under the Commissioners for Oaths Act 1889 (52 Vict. c. 10) to administer an oath, <sup>2</sup> affirmation, or declaration.

### ARTICLE 391

#### FORGERY PUNISHABLE WITH FIVE YEARS PENAL SERVITUDE.

<sup>3</sup> Every one commits felony, and is liable upon conviction thereof to <sup>4</sup> five years penal servitude, who

forges or utters any summons, conviction, order, or warrant, of any justice of the peace, or any recognizance purporting to have been entered into before any person authorized to take it, or any examination, deposition, affidavit, affirmation, or solemn declaration taken or made before any justice of the peace.

### ARTICLE 392.

#### FALSE ENTRY AS TO COPYRIGHT.

<sup>5</sup> Every one is guilty of a misdemeanor who wilfully makes or causes to be made any false entry in the registry book of the Stationers' Company.

### ARTICLE 393.

#### DEFACING RATE BOOKS.

<sup>6</sup> Every person is guilty of a misdemeanor who wilfully injures, defaces, conceals, or destroys a rate book, assessment,

<sup>1</sup> 52 Vict. c. 10, s. 8.

<sup>2</sup> Ibid. s. 11.

<sup>3</sup> 24 & 25 Vict. c. 98, s. 32.

<sup>4</sup> This was originally three years, but was raised to five years by 27 & 28 Vict. c. 47, s. 2 ; but three years is now the minimum, see 54 & 55 Vict. c. 69, s. 1.

<sup>5</sup> 5 & 6 Vict. c. 45, s. 12.

<sup>6</sup> 25 & 26 Vict. c. 103, s. 40.

or valuation required to be produced before an assessment committee.

## ARTICLE 394.

## FORGING BALLOT PAPERS.

<sup>1</sup> Every person is guilty of a misdemeanor, and is liable to imprisonment with hard labour for two years, if he is a returning officer or an officer or clerk in attendance at a polling station, or for six months if he is any one else, who

(a.) forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the returning officer any nomination paper knowing the same to be forged; or

(b.) forges or counterfeits or fraudulently defaces or fraudulently destroys any ballot paper, or the official mark on any ballot paper.

## ARTICLE 395.

## FORGING TELEGRAMS.

<sup>2</sup> Every one commits a misdemeanor, and is liable to imprisonment with hard labour for twelve months, who forges or wilfully and without due authority utters a <sup>3</sup> telegram, or transmits by telegraph as a telegram, or utters as a telegram, any message or communication which he knows not to be a telegram, whether he had or had not an intent to defraud.

## ARTICLE 396.

MAKING OR POSSESSION OF PAPER, ETC., FOR FORGING BANK NOTES PUNISHABLE WITH FOURTEEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable on conviction thereof to fourteen years penal servitude, who does any of

<sup>1</sup> 35 & 36 Vict. c. 33, s. 3.

<sup>2</sup> 47 & 48 Vict. c. 76, s. 11; this offence is also punishable summarily, see Oke's Synopsis, p. 632.

<sup>3</sup> For the definition of a telegram, see Note (6), p. 92.

the following things without lawful authority or excuse, the proof whereof lies upon him (that is to say):

(a.) <sup>1</sup> who purchases or receives from any person, or has in his custody or possession any forged <sup>2</sup> or blank bank-note, knowing it to be forged; or

(b.) <sup>3</sup> who makes, uses, sells, exposes to sale, utters, or knowingly has in his custody or possession any <sup>4</sup> bank-note paper, or

any frame, mould, or instrument for making such paper, or

who by any art or contrivance causes the numerical sum or amount of any bank-note <sup>5</sup> or blank bank-note in a word or words in Roman letters to appear visible in the substance of the paper whereon the same is written or printed, or

who causes any of the words or marks mentioned in the definition of bank-note paper given in the footnote to appear in the substance of any paper;

<sup>6</sup> provided that nothing in this Article is to prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in numerical figures denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same is written or printed;<sup>7</sup>

<sup>1</sup> 24 & 25 Vict. c. 98, s. 13.

<sup>2</sup> "Any forged bank-note, bank bill of exchange, or bank post bill, or blank bank-note, blank bank bill of exchange, or blank bank post bill."

<sup>3</sup> 24 & 25 Vict. c. 98, s. 14.

<sup>4</sup> Bank-note paper means "any paper whatsoever with the words 'Bank of England,' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof, in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper, or with any device or distinction peculiar to, and appearing in, the substance of the paper used by the Governor and Company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively."

<sup>5</sup> "Bank-note, bank bill of exchange, or bank post bill, blank bank-note," &c. (as before, inserting "blank" before "bank").

<sup>6</sup> 24 & 25 Vict. c. 98, s. 15.

<sup>7</sup> This probably means "any note in the substance of the paper of which there visibly appear either words or figures expressing the amount in guineas, or figures denoting the amount thereof in pounds sterling."

or from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of water-marks visible in the substance of the paper, not being bar lines or laying wire lines, provided that they are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the water-marks of the paper used by the Bank of England or the Bank of Ireland respectively; or

(c.) <sup>1</sup> who engraves or makes in any manner, upon any plate or other thing, any note purporting to be a <sup>2</sup> bank-note, or blank bank-note, or any part thereof, or any name, word, or character resembling any subscription to any bill of exchange or promissory note issued by any company or person mentioned in the note; or

uses any such plate or thing, or any other instrument or device for making or printing any such <sup>3</sup> note, or part thereof, or knowingly has in his possession any such plate, thing, or instrument, or device; or

knowingly utters or has in his possession any paper on which is made or printed any <sup>4</sup> blank bank-note, or part of a bank-note, or any word, name, or character resembling any subscription thereto; or

(d.) <sup>5</sup> who engraves or makes upon any material what-

It may possibly mean "nothing in this section prevents any person from issuing any note having the amount expressed in guineas, whatever kind of paper he may use for the purpose, or any note having the amount thereof expressed in numerical figures, denoting its value in pounds sterling, and appearing visible," &c.

<sup>1</sup> 24 & 25 Vict. c. 98, s. 16.

<sup>2</sup> "Any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank-note, bank bill of exchange, or bank post bill of the Governor and Company of the Bank of England, or of the Governor and Company of the Bank of Ireland, or of any other body corporate, company, or persons carrying on the business of bankers, or to be a blank bank-note," &c. (as before, inserting "blank" before "bank"). It is almost impossible to be sure whether these sections are quite correctly stated or not, the phraseology is quite bewildering.

<sup>3</sup> "Bank-note, bank bill of exchange, or bank post bill, or blank bank-note," &c. (as before, inserting "blank" before "bank").

<sup>4</sup> Blank bank-note, blank bank bill of exchange, or blank post bill of the Governor and Company, &c., repeating the persons named in Note 2, above.

<sup>5</sup> 24 & 25 Vict. c. 98, s. 17.



ever<sup>1</sup> any word, number, figure, device, character, or ornament, the impression taken from which resembles any part of a<sup>2</sup> bank-note; or

uses or knowingly has in his custody or possession<sup>1</sup> any material or instrument or device for impressing or making any such impression as aforesaid upon any paper or other material; or

knowingly utters or has in his custody or possession<sup>1</sup> any paper or other material upon which there is any such impression; or

(e.)<sup>3</sup> who makes or uses any frame, mould, or instrument for the manufacture of paper with the name or firm of any<sup>4</sup> bank (other than the Bank of England and the Bank of Ireland) appearing visible in the substance of the paper; or

knowingly has in his custody or possession any such frame, mould, or instrument; or

makes, uses, sells, exposes to sale, utters, or knowingly has in his custody or possession any such paper; or

by any art or contrivance causes any such name to appear visible in the substance of the paper upon which it is printed or written; or

(f)<sup>5</sup> who engraves or makes upon any plate or upon any<sup>6</sup> material any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any such document in any language, and, whether under seal or not, purporting to be a document of any foreign prince or state, or of any minister or officer in the service of any such prince or state, or of any corporation recognised by any such prince or state or of any person or company of persons resident out of Her Majesty's dominions; or

uses or has in his possession any plate or material upon

<sup>1</sup> "Any plate whatsoever, or any wood, stone, or other material."

<sup>2</sup> See note (3), *ante*, p. 341.

<sup>3</sup> 24 & 25 Vict. c. 98, s. 18.

<sup>4</sup> "body corporate, company, or person carrying on the business of bankers."

<sup>5</sup> 24 & 25 Vict. c. 98, s. 19. Taking a positive impression of an Austrian note on glass by photography is a "making" within this section: *R. v. Rivaldi*, 1863, L. & C. 330.

<sup>6</sup> "Upon any wood, stone, or other material."

which any such document, or any part thereof, is engraved; or

knowingly utters or has in his custody or possession any paper upon which any part of any such document is made or printed.

### ARTICLE 397.

#### OFFENCES RELATING TO EXCHEQUER BILLS AND PAPER USED FOR THEM, SEVEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction thereof to seven years penal servitude,

(a.)<sup>1</sup> who, without lawful authority or excuse (the proof whereof lies upon the party accused), makes, causes, or procures to be made, or aids or assists in making, or knowingly has in his possession,

(i.) any paper in the substance of which appears any thread or<sup>2</sup> device, or any part of any thread or device, peculiar to and appearing in the substance of paper<sup>3</sup> used for<sup>4</sup> exchequer bills, and intended to imitate the same;

(ii.)<sup>5</sup> any frame, mould, or instrument having therein any such<sup>6</sup> device;

(iii.)<sup>7</sup> any machinery for working any thread into the substance of any paper, or any such thread, such instrument, machinery, or thread being intended to imitate any such device;

(iv.)<sup>8</sup> any plate peculiarly employed for printing exchequer

<sup>1</sup> 24 & 25 Vict. c. 98, s. 10.

<sup>2</sup> "words, letters, figures, marks, lines, threads, or other devices."

<sup>3</sup> "Provided, or to be provided or used."

<sup>4</sup> "Exchequer bills, bonds, or debentures."

<sup>5</sup> 24 & 25 Vict. c. 98, s. 9. "Exchequer Bill" includes "Treasury Bill": 40 Vict. c. 2, s. 10.

<sup>6</sup> "Device" here has the same meaning as in note (2), except the word "thread."

<sup>7</sup> 24 & 25 Vict. c. 98, part of s. 9. The language thus paraphrased is exceedingly clumsy: "any . . . instrument having therein any words, &c., or any machinery for working any threads, &c., or any such thread, *and intended to imitate such words,*" &c. The words in italics are hardly grammatical, but I suppose they mean what is stated in the text.

<sup>8</sup> 24 & 25 Vict. c. 98, s. 9. Exchequer bill includes Treasury bill throughout this Article, 40 Vict. c. 2, s. 10.

bills, or any die or seal peculiarly used for preparing any such plate or for sealing exchequer bills, or any plate, die, or seal intended to imitate any such plate, die, or seal ; or

(b.) <sup>1</sup> who causes, or assists in causing, any such device, or any part of any such device as aforesaid, and intended to imitate the same, to appear in the substance of any paper whatever ; or

(c.) <sup>2</sup> who takes, or assists in taking, any impression of any such plate, die, or seal as is mentioned in clause (a.) (iv.)

### ARTICLE 398.

#### THE LIKE ; THREE YEARS IMPRISONMENT.

<sup>3</sup> Every one commits a misdemeanor, and is liable upon conviction thereof to imprisonment for three years with hard labour, who

(a.) purchases or receives or knowingly has in his custody or possession any such plate, die, or seal as is mentioned in clause (a.) (iv.) of the last Article ; or

(b.) who purchases or receives or knowingly has in his possession or custody any paper provided by or under the direction of the Commissioners of Inland Revenue or of the Treasury for the purpose of being used as exchequer bills before such paper is duly stamped, signed, and issued for public use.

### ARTICLE 399.

#### “TRADE MARK” AND “TRADE DESCRIPTION” DEFINED.

<sup>4</sup> “Trade mark means a trade mark registered in the register of trade marks kept under the Patents, Designs,

<sup>1</sup> 24 & 25 Vict. c. 98, s. 10.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> 50 & 51 Vict. c. 28, s. 3 (1), and see the same place for definitions of “goods,” “person,” &c. The provisions of the Merchandise-Marks Act 1887, as to the application of a false trade description to goods, extend to the application to goods of marks, &c., reasonably calculated to mislead as to who are the manufacturers or merchants thereof. The same provisions, and similar provisions as to the goods themselves, apply to the

and Trade Marks Act 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of section 103 of the said Act are, under order in Council for the time being, applicable ;

“Trade description” means any description, statement, or other indication, direct or indirect, (a) as to the number, quantity, measure, gauge, or weight of any goods, or (b) as to the place or country in which any goods were made or produced, or (c) as to the mode of manufacturing or producing any goods, or (d) as to the material of which any goods are composed, or (e) as to any goods being the subject of an existing patent, privilege, or copyright ; and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is a trade description within the meaning of this Act.

“False trade description” means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, does not prevent such trade description being a false trade description within the meaning of this Act.

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application of a false name or initials, as to which see the Act ; *Ibid.* s. 3, (2) and (3), considerably abbreviated. As to when the name of a country on a watch-case amounts to a trade description, see *Ibid.* s. 7, and as to false declarations in connection therewith, see *Ibid.* s. 8. If a trade description on 23rd August 1887 was lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of the Merchandise Marks Act 1887 with respect to false trade descriptions, as to which see Art. 400, do not apply to such trade description when so applied : but exceptions exist where the trade description includes the name of a place or country ; *Ibid.* s. 18.

## ARTICLE 400.

<sup>1</sup> FORGING TRADE MARKS AND MISAPPLYING TRADE DESCRIPTIONS.

<sup>2</sup> Every one commits a misdemeanor, and is liable on conviction thereof on indictment to imprisonment with hard labour for two years, or to a fine, or both, who,

<sup>3</sup> (a.) forges <sup>4</sup> any trade mark ; or

(b.) falsely applies <sup>5</sup> to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive ; <sup>6</sup> or

<sup>1</sup> These offences are also punishable summarily, as to which see Oke's Synopsis, pp. 446-450.

<sup>2</sup> 50 & 51 Vict. c. 28, s. 2 (3).

<sup>3</sup> Ibid. s. 2 (1).

<sup>4</sup> A person forges a trade mark who either (a) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive ; or (b) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise ; and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark. Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor lies on the defendant, 50 & 51 Vict. c. 28, s. 4. It seems that this definition would be unnecessary were it not that it makes it a crime to use a mark without being aware that it is a trade mark.

<sup>5</sup> (1) A person is deemed to apply a trade mark or trade description to goods who (a) applies it to the goods themselves ; or (b) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed, or had in possession for any purpose of sale, trade, or manufacture ; or (c) places, incloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied ; or (d) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark, or mark, or trade description. (2) See the Act as to the meaning of "covering" and "label." A trade mark, or mark, or trade description is deemed to be applied whether it is woven, impressed, or otherwise worked into or annexed or affixed to the goods, or to any covering, label, reel, or other thing. (3) A person is deemed falsely to apply to goods a trade mark or mark who without the assent of the proprietor of a trade mark applies such trade mark or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor lies on the defendant ; Ibid. s. 5.

<sup>6</sup> A person charged with committing this offence, or causing it to be committed, must be discharged if he (a) proves that in the ordinary course of his business he is employed to make instruments for making trade marks, or applying marks or descriptions to goods, that he was

(c.) makes any<sup>1</sup> instrument for the purpose of forging, or of being used for forging, a trade mark<sup>2</sup>; or

(d.) applies any false trade description to goods<sup>2</sup>; or

(e.) disposes of or has in his possession any<sup>1</sup> instrument for the purpose of forging a trade mark; or

(f.) causes any of the things above in this section mentioned to be done;

unless in any of the above cases he proves that he acted without intent to defraud; or

(2)<sup>3</sup> who sells, or exposes or has in his possession for sale or any purpose of trade or manufacture, any goods or things to which any forged<sup>4</sup> trade mark or false trade description is<sup>5</sup> applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely<sup>5</sup> applied, unless he prove

(a.) that, having taken all reasonable precautions against committing an offence against the Merchandise Marks Act 1887, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description, and

(b.) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(c.) that otherwise he<sup>6</sup> acted innocently.

<sup>7</sup> The person convicted also forfeits to Her Majesty every chattel, article, instrument, or thing by means of, or in relation to, which the offence has been committed.

employed by a person in the United Kingdom and was not interested in the sale of the goods; and (b) took reasonable precautions against committing the offence charged; and (c) had no reason to suspect the genuineness of the trade mark, &c.; and (d) gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, &c., was applied; but he is liable to pay the prosecutor's costs unless he gave due notice of the above defence; *Ibid.* s. 6 (shortened in parts).

<sup>1</sup> "die, block, machine, or other instrument."

<sup>2</sup> See note 6, p. 346.

<sup>3</sup> 50 & 51 Vict. c. 28, s. 2 (2).

<sup>4</sup> See note 4, p. 346.

<sup>5</sup> See note 5, p. 346.

<sup>6</sup> The Act says "had acted"; it must mean "acted."

<sup>7</sup> 50 & 51 Vict. c. 28, s. 2 (3).

<sup>1</sup> The Court before whom any person is convicted under this Article may order any forfeited articles to be destroyed or otherwise disposed of as the Court thinks fit.

#### ARTICLE 401.

##### ACCESSORIES ABROAD.

<sup>2</sup> Every one who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission without the United Kingdom of any act mentioned in Article 400 is guilty as a principal, and may be indicted in the place where he may happen to be.

#### ARTICLE 402.

##### <sup>3</sup> OFFENCES RELATING TO STAMPS.

<sup>4</sup> Every one is guilty of felony, and is liable to fourteen years penal servitude, who

(a.) prints or makes an impression upon any material with a forged die ; or

(b.) fraudulently prints or makes an impression upon any material from a genuine die ; or

(c.) fraudulently cuts, tears, or in any way removes from any material any stamp, with intent that any use should be made of such stamp or of any part thereof ; or

(d.) fraudulently mutilates any stamp, with intent that any use should be made of any part of such stamp ; or

(e.) fraudulently fixes or places upon any material or upon any stamp, any stamp or part of a stamp which, whether

<sup>1</sup> 50 & 51 Vict. c. 28, s. 2 (4).

<sup>2</sup> Ibid. s. 11.

<sup>3</sup> Section 27 of the Stamp Duties Management Act 1891 (54 & 55 Vict. c. 38) enacts that " 'stamp' means as well a stamp impressed by means of a die as an adhesive stamp for denoting any duty or fee": this must probably be read as confined to stamps issued by the authority of the Commissioners of Inland Revenue: also that " 'forge' and 'forged' include counterfeit and counterfeited." See the section for definitions of "material," "die," &c.

<sup>4</sup> 54 & 55 Vict. c. 38, s. 13 (2)-(7), (9).

fraudulently or not, has been cut, torn, or in any way removed from any other material, or out of or from any other stamp; or

(*f.*) fraudulently erases or otherwise either really or apparently removes from any stamped material any name, sum, date, or other matter or thing whatsoever thereon written, with the intent that any use should be made of the stamp upon such material; or

(*g.*) knowingly and without lawful excuse (the proof whereof lies on the person accused) has in his possession any forged die or stamp, or any stamp which has been fraudulently printed or impressed from a genuine die, or any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased, or otherwise either really or apparently removed<sup>1</sup>; or

(*h.*) causes, or procures to be done, or knowingly aids, abets, or assists in doing any of such acts.

<sup>2</sup> Every one commits felony, and is liable to penal servitude for seven years, who

(*a.*) makes or causes or procures to be made, or aids, or assists in making, or knowingly has in his custody or possession, any paper in the substance of which appears any<sup>3</sup> devices peculiar to, and appearing in the substance of, any paper provided or used by, or under the direction of, the Commissioners, for receiving the impression of any die, or any part of such devices, and intended to imitate and pass for the same; or

(*b.*) causes or assists in causing any such<sup>3</sup> devices, or any part thereof intended to pass for the same, to appear in the substance of any paper whatever.

<sup>1</sup> Any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, found in possession of forged stamps is deemed until the contrary is proved to be guilty of this offence; 54 & 55 Vict. c. 38, s. 18.

<sup>2</sup> Ibid. s. 14.

<sup>3</sup> "any words, letters, figures, marks, lines, threads, or other devices."



<sup>1</sup> Every person is guilty of a misdemeanor, and is liable to imprisonment for two years with hard labour, who without lawful authority or excuse (the proof of which lies on the accused) purchases, or receives, or knowingly has in his custody or possession :

(a.) Any paper manufactured by, or under the direction of, the Commissioners, for the purpose of being used for receiving the impression of any die, before the paper has been duly stamped and issued for public use ; or

(b.) any plate, die, dandy-roller, mould, or other implement peculiarly used in the manufacture of any such paper.

#### ARTICLE 403.

##### FORGERY AT COMMON LAW, MISDEMEANOR.

<sup>2</sup> 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.

##### *Illustrations.*

The forgery or uttering of any of the following documents is a misdemeanor :—

<sup>3</sup> An order from a magistrate to a gaoler to discharge a prisoner as upon bail being given.

<sup>4</sup> A certificate of character to induce the Trinity House to enable a seaman to act as master.

<sup>5</sup> Testimonials whereby the offender obtained an appointment as a police constable.

<sup>6</sup> The like with intent to obtain the office of a parish school-master.

<sup>7</sup> A certificate that a liberated convict was gaining his living honestly to obtain an allowance.

<sup>1</sup> 54 & 55 Vict. c. 38, s. 15.

<sup>2</sup> *R. v. Ward*, 1726, East, P. C. 861 ; *R. v. Sharman*, 1854, D. & P. 285 (overruling *R. v. Boulton*, 1848, 2 C. & K. 604).

<sup>3</sup> *R. v. Harris*, 1834, Moo. C. C. 393.

<sup>4</sup> *R. v. Toshack*, 1849, 1 Den. C. C. 492.

<sup>5</sup> *R. v. Moah*, 1858, D. & B. 550.

<sup>6</sup> *S. v. Sharman*, 1854, D. & P. 285.

<sup>7</sup> *R. v. Mitchell*, 1860, 2 F. & F. 44.

## CHAPTER XLVI

## PERSONATION

## ARTICLE 404.

## PERSONATION TO OBTAIN PROPERTY.

EVERY one commits felony, and is liable upon conviction thereof to penal servitude for life, who falsely and deceitfully personates

(a.) <sup>1</sup> any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property ;

(b.) <sup>2</sup> any owner of any share or interest of or in any stock, annuity, or other public fund transferable at the Bank of England or the Bank of Ireland ;

(c.) any owner of any share or interest of or in the capital stock of any body corporate, company, or society established by charter or by virtue of an Act of Parliament ;

(d.) any owner of any dividend or money payable in respect of any such share or interest as aforesaid ;

and who thereby (in the case of clauses (b.), (c.), and (d.)) transfers or endeavours to transfer any share or interest belonging to such owner, or thereby receives or endeavours to receive any money due to any such owner as if such offender were the true and lawful owner.

<sup>1</sup> 37 & 38 Vict. c. 36, s. 1.

<sup>2</sup> 24 & 25 Vict. c. 98, s. 3. Besides these general enactments there are various special Acts punishing personation in particular cases. See 7 Geo. 4, c. 16, s. 38 and 2 Will. 4, c. 53, s. 49 as to the personation of soldiers, and 28 & 29 Vict. c. 124, s. 8 as to the personation of sailors entitled to pay, &c. ; 26 & 27 Vict. c. 73, s. 14 as to the personation of persons entitled to India stock ; 30 & 31 Vict. c. 131, s. 35 as to the personation of persons interested in joint stock companies ; 33 & 34 Vict. c. 53, s. 4 as to the personation of stock-holders ; 53 & 54 Vict. c. 45, s. 9, *ante*, Art. 155, as to frauds on the police fund by personation.

## ARTICLE 405.

## ACKNOWLEDGING RECOGNIZANCE, ETC., IN FALSE NAME.

<sup>1</sup> Every one commits felony, and is liable upon conviction thereof to seven years penal servitude, who without lawful authority or excuse (the proof of which is on the party accused) acknowledges any recognizance or bail, or any cognovit actionem, or judgment, or any deed or other instrument before any Court, judge, or other person lawfully authorized in that behalf.

## ARTICLE 406.

## PERSONATION IN FRAUD OF THE ADMIRALTY.

<sup>2</sup> Every one commits a misdemeanor, and is liable on conviction thereof to five years penal servitude, who in order to receive any pay, wages, allotment, prize-money, bounty-money, grant, or other allowance in the nature thereof, half-pay pension, or allowance from the compassionate fund of the Navy, payable or supposed to be payable by the Admiralty, or any other money so payable or supposed to be payable, or any effects or money in charge or supposed to be in charge of the Admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same.

## ARTICLE 407.

## PERSONATION AT ELECTIONS.

<sup>3</sup> Every one commits felony, and is liable upon conviction thereof to two years imprisonment and hard labour, who commits the offence of personation or aiding, abetting,

<sup>1</sup> 24 & 25 Vict. c. 98, s. 34.

<sup>2</sup> 28 & 29 Vict. c. 124 s. 8. This offence is also punishable on summary conviction, see Oke's Magisterial Synopsis, p. 152.

<sup>3</sup> 46 & 47 Vict. c. 51, s. 6; 35 & 36 Vict. c. 33, s. 24; and Schedule 3 of 46 & 47 Vict. c. 51. It seems that hard labour must be inflicted, as the Act says imprisonment "together with" hard labour.

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counselling, or procuring that offence at any parliamentary or municipal election.

A person is for all purposes of the laws relating to parliamentary and municipal elections deemed to be guilty of the offence of personation who, at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who, having voted once at any such election, applies at the same election for a ballot paper in his own name.

## CHAPTER XLVII.

<sup>1</sup> OFFENCES RELATING TO THE COIN<sup>2</sup> ARTICLE 408.

## INTERPRETATION OF TERMS.

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

<sup>3</sup> “Current,” applied to coin, means coin coined in any of Her Majesty’s mints or lawfully current by virtue of any proclamation or otherwise in any part of Her Majesty’s dominions, whether within the United Kingdom or without.

“Copper,” applied to coin, includes bronze or mixed metal and every other kind of coin inferior in value to silver.

“Counterfeit coin” means coin not genuine, but resembling, or apparently intended to resemble, or pass for genuine coin; and includes genuine coin prepared or altered so as to resemble or pass for coin of a higher denomination.

<sup>4</sup> A coin fraudulently filed at the edges so as to remove the milling, and on which a new milling has been added to restore the appearance of the coin, is a counterfeit coin.

<sup>3</sup> “Gild” and “silver,” as applied to coin, include casing with gold or silver respectively, and washing and colouring by any means whatsoever with any wash or materials capable of producing the appearance of gold or silver respectively.

“Utter” includes “tender” and “put off.”

“Having in possession” includes knowingly and wilfully having

(a.) in the possession or custody of any other person; or

<sup>1</sup> 3 Hist. Cr. Law, 177–180.

<sup>2</sup> 24 & 25 Vict. c. 99; and see 46 & 47 Vict. c. 45, s. 2 (Counterfeit Medals Act) in Article 415.

<sup>3</sup> 24 & 25 c. 99, s. 1. The interpretation clause is rather clumsy, but the text will be found to represent it correctly, though as to the word “possession” in an abridged shape.

<sup>4</sup> *R. v. Hermann*, 1879, 4 Q. B. D. 284.

(b.) in any place for the use or benefit of the possessor or any other person.

## ARTICLE 409.

COINING AND POSSESSION OF INSTRUMENTS FOR COINING—  
PENAL SERVITUDE FOR LIFE.

Every one commits felony, and is liable upon conviction thereof to penal servitude for life,

(a.) <sup>1</sup> who makes any counterfeit gold or silver current coin ;  
or

(b.) <sup>2</sup> who gilds or silvers any counterfeit current coin ; or

(c.) <sup>2</sup> who gilds or silvers any piece of metal or mixture of metals whatever of a fit size and figure to be coined, with intent that it shall be coined into counterfeit current gold or silver coin ; or

(d.) <sup>2</sup> who gilds, files, or alters any current silver or copper coin with intent to make it resemble or pass for current gold or silver coin ; or

(e.) <sup>3</sup> who buys, sells, receives, pays, or puts off any counterfeit gold or silver current coin at a lower rate than it imports or was apparently intended to import, or offers to do any such thing, <sup>4</sup> whether or not such coin was in a fit state to be uttered, and whether or not the counterfeiting thereof was finished ; or

(f.) <sup>5</sup> who imports or receives into the United Kingdom from beyond the seas any counterfeit current coin knowing it to be counterfeit ; or

(g.) <sup>6</sup> who makes, mends, begins, or proceeds to make or mend, buys, sells, or has in his custody or possession,

(i.) any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which is made or impressed or which is adapted and intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign

<sup>1</sup> 24 & 25 Vict. c. 99, s. 2.

<sup>3</sup> Ibid. s. 6.

<sup>6</sup> Ibid. s. 7.

<sup>2</sup> Ibid. s. 3.

<sup>4</sup> Ibid. s. 30.

<sup>5</sup> Ibid. s. 24.

state, prince, or country, or any part of either side thereof, knowingly ; or

(ii.) any edger, edging or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling the marks on the edge of such coin as aforesaid, knowing the same to be so adapted and intended ; or

(iii.) any press for coinage, or any cutting engine for cutting, by force of a screw or any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been, or to be intended to be, used for or in order to counterfeiting any such coin as aforesaid ; or

(*h.*) <sup>1</sup> who knowingly conveys out of any of Her Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press, or engine used or employed in coining, or any useful part of any of the said things, or any coin, bullion, metal, or mixture of metals.

<sup>2</sup> None of the acts specified in (*e.*), (*f.*), (*g.*), and (*h.*) is an offence, unless it is done without lawful authority or excuse, to be proved by the party accused.

## ARTICLE 410.

### CLIPPING—PENAL SERVITUDE FOR FOURTEEN YEARS.

<sup>3</sup> Every one commits a felony, and is liable on conviction to fourteen years penal servitude, who impairs, diminishes, or lightens any current gold or silver coin with intent that when so dealt with it may pass as current gold or silver coin.

<sup>1</sup> 24 & 25 Vict. c. 99, s. 25.

<sup>2</sup> A orders a die for coining counterfeit half-crowns (see clause (*g.*) (*i.*)) from B. B communicates with the Mint, and is permitted by them to finish and deliver the die to A. A receives it. A has the die in his possession without lawful excuse: *R. v. Harvey*, 1871, 1 C. C. R. 285.

<sup>3</sup> 24 & 25 Vict. c. 99, s. 4.

## ARTICLE 411.

COINING COPPER OR FOREIGN MONEY—PENAL SERVITUDE  
FOR SEVEN YEARS.

Every one commits felony, and is liable to seven years penal servitude,

(a.) <sup>1</sup> who counterfeits the Queen's current copper coin ; or

(b.) <sup>1</sup> who (without lawful authority or excuse (the proof whereof lies upon him)) knowingly makes or mends, or begins or proceeds to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for counterfeiting any of the Queen's current copper coin ; or

(c.) <sup>2</sup> who buys, sells, receives, pays, or puts off any counterfeit copper coin at a lower rate or value than the same imports or was apparently intended to import ; or

(d.) <sup>3</sup> who makes counterfeit gold or silver coin of any foreign prince, state, or country ;

<sup>4</sup> whether or not, as regards (a.), (c.), and (d.), such coin was in a fit state to be uttered, and whether or not the counterfeiting was finished ; or

(e.) <sup>5</sup> who brings or receives into the United Kingdom counterfeit gold or silver coin of any foreign prince, state, or country, knowing the same to be counterfeit, without lawful authority or excuse, to be proved by the party accused ; or

(f.) <sup>6</sup> who has in his custody or possession any filings or clippings, gold or silver bullion, or gold or silver in dust or solution, obtained by impairing current gold or silver coin, knowing it to have been so obtained.

<sup>1</sup> 24 & Vict. c. 99, s. 14.

<sup>3</sup> Ibid. s. 18.

<sup>5</sup> Ibid. s. 19.

<sup>2</sup> Ibid. s. 14.

<sup>4</sup> Ibid. s. 30.

<sup>6</sup> Ibid. s. 5.



## ARTICLE 412.

## COINING FOREIGN COPPER MONEY—PENAL SERVITUDE FOR SEVEN YEARS.

<sup>1</sup> Every one commits a misdemeanor who makes any counterfeit copper coin of any foreign state; the punishment is, for the first offence, one year's imprisonment without hard labour; for the second offence, after conviction of the first, seven years penal servitude.

## ARTICLE 413.

## UTTERING AND POSSESSING WITH INTENT TO UTTER.

Every one commits a misdemeanor, or in case (*d.*) a felony, and is liable to a punishment of one year's imprisonment and hard labour in cases (*a.*) and (*b.*), two years imprisonment and hard labour in case (*c.*), five years penal servitude in case (*d.*), and penal servitude for life in case (*e.*),

(*a.*) <sup>2</sup> who without lawful authority or excuse, to be proved by him, exports or puts on board any vessel for the purpose of being exported from the United Kingdom any counterfeit current coin whatever, knowing the same to be counterfeit; or

(*b.*) <sup>3</sup> who utters counterfeit current gold or silver coin, knowing it to be counterfeit; or

(*c.*) <sup>4</sup> who at the time of such uttering as is specified in clause (*b.*) has in his custody or possession any other piece of such counterfeit coin, or who on the same day, or on any of the ten days next ensuing, utters any such counterfeit coin, knowing the same to be counterfeit; or

(*d.*) <sup>5</sup> who has in his possession three or more pieces of counterfeit current gold or silver coin, with intent to utter them or any of them; or

<sup>1</sup> 24 & 25 Vict. s. 99, s. 22.

<sup>3</sup> Ibid. s. 9.

<sup>2</sup> Ibid. s. 99, s. 8.

<sup>4</sup> Ibid. s. 10.

<sup>5</sup> Ibid. s. 11.

(c.) <sup>1</sup> who commits any of the above-mentioned offences, after having been previously convicted <sup>2</sup> at any time of any one of them, or of any felony relating to the coin.

<sup>3</sup> The offence defined in clause (b.) is complete whether or not the coin was in a fit state to be uttered, and whether or not the counterfeiting thereof was finished.

#### ARTICLE 414.

##### UTTERING BASE COPPER OR FOREIGN COIN.

Every one commits a misdemeanor

(a.) <sup>4</sup> who utters any counterfeit current copper coin, knowing it to be counterfeit; or

(b.) <sup>4</sup> who has in his possession three or more pieces of such counterfeit coin, knowing the same to be false and with intent to utter any of them; or

(c.) <sup>5</sup> who, with intent to defraud, utters as current gold or silver coin any coin which is not such coin, or any medal or piece of metal or mixed metal resembling in size, figure, and colour the current coin as which it is uttered, but being of less value; or

(d.) <sup>6</sup> who defaces any current coin whatever by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened; or

(e.) <sup>7</sup> who utters any counterfeit gold or silver coin of any foreign prince, state, or country, knowing it to be counterfeit.

<sup>8</sup> The offences defined in clauses (a.), (c.), and (e.) are

<sup>1</sup> 24 & 25 Vict. c. 99, s. 12.

<sup>2</sup> Such a conviction means the finding of a verdict of guilty, that no judgment follows the verdict is immaterial; *R. v. Blaby*, 1894, 2 Q. B. 170.

<sup>3</sup> 24 & 25 Vict. c. 99, s. 30.

<sup>4</sup> *Ibid.* s. 15.

<sup>5</sup> *Ibid.* s. 13. As to the degree of resemblance necessary to bring a medal within this section, see *R. v. Robertson*, 1865, L. & C. 604.

<sup>6</sup> *Ibid.* s. 16.

<sup>7</sup> *Ibid.* s. 20.

<sup>8</sup> *Ibid.* s. 30.

complete, whether or not the coin was in a fit state to be uttered, and whether or not the counterfeiting thereof was finished.

The punishment for each of the offences in clauses (*a.*), (*b.*), (*c.*), and (*d.*) is one year's imprisonment with hard labour.

The punishment for the offence in clause (*e.*) is, for the first offence, six months imprisonment with hard labour; <sup>1</sup>for a second offence, after a previous conviction therefor, two years imprisonment and hard labour; <sup>1</sup>and after two previous convictions the offence is felony, and the offender is liable to penal servitude for life.

#### ARTICLE 415.

##### MAKING OR SELLING MEDALS RESEMBLING COIN.

<sup>2</sup> Every one commits a misdemeanor, and is liable on conviction thereof to be imprisoned with hard labour for one year, who

without due authority or excuse (the proof whereof lies on the person accused)—

makes or has in his possession for sale, or offers for sale, or sells,

any medal, cast, coin, or other like thing made wholly or partially of metal or any metallic combination and resembling in size, figure, and colour any of the Queen's current gold or silver coin, or having thereon a device resembling any device on any of the Queen's current gold or silver coin, or being so formed that it can by gilding, silvering, colouring, washing, or other like process, be so dealt with as to resemble any of the Queen's current gold or silver coin.

<sup>1</sup> 24 & 25 Vict. c. 99, s. 21.

<sup>2</sup> 46 & 47 Vict. c. 45, s. 2. As to "current coin," see Art. 408.

## ARTICLE 416.

## PRINCIPALS AND ACCESSORIES.

<sup>1</sup> Every principal in the second degree in and every accessory before the fact to any felony under the Coining Act 1861 (24 & 25 Vict. c. 99) is punishable in the same manner as a principal in the first degree is by the Act punishable.

<sup>1</sup> 24 & 25 Vict. c. 99, s. 35.

## CHAPTER XLVIII

<sup>1</sup> MALICIOUS INJURIES TO PROPERTY

## ARTICLE 417.

<sup>2</sup> BURNING SHIPS OF WAR, ETC.—FELONY—DEATH.

EVERY one is guilty of felony, and must upon conviction thereof be sentenced to death, who either within this realm or in any of the islands, countries, ports, or places thereto belonging,

wilfully and maliciously sets on fire, burns, or otherwise destroys; or

causes to be set on fire or burnt or otherwise destroyed; or

aids, procures, abets, or assists in the setting on fire or burning or otherwise destroying

(a.) any of Her Majesty's ships or vessels of war, whether afloat or building or begun to be built in any of Her Majesty's dockyards, or building or repairing by contract in any private yards for the use of Her Majesty; or

(b.) any of Her Majesty's arsenals, magazines, dockyards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto; or

(c.) any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or

(d.) any of Her Majesty's military, naval, or victualling stores or other ammunition of war; or

(e.) any place or places where any such military, naval, or victualling stores or other ammunition of war is, are, or shall be kept, placed, or deposited.

<sup>1</sup> 3 Hist. Cr. Law, 188-190.

<sup>2</sup> 12 Geo. 3, c. 24. The punishment is not altered either by 7 & 8 Geo. 4, c. 28, or 1 Vict. c. 91. The Court, however, may order the judgment of death to be recorded: 4 Geo. 4, c. 48.

## ARTICLE 418.

OFFENCES COMMITTED BY OR IN RELATION TO EXPLOSIVE  
SUBSTANCES.

<sup>1</sup> Every one is guilty of felony, and is liable on conviction thereof in case (a.) to penal servitude for life, in case (b.) to penal servitude for twenty years, and in case (c.) to penal servitude for fourteen years—

(a.) who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property has been actually caused or not ;

(b.) who within or (being a subject of Her Majesty) without Her Majesty's dominions unlawfully and maliciously—

(i.) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion in the United Kingdom of a nature likely to endanger life or to cause serious injury to property ; or

(ii.) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom,

whether any explosion does or not take place, and whether any injury to person or property has been actually caused or not ;

(c.) (i.) who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, unless he can show that he made it or had it in his possession or under his control for a lawful object. In this case the explosive substance is forfeited.

<sup>1</sup> 46 Vict. c. 3, ss. 2, 3, 4, 5, 6, and 9.

(ii.) In any proceeding against any person for a crime under this clause, such person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

Every one is guilty of felony, and is upon conviction thereof liable to the same punishment as if he had been guilty as a principal, who

within or (being a subject of Her Majesty) without Her Majesty's dominions, by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any crime under this Article.

In this Article the expression "explosive substance" includes any materials for making any explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement.

# <sup>1</sup> ARTICLE 419.

## ARSON, ETC.—PENAL SERVITUDE FOR LIFE.

Every one commits felony, and is liable on conviction thereof to penal servitude for life, who unlawfully and maliciously does any of the following acts (that is to say):—

- (a.) <sup>2</sup> who <sup>3</sup> sets fire to any <sup>4</sup> place of divine worship;
- <sup>5</sup> or to any dwelling-house, any person being therein;

<sup>1</sup> 24 & 25 Vict. c. 97.

<sup>2</sup> Ibid. s. 1, W.

<sup>3</sup> As to what constitutes "setting fire," it is not necessary that flame should be seen: *R. v. Stallion*, 1834, 1 Moo. 398; but it is not sufficient that wood should be scorched black: *R. v. Russell*, 1842, Car. & M. 541. It is sufficient if the wood has been at a red heat: *R. v. Parker*, 1839, 9 C. & P. 45. I suppose the question is whether the thing burnt has or has not begun to be decomposed by the action of fire.

<sup>4</sup> "Church, chapel, meeting-house, or other place of divine worship."

<sup>5</sup> 24 & 25 Vict. c. 97, s. 2, W.

<sup>1</sup> or to any <sup>2</sup> private building, whether in the possession of the offender or of any other person, with intent to injure or defraud any person ;

<sup>3</sup> or to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, port, dock, harbour, or canal, or other navigation ;

<sup>4</sup> or to any <sup>5</sup> public building ;

<sup>6</sup> or to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, any cultivated vegetable produce, furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark ;

<sup>7</sup> or to any mine of coal, cannel coal, anthracite, or other mineral fuel ;

<sup>8</sup> or to any ship, whether in a complete or unfinished state ; or

(b.) <sup>9</sup> who by the explosion of gunpowder or other explosive substance throws down or damages the whole or any part of any dwelling-house, any person being therein, or of any building so as to endanger the life of any person ; or

(c.) <sup>10</sup> who cuts, breaks, destroys, or damages with intent to destroy or render useless any of the <sup>11</sup> goods or articles mentioned below being in any stage of manufacture, or

<sup>1</sup> 24 & 25 Vict. 97, s. 3, W.

<sup>2</sup> Private building means "house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed," fold, farm building, "building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof." Many cases are collected in Fisher's Digest, 1634-1637, as to the buildings which fall under one or the other of these terms. But they are all nisi prius rulings, and the matter is too minute to be referred to in detail here.

<sup>3</sup> 24 & 25 Vict. c. 97, s. 4, W.

<sup>4</sup> Ibid. s. 5.

<sup>5</sup> Public building means building other than such as are before mentioned, "belonging to the Queen or to any county, riding, division, city, borough, poor law union, parish or place, or to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated, to public use or ornament, or erected or maintained by public subscription or contribution."

<sup>6</sup> 24 & 25 Vict. c. 97, s. 17, W.

<sup>7</sup> Ibid. s. 26, W.

<sup>8</sup> Ibid. s. 42, W., and see s. 43 and Note 2, p. 367, *post*.

<sup>9</sup> Ibid. s. 9, W.

<sup>10</sup> Ibid. s. 14, W.

<sup>11</sup> "Any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any or more of those materials mixed with each other or mixed with any other material, or any framework knitted piece, stocking,



any <sup>1</sup> tool or machinery employed in manufacturing or preparing such goods, or who by force enters any house, shop, building, or place with intent to commit any such offence; or

(*d.*) <sup>2</sup> who breaks down, cuts down, or otherwise damages or destroys any sea bank, or sea wall, or the bank, dam, or wall of or belonging to any water <sup>3</sup> whereby any land or building shall be, or shall be in danger of being, overflowed or damaged; or

(*e.*) <sup>4</sup> who <sup>5</sup> destroys any <sup>6</sup> work belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal; or

(*f.*) <sup>7</sup> who pulls or throws down, or in anywise destroys any bridge (whether over any stream of water or not) or any viaduct or aqueduct over or under which any highway, railway, or canal passes; or

(*g.*) <sup>8</sup> who does any injury with intent and so as thereby to render dangerous or impassable any such bridge, viaduct, or aqueduct, or any highway, railway, or canal passing over or under the same or any part thereof; or

(*h.*) <sup>9</sup> who with intent to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using any railway;

puts, places, casts, or throws <sup>10</sup> anything whatever upon or across any railway; or

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hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture . . ." or any warp or shute of any such article, or any framework knitted piece, stocking, hose, or lace.

<sup>1</sup> Any "loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles."

<sup>2</sup> 24 & 25 Vict. c. 97, s. 30, W.

<sup>3</sup> Water means "river, canal, drain, reservoir, pool, or marsh."

<sup>4</sup> 24 & 25 Vict. c. 97, s. 30, W.

<sup>5</sup> Throws, breaks, or cuts down, levels, undermines, or otherwise destroys.

<sup>6</sup> Work = "quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing path, drain, watercourse, or other work."

<sup>7</sup> 24 & 25 Vict. c. 97, s. 33, W.

<sup>8</sup> Ibid. s. 33, W.

<sup>9</sup> Ibid. s. 35, W. The whole section might be expressed thus: "who attempts to obstruct," &c.

<sup>10</sup> "Any wood, stone, or other matter or thing."

takes up, removes, or displaces any rail, sleeper, or other thing belonging to any railway; or

turns, moves, or diverts any points or other machinery belonging to any railway; or

makes, shows, hides, or removes any signal or light upon or near to any railway; or

does, or causes to be done, any other matter or thing; or

(i.)<sup>1</sup> who casts away or in anywise destroys any ship or vessel whether complete or in an unfinished state; or

(j.)<sup>2</sup> who casts away or in anywise destroys any ship or vessel with intent thereby to prejudice the owner or part owner of such ship or vessel or of any goods on board the same, or any insurer of the ship, freight, or goods; or

(k.)<sup>3</sup> who with intent<sup>4</sup> to bring any ship, vessel, or boat into danger, masks, alters, or removes any light or signal, or exhibits any false light or signal; or

(l.)<sup>5</sup> does anything tending to the immediate loss or destruction of any ship, vessel, or boat for which no punishment is otherwise provided by the 24 & 25 Vict. c. 97.

#### ARTICLE 420.

#### ARSON, INJURIES TO SHIPS OR CATTLE, ETC.—FOURTEEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction thereof to fourteen years penal servitude, who unlawfully and maliciously does any of the following things (that is to say)—

(a.)<sup>6</sup> who sets fire to any building other than those men-

<sup>1</sup> 24 & 25 Vict. c. 97, s. 42, W.

<sup>2</sup> Ibid. s. 43, W. This section and s. 42 are like dividing theft into two offences—*theft*, and *theft with intent to injure the owner of the stolen goods*, each offence being punished in the same way.

<sup>3</sup> 24 & 25 Vict. c. 97, s. 47, W.

<sup>4</sup> The word “*maliciously*” is here omitted, though “*unlawfully*” is retained. The reason, no doubt, is that one particular form of malice, viz., an intent to bring a ship into danger, is specified.

<sup>5</sup> 24 & 25 Vict. c. 97, s. 47, W.

<sup>6</sup> Ibid. s. 6, W.

tioned in <sup>1</sup> Article 419 (a.) (whether finished or unfinished); <sup>2</sup> or

(b.) <sup>3</sup> who sets fire to anything in, against, or under any building under such circumstances that if the building were thereby set fire to the offence would amount to felony; or

(c.) <sup>4</sup> who sets fire to any crop of hay, grass, corn, grain, pulse, or cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing; or

(d.) <sup>5</sup> who attempts by any overt act to set fire to any building or to anything mentioned in clause (b.) of this Article, or to any mine mentioned in Article 419, clause (a.); or to set fire to, cast away, or destroy any ship or vessel under such circumstances that if such building, mine, or ship were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony; or

(e.) <sup>6</sup> who places or throws in, into, upon, <sup>7</sup> under, against, or near any building, ship, or vessel any gunpowder or other

<sup>1</sup> If it were not for the arbitrary and practically unimportant distinction between the punishment for this offence and for the offences defined in Art. 419, clause (a.), the following enactment would include them all:—"Whoever sets fire to any building whatever shall be liable to penal servitude for life." This would reduce six cumbrous sections, filling a page of Chitty's Statutes, to two lines.

<sup>2</sup> *R. v. Manning*, 1871, 1 C. C. R. 338. It is a question for a jury what constitutes a building.

<sup>3</sup> 24 & 25 Vict. c. 97, s. 7. In *R. v. Child*, 1871, 1 C. C. R. 307, it was said that the legislature probably meant to enact that, if any person sets fire to anything in a house likely to set fire to the house itself, he should be guilty of felony, but that they had failed to say so. In that case A set fire to goods in a house to spite the owner, but with no intention to burn the house, and (as the jury were considered by the Court to have found) not thinking it probable that what he was doing would have that effect, and not being reckless on the subject. My impression is that the legislature said what it meant, but that the judge who reserved the case (*Blackburn, J.*) was not followed by the jury in the directions which he gave.

<sup>4</sup> 24 & 25 Vict. c. 97, s. 16, W.

<sup>5</sup> *Ibid.* ss. 8, W., 27, 44, W.

<sup>6</sup> *Ibid.* ss. 10, W., 45, W.

<sup>7</sup> The word "under" does not occur in s. 45, which applies to ships and vessels and which repeats s. 10 verbatim, with the exception of the omission of that word and the substitution of "injury is effected" for "damage is caused." The omission of "under" as to vessels dates from before the invention of torpedoes.

explosive substance with intent to destroy or damage any such building, ship, or vessel, or any engine, machinery, working tools, fixtures, goods, or chattels, whether or not explosion takes place, and whether or not any damage is caused; or

(*f.*)<sup>1</sup> who destroys any part of any ship or vessel in distress, wrecked, stranded, or cast on shore, or any goods merchandise, or articles of any kind belonging to such ship or vessel; or

(*g.*)<sup>2</sup> who kills, maims, or wounds any cattle; or

(*h.*)<sup>3</sup> who cuts or otherwise destroys any hopbinds growing on poles in any plantation of hops.

#### ARTICLE 421.

##### THREATS TO BURN, ETC.—TEN YEARS PENAL SERVITUDE.

<sup>4</sup> Every one commits felony, and is liable upon conviction thereof to ten years penal servitude, who, knowing the contents thereof, sends, delivers, utters, or directly or indirectly causes to be received any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce whether in or under any building or not, or any ship or vessel, or to kill, maim, or wound any cattle.

#### ARTICLE 422.

##### MALICIOUS MISCHIEF—SEVEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction to

<sup>1</sup> 24 & 25 Vict. c. 97, s. 49.

<sup>2</sup> Ibid. s. 40. An injury inflicted by the hand may be a wound: *R. v. Bullock*, 1868, 1 C. C. R. 115. On repealed statutes to the same effect, see *R. v. Owens*, 1828, 1 Moo. 205, and *R. v. Hughes*, 1826, 2 C. & P. 420, in which Parke, B., said setting a dog at an animal whereby it was bitten was not a maiming or wounding.

<sup>3</sup> 24 & 25 Vict. c. 97, s. 19, W.

<sup>4</sup> Ibid. s. 50, W.

seven years penal servitude, who does any of the following acts unlawfully and maliciously (that is to say),

(a.) <sup>1</sup> who cuts, breaks, destroys, or damages with intent to destroy or render useless any machine or engine, whether fixed or movable, used or intended to be used for <sup>2</sup> any agricultural operation, or prepared for or employed in any manufacture other than those enumerated in note 11 to Article 419 (c.), or any tool or implement, whether fixed or movable, prepared for or employed in any such manufacture;

(b.) <sup>3</sup> or who by any overt act attempts to set fire to any of the stacks or produce mentioned in Article 419, clause (a.), or to anything mentioned in Article 420, clause (c.), under such circumstances that if the same were set on fire the offender would be guilty of felony;

(c.) <sup>4</sup> or who, with intent thereby to destroy or damage any mine or to hinder <sup>5</sup> [obstruct] or delay the working thereof,

causes any water to be conveyed or run into any mine, or into any subterranean passage communicating therewith;

or <sup>6</sup> pulls down, fills up, obstructs, or damages with intent to destroy, obstruct, or render useless any airway, waterway, drain, pit level, or shaft of or belonging to any mine; or

\* <sup>7</sup> pulls down or destroys, or damages with intent to destroy or render useless, any steam or other engine for sinking, draining, ventilating, or working any mine, or in anywise assisting <sup>8</sup> therein, or any appliance or apparatus in connection with any such engine, or any staith, building, or

<sup>1</sup> 24 & 25 Vict. c. 97, s. 15, W. Some cases on the application of this section to imperfect machines are collected in Fisher's Digest, pp. 1992-1994.

<sup>2</sup> "Sowing, reaping, mowing, threshing, ploughing, or draining, or for performing any other agricultural operation."

<sup>3</sup> 24 & 25 Vict. c. 97, s. 18, W.

<sup>4</sup> Ibid. s. 28, W.

<sup>5</sup> This word refers only to the paragraph marked with a \*.

<sup>6</sup> This accumulation of intents is clumsy, but not unmeaning. The expression "Damage with intent to destroy any airway with intent to obstruct a mine" has a meaning slightly narrower than "damaging an airway with intent to obstruct a mine," but not very different from it.

<sup>7</sup> 24 & 25 Vict. c. 97, s. 29, W.

<sup>8</sup> The words "sinking—mine" are here repeated.

erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether any such <sup>1</sup>thing is completed or unfinished; or

<sup>2</sup>stops, obstructs, or hinders the working of any such engine, apparatus, or appliance; or

(*d.*) <sup>3</sup>who wholly or partially cuts through, severs, breaks, unfastens, or damages with intent to destroy or render useless, any rope, chain, or tackle of whatever material used in any mine, or upon <sup>4</sup>any way or work connected therewith or employed in working it;

(*e.*) <sup>5</sup>who cuts off, draws up, or removes any piles, chalk, or other materials fixed in the ground and used for securing any sea bank or sea wall, or the bank, dam, or wall of any other <sup>6</sup>water; or

(*f.*) <sup>7</sup>who, with intent and so as thereby to obstruct and prevent the carrying on or completing or maintaining the navigation of any navigable river or canal, opens or draws up any flood-gate or sluice, or does any injury or mischief to such river or canal; or

(*g.*) <sup>8</sup>who cuts through, breaks down, or otherwise destroys the dam, flood-gate, or sluice of any fish-pond, or of any water being private property, or in which there is any private right of fishery, with intent thereby to take or destroy any of the fish therein, or so as thereby to cause the loss or destruction of any of them; or

(*h.*) <sup>8</sup>who puts lime or any other noxious material in any

<sup>1</sup> The words "bridge—trunk" are here repeated.

<sup>2</sup> The words relating to the intent with which these acts are not to be done follow these words. I think, however, that they are meant to apply to all the words which precede them. If not, the words as to intent at the beginning of the clause do not apply to the paragraph beginning "or pulls down." The sections are very clumsy.

<sup>3</sup> 24 & 25 Vict. c. 97, s. 29, W.

<sup>4</sup> "Any inclined plane, railway, or other way or other work whatsoever in anywise belonging or appertaining to or connected with or employed in any mine, or the working or business thereof."

<sup>5</sup> 24 & 25 Vict. c. 97, s. 31, W.

<sup>6</sup> "river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock."

<sup>7</sup> 24 & 25 Vict. c. 97, s. 31, W.

<sup>8</sup> Ibid. s. 32, W.

such water [<sup>1</sup> or in any salmon river] with intent to destroy any fish then being or afterwards to be put therein; or

(i.) who cuts through, breaks down, or otherwise destroys the dam or flood-gate of any mill-pond, reservoir, or pool; or

(j.) <sup>2</sup> who damages with intent to destroy or render it useless, any ship or vessel, whether complete or incomplete, by any means other than fire, gunpowder, or other explosive substance; or

(k.) <sup>3</sup> who cuts away, casts adrift, removes, alters, defaces, sinks, or destroys any boat, buoy, buoy rope, perch, or mark used or intended for the guidance of seamen for the purpose of navigation, or who does any act with intent to do any of the things aforesaid, or who in any other manner injures or conceals any of the things aforesaid.

#### ARTICLE 423.

##### MALICIOUS MISCHIEF—FIVE YEARS PENAL SERVITUDE.

<sup>4</sup> Every one commits felony, and is liable upon conviction thereof to five years penal servitude, who unlawfully and maliciously

(a.) cuts, breaks, barks, roots up, or otherwise destroys or damages the whole or any part of any tree, sapling, shrub, or any underwood, if the injury done exceeds the sum of £5, <sup>5</sup> or the sum of £1 if the thing injured grows in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house; or

<sup>1</sup> These words are added by 36 & 37 Vict. c. 71, s. 13. For definition of "salmon river," see 28 & 29 Vict. c. 121, s. 3, and 24 & 25 Vict. c. 109, s. 4.

<sup>2</sup> 24 & 25 Vict. c. 97, s. 46, W.

<sup>3</sup> Ibid. s. 48, W.

<sup>4</sup> 24 & 25 Vict. c. 97, ss. 21, W., 20, W. These sections are thus arranged in the Act (20.): Whoever cuts . . . trees . . . in any park, &c., if the damage exceeds £1, is guilty of felony, &c. (21.) Whoever cuts . . . trees . . . not growing in any park, &c., if the damage done exceeds £5, is guilty of felony, &c. The text is only half as long, and has precisely the same meaning.

<sup>5</sup> These sums are exclusive of consequential damage. A did injury to the amount of £1 to a hedge which it would cost £4 14s. 6d. to replace. This is injury to the amount of £1, not to the amount of £5 14s. 6d.: *R. v. Whiteman*, 1854, D. & P. 353 (upon 7 & 8 Geo. 4, c. 30, s. 19).

(b) <sup>1</sup> cuts or injures any electric line or work with intent to cut off any supply of electricity.

#### ARTICLE 424.

##### MAKING AND POSSESSING GUNPOWDER FOR CERTAIN PURPOSES.

<sup>2</sup> Every one commits a misdemeanor, and is liable upon conviction thereof to two years imprisonment and hard labour, who knowingly has in his possession, or makes or manufactures any gunpowder, explosive substance, dangerous or noxious thing, machine, engine, instrument, or thing with intent thereby or by means thereof, to commit, or for the purpose of enabling any other person to commit any felony mentioned in the 24 & 25 Vict. c. 100, or the 24 & 25 Vict. c. 97.

#### ARTICLE 425.

##### SUNDRY MALICIOUS INJURIES TO PROPERTY. <sup>3</sup>

Every one who unlawfully and maliciously does any of the following acts is liable to the following punishments respectively, that is to say,

(a.) 'who being possessed of any <sup>5</sup> building or part of any building as tenant for a term, at will, or on sufferance, or

<sup>1</sup> 45 & 46 Vict. c. 56, s. 22. "Electric line" is defined by sect. 32 to mean "a wire or wires conductor or other means used for the purpose of conveying, transmitting, or distributing electricity with any casing, coating, covering, tube, pipe, or insulator inclosing, surrounding, or supporting the same or any part thereof, or any apparatus connected therewith for the purpose of conveying, transmitting, or distributing electricity or electric currents."

"Works means and includes electric lines, also any buildings, machinery, engines, works, matters, or things of whatever description required to supply electricity and to carry into effect the object of the undertakers under this Act."

<sup>2</sup> 24 & 25 Vict. c. 100, s. 64, W. ; 24 & 25 Vict. c. 97, s. 54, W. The felonies in question are those specified in this chapter, and in chapters xxiv.-xxix., both inclusive, and in Articles 79 and 186.

<sup>3</sup> For the punishment of similar offences summarily, see Oke's Synopsis, pp. 420-424. Where offences in this Article are punishable after a previous conviction or previous convictions, the first, or the first and second offences are punishable summarily.

<sup>4</sup> 24 & 25 Vict. c. 97, s. 13.

<sup>5</sup> "any dwelling-house or other building or part of any dwelling-house or other building."



held over after the termination of any tenancy, pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or pulls down or severs from the freehold any fixture being fixed in or to, or being part of such building, is punishable as for a misdemeanor at common law ;

(b.) <sup>1</sup> who cuts, breaks, barks, roots up, or otherwise destroys or damages the whole or part of any tree, sapling, or shrub, or any underwood wheresoever growing, to the amount of one shilling at the least ; after two convictions of any such offence is guilty of misdemeanor and liable to two years imprisonment with hard labour ;

(c.) <sup>2</sup> who destroys or damages with intent to destroy any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory after one conviction of any such offence is guilty of felony and liable to five years penal servitude ;

(d.) <sup>3</sup> who throws down, levels, or otherwise destroys in whole or in part any turnpike gate or toll-bar, or <sup>4</sup> fence belonging to any turnpike or toll-bar, so set up or erected to prevent passengers from passing by without payment of any toll directed to be paid by any Act of Parliament, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll ; is guilty of a misdemeanor ;

(e.) <sup>5</sup> who cuts, breaks, throws down, destroys, injures, or removes anything whatever <sup>6</sup> being part of or used in or about any electric or magnetic telegraph, or in the working thereof, or prevents or obstructs in any manner whatever the sending, conveyance, or delivery of any communication by any such telegraph is guilty of a misdemeanor and liable to imprisonment with hard labour for two years ;

<sup>1</sup> 24 & 25 Vict. c. 97, s. 22, W.

<sup>2</sup> Ibid. s. 23, W.

<sup>3</sup> Ibid. s. 34.

“any wall, chain, rail, post, bar, or other fence.”

<sup>5</sup> 24 & 25 Vict. c. 97, s. 37. The committing magistrate may deal summarily with this offence ; see Oke's Synopsis, p. 422.

<sup>6</sup> “any battery, machinery, wire, cable, post, or other matter or thing whatsoever.”

(*f.*) <sup>1</sup> who destroys or damages any book, manuscript, <sup>2</sup> work of art, or thing kept for the purposes of art, science or literature, or as an object of curiosity in any <sup>3</sup> repository open at all times or from time to time for the admission of the public, or to any considerable number of persons, whether by the permission of the proprietor, or by the payment of money; or

any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art in any <sup>4</sup> place of divine worship or <sup>5</sup> public building, or <sup>6</sup> public place, churchyard, or burial ground; or

any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, is guilty of misdemeanor and is liable to imprisonment with hard labour for six months;

(*g.*) <sup>7</sup> who by any unlawful act, or by any wilful omission or neglect, obstructs or causes to be obstructed any engine or carriage using any railway or aids therein is guilty of a misdemeanor and liable to imprisonment with hard labour for two years;

(*h.*) <sup>8</sup> who unlawfully and maliciously commits any damage, injury, or spoil to an amount exceeding £5, to, or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is otherwise provided in this chapter is guilty of a misdemeanor and liable to imprisonment and hard labour for two years, and if the offence is committed between 9 P.M. and 5 A.M. five years penal servitude.

<sup>1</sup> 24 & 25 Vict. c. 97, s. 39, W.

<sup>2</sup> Work of art = "picture, print, statue, bust, vase, or any other article or thing kept for the purposes of art."

<sup>3</sup> "Museum, gallery, cabinet, library, or other depository."

<sup>4</sup> See the definition of these words in Note IV., p. 364.

<sup>5</sup> See the definition of these words in Note V., p. 365, from "belonging to the Queen" to "Inn of Court."

<sup>6</sup> Public place = street, square, public garden, or ground.

<sup>7</sup> 24 & 25 Vict. c. 97, s. 36. Changing a signal so as to cause a train to go slower than it otherwise would is an obstructing: *R. v. Hadfield*, 1870, 1 C. C. R. 253; so is stretching out the arms as a signal: *R. v. Hardy*, 1871, 1 C. C. R. 278. A railway not opened for public traffic may be obstructed: *R. v. Bradford*, 1860, Bell, C. C. 269.

*Ibid.* s. 51.

## CHAPTER XLIX

*<sup>1</sup> OFFENCES RELATING TO GAME, WILD ANIMALS, AND FISH*

## ARTICLE 426.

## "NIGHT" AND "GAME" DEFINED.

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

<sup>2</sup> "Night" means the interval between the end of the first hour after sunset and the beginning of the last hour before sunrise.

<sup>3</sup> "Game" means hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

## ARTICLE 427.

## NIGHT POACHING AND ASSAULTING KEEPER.

Every one commits a misdemeanor who does either of the following things and is liable to the following punishments respectively, that is to say,

(a.) <sup>4</sup> who by night unlawfully takes or destroys any game or rabbits in any land, whether open or inclosed, or by night unlawfully enters or is in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game after twice so offending is guilty of a misdemeanor and liable to serve seven years penal servitude ;

(b.) <sup>5</sup> who assaults or offers any violence with any gun,

<sup>1</sup> 3 Hist. Cr. Law, 275-282.

<sup>2</sup> 9 Geo. 4, c. 69, s. 12 ; 24 & 25 Vict. c. 96, ss. 17, 24.

<sup>3</sup> Ibid. s. 13.

<sup>4</sup> Ibid. s. 1 ; see Oke's Synopsis, p. 322, for the summary punishment for the first two offences.

<sup>5</sup> Ibid. s. 2.

cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatever, towards any <sup>1</sup>person authorized to seize and apprehend him for the offence specified in clause (a.) is guilty of a misdemeanor and is liable to seven years penal servitude.

## ARTICLE 428.

## OFFENCES RELATING TO DEER, HARES, AND RABBITS.

<sup>2</sup> Every one is guilty of an offence who does any of the following things, and is liable to the following punishments respectively, that is to say,

(a.) <sup>3</sup> who unlawfully and wilfully courses, hunts, snares, or carries away, kills, wounds, or attempts to kill or wound any deer kept or being

(i.) in the uninclosed part of any forest, chase, or purlieu, after a <sup>4</sup> previous conviction of any offence relating to deer for which a pecuniary penalty is imposed by any Act of Parliament, is guilty of a felony and liable to imprisonment with hard labour for two years ;

(ii.) <sup>5</sup> in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer are usually kept, is guilty of felony and liable to imprisonment with hard labour for two years ;

(b.) <sup>6</sup> who having entered into any forest, chase, or purlieu, inclosed or not, or into any inclosed land where deer are usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, unlawfully beats or wounds any person intrusted with the care of the deer, or

<sup>1</sup> i.e. "the owner or occupier of such land (i.e. land mentioned in (a) ) or . . . any person having a right or reputed right of free warren or free chase thereon, or . . . the lord of the manor or reputed manor wherein such land may be situate, and also . . . any gamekeeper or servant of any of the persons herein mentioned, or any persons assisting such gamekeeper or servant," sect. 2.

<sup>2</sup> For other offences connected with stealing deer and punishable summarily, see Oke's Synopsis, pp. 404-406.

<sup>3</sup> 24 & 25 Vict. c. 96, s. 12, W.

<sup>4</sup> The first offence is punishable summarily, see Oke's Synopsis, p. 404.

<sup>5</sup> 24 & 25 Vict. c. 96, s. 13, W.

<sup>6</sup> Ibid. s. 16, W.

any of his assistants, in the execution of the powers hereunder mentioned <sup>1</sup> is guilty of felony and liable to imprisonment with hard labour for two years;

(c.) <sup>2</sup> who by night unlawfully and wilfully takes or kills any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, is guilty of a misdemeanor;

(d.) <sup>3</sup> who unlawfully and wilfully takes or destroys, or attempts to take or destroy any fish, otherwise than by angling in the day-time, in any water running through or being in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, is guilty of a misdemeanor.

<sup>4</sup> If any person is found committing any offence under (d.), the owner of the ground, water, or fishery where such offender is found, his servant, or any person authorized by him, may demand from such offender any rod, line, hook, net, or other implement, for taking or destroying fish then in such offender's possession, and, if such offender does not immediately deliver up the same, may seize and take it from him for the use of such owner. Any person angling by day is by such taking or delivery exempted from any further damage or penalty.

<sup>1</sup> "Every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer."

<sup>2</sup> 24 & 25 Vict. c. 96, s. 17; this offence when committed by day, and setting snares, &c., in a warren are punishable summarily: see Oke's Synopsis, p. 316.

<sup>3</sup> Ibid. s. 24; other offences consisting of unlawfully taking fish are punishable summarily; see Oke's Synopsis, p. 408.

<sup>4</sup> Ibid. s. 25.

## CHAPTER L

<sup>1</sup> OFFENCES CONNECTED WITH TRADE AND BREACH OF CONTRACT

## ARTICLE 429.

## ABSCONDING WITH PROPERTY IN CONTEMPLATION OF BANKRUPTCY.

<sup>2</sup> EVERY one commits felony, and is liable upon conviction thereof to two years imprisonment and hard labour, who quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of £20 or upwards, which ought by law to be divided amongst his creditors,<sup>3</sup> having been adjudged a bankrupt, or having had his affairs liquidated by arrangement after the presentation of a bankruptcy petition [<sup>4</sup> by or] against him, or the commencement of his liquidation, or within four months before such presentation or commencement, unless the jury is satisfied that he had no intent to defraud.

<sup>5</sup> ARTICLE 430.

## PUNISHMENT OF FRAUDULENT DEBTORS.

Every person adjudged bankrupt, and every person whose affairs are liquidated by arrangement in pursuance of the

<sup>1</sup> 3 Hist. Cr. Law, 228-233. A few obsolete Statutes such as 28 Geo. 3, c. 55, as to unlawful dealings with stocking-frames are omitted from this chapter.

<sup>2</sup> 32 & 33 Vict. c. 62, s. 12.

<sup>3</sup> In the case of an infant adjudged a bankrupt for trading debts who was convicted under this section, it was held that the conviction must be set aside, as since 37 & 38 Vict. c. 62 the infant could have no creditors capable of being defrauded; *R. v. Wilson*, 1879, 5 Q. B. D. 28.

<sup>4</sup> 46 & 47 Vict. c. 163 (1).

<sup>5</sup> 32 & 33 Vict. c. 62, s. 11. These provisions apply "to any person whether a trader or not in respect to whose estate a receiving order has been made, as if the term 'bankrupt' in that Act (*i.e.* 32 & 33 Vict. c. 62) included a person in respect of whose estate a receiving order has been made"; 46 & 47 Vict. c. 52, s. 163 (2).

Bankruptcy Act 1869,<sup>1</sup> commits a misdemeanor, and is liable upon conviction thereof to a punishment of two years imprisonment and hard labour,

(1.) If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud :

(2.) If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud :

(3.) If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control, relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud :

(4.) If after the presentation of a bankruptcy petition [<sup>2</sup>by or] against him, or the commencement of the <sup>3</sup>liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of £10 or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud :

(5.) If after the presentation of a bankruptcy petition [<sup>2</sup>by or] against him, or the commencement of the <sup>3</sup>liquidation,

<sup>1</sup> The Bankruptcy Act of 1869 being repealed, the above is to be construed "as if reference were made therein to the corresponding provisions" of the Act of 1883, 46 & 47 Vict. c. 52, s. 149 (2). What are the provisions of the latter Act which correspond to liquidation by arrangement under the Act of 1869? It might be argued that they are those referring to compositions and schemes of arrangement (see 53 & 54 Vict. c. 71, s. 3; 50 & 51 Vict. c. 57, &c.); but the decision in *In Re Burdon, Ex parte Wood*, 1888, 57 L. J. Q. B. 570, seems to decide to the contrary effect.

<sup>2</sup> 46 & 47 Vict. c. 52, s. 163 (i.)

See Note I., *supra*.

or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of £10 or upwards :

(6.) If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud :

(7.) If, knowing or believing that a false debt has been proved by any person under the bankruptcy or <sup>1</sup>liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof :

(8.) If after the presentation of a bankruptcy petition [<sup>2</sup> by or] against him, or the commencement of the <sup>1</sup>liquidation, he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :

(9.) If after the presentation of a bankruptcy petition [<sup>2</sup> by or] against him, or the commencement of the <sup>1</sup>liquidation, or within four months next before such presentation or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intention to conceal the state of his affairs or to defeat the law :

(10.) If after the presentation of a bankruptcy petition [<sup>2</sup> by or] against him or commencement of the <sup>1</sup>liquidation, or within four months next before such presentation or commencement, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law.

(11.) If after the presentation of a bankruptcy petition [<sup>2</sup> by or] against him or the commencement of the <sup>1</sup>liquidation, or within four months next before such presentation

<sup>1</sup> See note I., *ante*, p. 380.

<sup>2</sup> 46 & 47 Vict. c. 52, s. 163 (i.)



or commencement, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs:

(12.) <sup>1</sup>If after the presentation of a bankruptcy petition [<sup>2</sup>by or] against him or the commencement of the <sup>3</sup>liquidation, or at any meeting of his creditors within four months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses:

(13.) [<sup>4</sup>If within four months next before the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under section 103 of the Bankruptcy Act 1883, before the date of the order] or the commencement of the <sup>3</sup>liquidation, he, by any false representation or other fraud, has obtained any property on credit, and has not paid for the same:

(14.) [<sup>5</sup>If within four months next before the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under section 103 of the Bankruptcy Act 1883, before the date of the order] or the commencement of the <sup>3</sup>liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way in his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud:

(15.) [<sup>5</sup>If within four months next before the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under section 103 of the Bankruptcy Act 1883, before the date of the order] or the commencement of the <sup>3</sup>liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid

<sup>1</sup> See *Ex parte Brett*, 1875, 1 Ch. D. 151.

<sup>2</sup> 46 & 47 Vict. c. 52, s. 163, (i.)

<sup>3</sup> See Note I., *ante*, p. 380.

<sup>4</sup> 53 & 54 Vict. c. 71, s. 26.

<sup>5</sup> 53 & 54 Vict. c. 71, s. 26, and see *Ex parte Brett*, *supra*.

for, unless the jury is satisfied that he had no intent to defraud:

(16.) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs, or his bankruptcy or <sup>1</sup> liquidation.

#### ARTICLE 431.

##### UNDISCHARGED BANKRUPT OBTAINING CREDIT.

Where an undischarged bankrupt who has been adjudged bankrupt under the Bankruptcy Act 1883 obtains credit to the extent of £20 or upwards from any person without informing such person that he is an undischarged bankrupt, he commits a misdemeanor to which all the provisions of the last Article apply.<sup>2</sup>

#### ARTICLE 432.

##### FALSE CLAIM ON BANKRUPT'S ESTATE.

<sup>3</sup> Every one commits a misdemeanor and is liable upon conviction thereof to one year's imprisonment and hard labour,

Who being a creditor in any bankruptcy or <sup>1</sup> liquidation by arrangement or composition with creditors in pursuance of the Bankruptcy Acts 1883 and 1890 wilfully and with intent to defraud makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular.

#### ARTICLE 433.

##### OFFENCES BY MASTERS AND OWNERS OF SHIPS.

<sup>4</sup> Every master or owner of a ship is guilty of a mis-

<sup>1</sup> See Note I., p. 380.

<sup>2</sup> 46 & Vict. c. 52, s. 31. This section applies to cases where credit is in fact obtained though no definite stipulation is made for it: *R. v. Peters*, 16 Q. B. D. 636.

<sup>3</sup> 32 & 33 Vict. c. 62, s. 14.

<sup>4</sup> 57 & 58 Vict. c. 60 s. 680.

demeanor, and is liable to fine or imprisonment with hard labour for two years, and in (1) the ship is liable to forfeiture who

(1) <sup>1</sup> uses or attempts to use for her navigation a certificate of registry not legally granted in respect of the ship ; or

(2) <sup>2</sup> is guilty of a wilful default which causes an infringement of the collision regulations of the Merchant Shipping Act 1894 ; or

(3) <sup>3</sup> is party or privy to the obstruction of the service on the master of any ship of any document under the provisions of the Merchant Shipping Act 1894 relating to the detention of the ship as unseaworthy.

#### ARTICLE 434.

##### OFFENCES BY THE MASTERS OF BRITISH SHIPS.

<sup>4</sup> Every master of and in (2) every person belonging to a British ship is guilty of a misdemeanor, and is liable to fine or imprisonment with hard labour for two years, who

(1) <sup>5</sup> does anything, or permits anything to be done, or carries or permits to be carried any papers or documents, with intent to conceal the British character of the ship from any person entitled by British law to inquire into the same or with intent to assume a foreign character, or with intent to deceive any person so entitled as aforesaid, or is privy to the commission of such an offence ; or

(2) <sup>6</sup> wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind in any place on shore or at sea in or out of Her Majesty's dominions, a seaman or apprentice to the sea service before the completion of the voyage for which he was engaged or before the return of the ship to the United Kingdom ; or

<sup>1</sup> 57 & 58 Vict. c. 60, s. 16.

<sup>3</sup> Ibid. s. 696 (2).

<sup>5</sup> Ibid. s. 70.

<sup>2</sup> Ibid. s. 419.

<sup>4</sup> Ibid. s. 680.

<sup>6</sup> Ibid. s. 187

(3) <sup>1</sup> discharges a seaman or apprentice to the sea service abroad, or leaves him behind abroad, ashore, or at sea, unless he previously obtains indorsed on the agreement with the crew the sanction, or in the case of leaving behind the certificate, of a superintendent in a British possession, or of a consular officer elsewhere; or

(4) <sup>2</sup> knowingly takes the ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, unless he proves that her going to sea in such an unseaworthy state was under the circumstances reasonable and justifiable.

#### ARTICLE 435.

##### NEGLECT OF DUTY IN CASE OF COLLISION.

<sup>3</sup> Every master of or person in charge of a vessel is guilty of a misdemeanor, and is liable to fine or imprisonment with hard labour for two years, who in case of collision with another vessel fails, without reasonable cause,

(a.) to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable, and may be necessary, to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no further need of assistance, and also

(b.) to give the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound,

if and in so far as he can do so without danger to his own vessel, crew, and passengers (if any).

If he fails to comply with this Article, and no reasonable cause for such failure is shown, the collision, in the absence of proof to the contrary, is deemed to have been caused by his wrongful act, neglect, or default.

<sup>1</sup> 57 & 58 Vict. c. 60, s. 188.

<sup>2</sup> Ibid. 457 (2).

<sup>3</sup> Ibid. ss. 422, 680.

## ARTICLE 436.

## OFFENCES BY PILOTS.

<sup>1</sup> Every pilot is guilty of a misdemeanor, and is liable to fine or imprisonment with hard labour for two years, who when in charge of a ship by wilful breach of duty, or by neglect of duty, or by reason of drunkenness,

(a.) does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of any person on board the ship; or

(b.) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from danger to life and limb.

## ARTICLE 437.

## SENDING UNSEAWORTHY SHIPS TO SEA.

<sup>2</sup> Every person is guilty of a misdemeanor, and is liable to fine or imprisonment with hard labour for two years, who

(1.) <sup>3</sup> sends, or attempts to send, or is party to sending, or attempting to send a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered,

unless he proves either that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such an unseaworthy state was under the circumstances reasonable and justifiable.

<sup>1</sup> 57 & 58 Vict. c. 60, ss. 607, 680.

<sup>2</sup> Ibid. s. 680.

<sup>3</sup> Ibid. s. 457 (1).

ARTICLE 438.<sup>1</sup>

## FORGING FALSE DECLARATIONS, ETC., UNDER THE MERCHANT SHIPPING ACT.

The following persons are guilty of felony, and in (2) liable to penal servitude for seven years, that is to say—

(1.) <sup>2</sup> every one who forges or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any register book, builder's or surveyor's certificate, certificate of registry, declaration, bill of sale, instrument of mortgage or certificate of mortgage or sale under Part I. of the Merchant Shipping Act 1894, or any entry or indorsement required by the said Part to be made in or on any of those documents; or

(2.) <sup>2</sup> forges the seal, stamp, or signature of any document declared by the Merchant Shipping Act 1894 to be admissible in evidence, or knowingly tenders in evidence any such document with a false or counterfeit seal, stamp, or signature thereto.

<sup>3</sup> Any person is liable to five years penal servitude who for the purpose of obtaining for himself or another any property of a deceased seaman or apprentice to the sea service, forges, or makes use of when forged, any document purporting to show a right thereto, or knowingly gives any false evidence, or makes any false representation or assists in so giving or making such evidence or representation.

<sup>4</sup> The following persons are guilty of a misdemeanor, and are liable to fine or imprisonment with hard labour (except as to hard labour in (6)) for two years, that is to say, any person who,

(1.) <sup>5</sup> in the case of any declaration made in the presence of, or produced to a registrar under, Part I. of the Merchant

<sup>1</sup> The contents of this Article are set out in a very much abbreviated form. The sections constituting the various offences are unfortunately almost all in a different form.

<sup>2</sup> 57 & 58 Vict. c. 60 s. 66.

<sup>3</sup> Ibid. s. 180.

<sup>4</sup> Ibid. s. 680.

<sup>5</sup> Ibid. s. 67.

Shipping Act 1894, wilfully makes any false statement concerning the title to or ownership of or the interest existing in any ship or share thereof; or knowingly makes use of any declaration or document containing any such false statement, or<sup>2</sup> wilfully makes a false declaration as to the qualification of himself or any other person or corporation to own any British ship or share therein; or

(2.)<sup>3</sup> forges, or makes a false representation to procure, or fraudulently uses a forged or suspended, or fraudulently lends any, certificate of competency; or

(3.)<sup>4</sup> fraudulently alters, makes any false entry in, or delivers a false copy of any agreement with a ship's crew, or assists in so doing; or

(4.)<sup>5</sup> forges or procures to be forged or presents when forged any document, or knowingly gives any false evidence or makes any false representation, in support of an application made for the wages of a seaman received into Her Majesty's service; or

(5.)<sup>6</sup> knowingly and wilfully makes a false or fraudulent declaration of survey or passenger steamer's certificate; or forges any such declaration or certificate; or

(6.)<sup>6</sup> forges, or puts off when forged, any document, or knowingly gives or makes any false evidence or representation, under Part IX. of the Merchant Shipping Act 1894 relating to salvage; or

(7.)<sup>7</sup> forges the seal or distinguishing mark of the Board of Trade on, or fraudulently alters, any form issued by the Board of Trade under the said Act.

<sup>8</sup> Any officer to whose custody an original document

<sup>1</sup> In this case the ship or share is liable to forfeiture to the extent of the declarant's interest, unless it is proved that the declaration was made without the authority of the person or corporation on whose behalf it was made.

<sup>2</sup> 57 & 58 Vict. c. 60, s. 104.

<sup>3</sup> Ibid. s. 121.

<sup>4</sup> Ibid. s. 197.

<sup>5</sup> Ibid. s. 282.

<sup>6</sup> Ibid. 564. This offence is not like the others made punishable by reference to sect. 680, but the punishment is the same.

<sup>7</sup> Ibid. s. 722.

<sup>8</sup> Ibid. s. 695 (3).

declared to be admissible in evidence by the Merchant Shipping Act 1894 is committed is guilty of a misdemeanor, and is liable to eighteen months imprisonment, who wilfully and falsely certifies any document to be a true copy thereof or extract therefrom.

## ARTICLE 439.

## VARIOUS OFFENCES UNDER THE MERCHANT SHIPPING ACT 1894.

<sup>1</sup> Every superintendent or officer granting or issuing a seaman's order with a fraudulent intent is guilty of felony, and liable to five years penal servitude.

<sup>2</sup> Every person appointed to any office or service by or under a local marine board is a clerk or servant within the meaning of sect. 68 of the Larceny Act (see Art. 335, *ante*), and is guilty of embezzlement within the meaning of the said section, who

(a.) fraudulently applies or disposes of any chattel, money, or valuable security received by him (whilst employed in such office or service) for or on account of any local marine board, or for or on account of any other public board or department for his own use, or any use or purpose other than that for which the same was paid, intrusted to, or received by him, or

(b.) fraudulently withholds, retains, or keeps back the same or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service as aforesaid.

<sup>3</sup> Every person is guilty of a misdemeanor, and to fine or imprisonment with hard labour for two years, who

(1.) <sup>4</sup> wilfully destroys or mutilates or renders illegible any entry in an official log book, or wilfully makes or procures to be made or assists in making a false or fraudulent entry in or omission from an official log book; or

<sup>1</sup> 57 & 58 Vict. c. 60, s. 147.

<sup>2</sup> Ibid. s. 248.

<sup>3</sup> Ibid. s. 680.

<sup>4</sup> Ibid. s. 241 (3).



<sup>1</sup> receives any money or valuable consideration from the person to whom an apprentice in the sea-fishing service is bound, or to whom a sea-fishing boy is bound by any agreement, or from any one on that person's behalf, or from the apprentice or boy or any one on the apprentice or boy's behalf, in consideration of the boy being so bound; or makes or causes any such payment to be made.

<sup>2</sup> Every one is guilty of felony, and is liable to penal servitude for five years, who takes into any foreign port any vessel, stranded, derelict or otherwise in distress, found on or near the coasts of the United Kingdom, or any tidal water within the limits of the United Kingdom, or any part of the cargo or apparel thereof, or anything belonging thereto, or any wreck within those limits, and there sells the same.

<sup>3</sup> Every person is guilty of a common nuisance (see *ante*, Art. 197) on whom a notice under section 667 of the Merchant Shipping Act 1894 as to the exhibition of false lights is served, and who does not comply with the directions contained therein.

#### ARTICLE 440.

##### CONSPIRACIES IN RESTRAINT OF TRADE.

<sup>4</sup> A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

##### *Illustration.*

<sup>5</sup> The defendants, a body of shipowners, agreed that if persons in a certain trade would deal exclusively with them, such persons should have certain advantages at their hands; and that if they dealt with any other shipowner, to however small an extent, they should lose all the advantages which otherwise they would derive from dealing with the defendants. This was not a

<sup>1</sup> 57 & 58 Vict. c. 60, s. 398.

<sup>2</sup> Ibid. s. 535.

<sup>3</sup> Ibid. s. 667. This offence is also punishable summarily.

<sup>4</sup> 3 Hist. Cr. Law, 202-227.

<sup>5</sup> *Mogul Steamship Company v. McGregor*, 21 Q. B. D. 544; 23 Q. B. D. 598; 1892, App. Cas. 25. The law of conspiracy was much discussed in this case.

conspiracy in restraint of trade, because the defendants used no violence, threats, fraud, or coercion, and had no intention of injuring the plaintiff's trade except in so far as such injury was incidental to the improvement of their own.

#### ARTICLE 441.

##### WHAT ACTS DONE IN RESTRAINT OF TRADE ARE NOT UNLAWFUL.

<sup>1</sup> The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of Article 440.

<sup>2</sup> No act in contemplation or furtherance of a trade dispute between employers and workmen is unlawful within the meaning of Article 440, unless a person doing it would be punishable for it on indictment, or liable to be imprisoned (either absolutely or at the discretion of the Court as an alternative for some other punishment) on summary conviction.

#### ARTICLE 442.

##### CONSPIRACIES IN RESTRAINT OF TRADE, MISDEMEANORS.

<sup>3</sup> Every conspiracy in restraint of trade is a misdemeanor, but no person convicted of a conspiracy to do, or procure to be done, in restraint of trade an act punishable only on summary conviction can be sentenced to imprisonment for more than three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.

#### ARTICLE 443.

##### CRIMINAL BREACHES OF CONTRACT OF SERVICE—INTIMIDATION AND PICKETING.

<sup>4</sup> Every person commits a misdemeanor, and is liable upon

<sup>1</sup> 34 & 35 Vict. c. 31, s. 2.

<sup>2</sup> 38 & 39 Vict. c. 86, s. 3. The words of the earlier part of the section are "punishable as a crime." "Crime" is defined at the end of the section as in the text.

<sup>3</sup> Ibid. last paragraph.

<sup>4</sup> Ibid. s. 5.

conviction thereof to be fined £20 or to imprisonment for three months with hard labour,

(a.) <sup>1</sup> who wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequence of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or

(b.) <sup>2</sup> who being employed by a municipal authority, or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing, or having reasonable cause to believe, that the probable consequences of his so doing, alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place or part, wholly or to a great extent of their supply of gas or water; or

(c.) <sup>3</sup> who being a master legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured; or

(d.) <sup>4</sup> who with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing wrongfully and without legal authority,

(i.) uses violence to or <sup>5</sup> intimidates such other person or his wife or children, or injures his property; or

<sup>1</sup> 38 & 39 Vict. c. 86, s. 5.

<sup>2</sup> Ibid. s. 4.

<sup>3</sup> Ibid. s. 6.

<sup>4</sup> Ibid. s. 7.

<sup>5</sup> The meaning of the word intimidates in this section has been much discussed, but not authoritatively defined. 34 & 35 Vict. c. 32, s. 1, subs. (2) limited the intimidation contemplated by that sub-section to "such intimidation as would justify a magistrate in binding over the

(ii.) persistently follows such other person about from place to place; or

(iii.) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or

(iv.) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or

(v.) follows such other person with two or more other persons in a disorderly manner in or through any street or road.

Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place in order merely to obtain or communicate information is not a watching or besetting within (iv.)

<sup>1</sup> Cases under this Article may be determined by a Court of summary jurisdiction, or if the accused objects to being tried for such offence by such a Court, the Court of summary jurisdiction [must<sup>2</sup>] deal with the case in all respects as if the offender were charged with an indictable offence, and the offence may be prosecuted on indictment accordingly.

intimidator to keep the peace—in other words, to such intimidation as implies a threat of personal violence” (*Gibson v. Lawson*, 1891, 2 Q. B. at p. 559), but this Act is repealed by 38 & 39 Vict. c. 86, which contains no such express limitation. It was held by Mr. Justice Cave in the unreported case of *R. v. McKeever*, tried at the Liverpool Assizes, December 1891, though it has never been more authoritatively decided, that such a limitation of the meaning of the word must be the implicit intention of the later Act. In *Curran v. Treleaven* (1891, 2 Q. B., at p. 560), and the cases decided at the same time, it was held in substance that a declaration by officials of a trade-union that if their wishes were not complied with they would call out the union workmen, followed by such calling out, was not intimidation of the persons whose action it was intended to influence. See *R. v. Druitt*, 1867, 10 Cox, C. C. 592, and *Connor v. Kent* (with which are reported *Gibson v. Lawson*, and *Curran v. Treleaven*), 1891, 2 Q. B. 545.

<sup>1</sup> 38 & 39 Vict. c. 86, s. 9.

<sup>2</sup> “may,” but apparently it means “must.”

## ARTICLE 444.

## THIRD OFFENCES AGAINST THE TRUCK ACTS.

<sup>1</sup> Any person is guilty of a misdemeanor, and is liable to a fine not exceeding £100, who being an employer of any <sup>2</sup> workman, by himself or by the agency of any other person or persons, directly or indirectly enters into any contract, or makes any payment declared illegal by the Truck Acts, after having been twice convicted of the same offence.

<sup>1</sup> 1 & 2 Will. 4, c. 37, s. 9. A complete account of the offences referred to in this Article will be found in Oke's Magisterial Synopsis at pp. 424-429; as third offences are very rare, it has not been thought worth while to set them out further above. The Truck Amendment Act 1887, 50 & 51 Vict. c. 46, is by sect. 1 to be read as one with the Truck Act 1831. Third offences are now punishable summarily as well as on indictment, 50 & 51 Vict. c. 46, ss. 11, 13.

<sup>2</sup> The Act of 1831 originally applied only to certain artificers as therein defined; it extends to all workmen as defined in the Employers and Workmen's Act 1875; see Oke's Synopsis, p. 971; 50 & 51 Vict. c. 46, ss. 2 and 1.

## APPENDIX OF NOTES

## NOTE I.

(TO ARTICLE 31.)

HARDLY any legal doctrine is less satisfactory than the one embodied in this Article. The rule has been too long settled to be disputed ; but on examining the authorities in their historical order, it appears to me to have originated, like some other doctrines, in the anxiety of judges to devise means by which the excessive severity of the old criminal law might be evaded.

The doctrine as it now stands is uncertain in its extent and irrational as far as it goes. It is, besides, rendered nearly unmeaning by the rule that the presumption is liable to be rebutted by circumstances. The first authority on the subject is Bracton, in whose time the more recent doctrine appears to have been unknown. He says :—“ *Uxor vero furi desponsata, non tenebitur ex furto viri, quia virum accusare non debet nec detegere furtum suum nec feloniam, cum ipsa sui potestatem non habeat, sed vir. Consentire tamen non debet feloniam viri sui nec coadjutrix esse, sed nequitiam et feloniam viri impedire debet quantum potest. In certis vero casibus de furto tenebitur, si furtum inveniatur sub clavibus uxoris, quas quidem claves habere debet uxor sub custodia et curâ suâ. Claves videlicet dispensæ suæ, archæ suæ, et scrinii sui : et si aliquando furtum sub clavibus istis inveniatur, uxor cum viro culpabilis erit. Sed quid si res furtiva in manu uxoris inveniatur, numquid tenebitur vir? Non ut videtur, nisi ei expresse consenserit, vel cum rem ei warrantizaverit cum ipsum vocaverit ad warrantum, et tunc consensisse præsumitur nisi expresse dissentiat, vel nisi de eo præsumatur quod fidelis sit eo quod societatem talis uxoris devitavit in quantum potuit. Item quid erit si uxor cum viro conjuncta fuerit, vel confessa quod viro*

suo consilium præstiterit et auxilium, numquid tenebuntur ambo? Imo ut videtur, quia vir potest teneri per se cum sit malus, et uxor poterit esse bona et fidelis et liberari. Item uxor mala per se et vir fidelis. Cum ergo uterque possit esse malus per se et alter eorum bonus, ita poterit uterque eorum, simul et conjunctim, esse malus sicut bonus. Solutio. Non igitur erit in omni casu uxor deliberanda propter consilium, auxilium, et consensum, desicut sunt participes in crimine, ita erunt participes in pœna. Et licet obedire debeat viro, in atrocioribus tamen suis latrociniiis ei non erit obediendum. Poterit quidem vir ligare et tenere, et uxor sponte et non coacta occidere, et ita ut videtur tenetur de maleficio uterque. De concubina vero, vel familia domus, non erit sicut de uxore. Ipse vero accusare tenentur, vel a servitio recedere alioquin videntur consentire." Bracton, Lib. 3, Tract 2, cap. 32, sect. 10, Rolls series, vol. ii. p. 518.

The effect of this passage is that the wife is not bound to accuse her husband, nor is she to be regarded as accessory after the fact to a theft committed by him merely because she receives the stolen goods, though she may be so regarded if she so conducts herself as to show actual consent to the theft. The passage does not contain a word about her right to steal with impunity in his presence.

The next authority is Assise 27 Edw. 3, cap. 40, vol. iv. p. 137 of Brooks' edition, 1679, which is in these words:—"Un feme fuit arraine de c̄ q̄ el aver feloñ emble ii s de pain; q̄ disq̄. elle fist per commandem̄t de celuy qui fuit son baron a cel temps. Et les justices ne voilent prendre pur pite a sa conis, mes pristeront l'enquest; per q̄ fut trove que el' le fit per cohersion de son baron maugre le soē per que el' ala quite, et dit fui q̄ p command de baron sans auter cohersion, ne serra nul manner de feloñ," &c.

In this case the jury seem to have found actual coercion by the husband. The dictum that the husband's command, he being absent, relieves the wife from guilt is clearly wrong according to more modern authorities. In Fitzherbert's Abridgment (A.D. 1565), Corone, 199, the case in the Book of Assizes is quoted in an abridged form: and Staundforde (A.D. 1583), c. 19, quotes Fitzherbert, but adds a *quære* to the dictum appended to the case, on which Fitzherbert relies. He does not, however, quote the case itself.

Coke, 3rd Inst. ch. xlvii. p. 108, says:—"A feme covert

committeth not larceny if she does it by the coercion of her husband ; but a feme covert may commit larceny if she doth it without the coercion of her husband." He quotes 27 Ass. 40, and Staundforde, but does not say that the bare presence of the husband is to be regarded as coercion, and does not notice the dictum as to the husband's command.

Bacon (Law Tracts, p. 57, ed. 1737), upon the maxim "*Necessitas inducit privilegium quoad jura privata*," observes, "the second necessity is of obedience, and therefore when baron and feme commit a felony, the feme can neither be principal nor accessory, because the law intends her to have no will in regard of the subjection and obedience she owes to her husband." For this he quotes the passage in Staundforde already referred to, and Fitzherbert (Corone, 160), which states, as the effect of a case, in 2 Edw. 3, that eight men and a woman being convicted of felony, and the woman declaring that she was the wife of one of the men, and the jury saying they knew nothing of it, the judge inquired of the bishop. Lord Bacon's proposition thus goes infinitely beyond his authorities.

Dalton (Justice, ch. clvii.) says :—"A feme covert doth steal goods by the compulsion or constraint of her husband. This is no felony in her." And he quotes Fitzherbert and the case quoted by Fitzherbert. He also quotes Bracton in a very unintelligent and fragmental way, and says that in murder and treason the husband's compulsion does not excuse the wife. As to murder, his authority is Marrow,<sup>1</sup> an author of the time of Henry VII. As to treason, he quotes Fitzherbert (Cor. 130). This passage refers to the case of a woman sentenced to be burnt for coining, respited on the ground of pregnancy, delivered of her child, and becoming pregnant again before she was burnt. The case does not say that she was married at all, and rather implies that she was not.

Hale (1 P. C. 45) says :—"If she (the wife) commit larceny by the coercion of the husband, she is not guilty (27 Ass. 40), and according to some, if it be by the command of her husband, which seems to be law if the husband be present, but not if her husband be absent at the time and place of the felony committed.

<sup>1</sup> Lambard's "Preface" begins, "To write of the office and duties of a justice of the peace, after H. Marrow," is like "bringing owls to Athens." In *Willes v. Bridger*, 1819, 2 B. & Ald. 282, Marrow is said to have been a Master in Chancery.



"But this command or coercion of the husband doth not excuse in case of treason nor of murder, in regard of the heinousness of those crimes." He quotes for this the passage in Dalton given above and the cases of Arden and Somerville as to treason, and Lady Somerset as to murder. He goes on: "If the husband and wife together commit larceny or burglary, by the opinion of Bracton (lib. iii. ch. xxxii. s. 10) both are guilty" (Bracton says nothing of the sort), "and so it hath been practised by some judges. *Vide Dalt., ubi supra*, ch. civ." (Dalton does not say so). "And possibly, in strictness of law, unless the actual coercion of the husband appear, she may be guilty in such a case; for it may many times fall out that the husband doth commit larceny by the instigation, though he cannot in law do it by the coercion, of his wife; but the latter practice hath obtained, that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted; and with this agrees the old book (2 E. 3, Corone, 160). And this being the modern practice, and *in favorem vite*, is fittest to be followed: and the rather because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged, where the case is within clergy, though I confess this reason is but of small value; for in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture.

"And accordingly in the modern practice where the husband and wife, by the name of his wife, have been indicted for a larceny or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the husband acquitted, merciful judges have used to reprieve the wife before judgment, because they have thought, or at least doubted, that the indictment was void against the wife, she appearing by the indictment to be a wife, and yet charged with felony jointly with her husband.

"But this is not agreeable to law, for the indictment stands good against the wife, inasmuch as every indictment is as well several as joint."

This extract probably gives the key to the confusion of the law upon this subject. It was thought hard that a woman should be hanged for a theft for which her husband had his clergy, and accordingly a loophole was devised for married

women, similar, as far as theft was concerned, to clergy for men. Hale's remark as to manslaughter shows how incomplete and unsystematic the arrangement was.

Hawkins (1—4) says:—"If she . . . be guilty of treason, murder, or robbery, in company with, or by the coercion of, her husband, she is punishable as much as if she were sole." And Blackstone excepts "treason and *mala in se*, as murder and the like."

The recent cases on the subject are referred to in the Illustrations to the Article and in the footnote.

Surely, as matters now stand, and have stood for a great length of time, married women ought, as regards the commission of crimes, to be on exactly the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on almost every occasion where it ought to be applied.

## NOTE II.

### (TO ARTICLE 48.)

In *R. v. Welham*, 1845, 1 Cox, C. C. 192, Mr. Justice Patteson, after consulting Baron Parke, said, "We are both clearly of opinion that there can be no inciting to commit a felony unless the party incited knows that the act in which he is to engage is a felony." Upon this Mr. Greaves (1 Russ. Cr. 189, note (*f*)) asks, "How can the guilt of the inciter depend upon the state of mind of the incited? The inciting and the intention of the inciter constitute the offence." As I understand the facts of *R. v. Welham*, Welham incited Hood to carry off corn which Hood supposed Welham to have a right to carry off. If this were so, Welham's offence, if any, was an attempt to commit a felony by an innocent agent, and not an incitement to commit a felony, which view would justify the language of the two eminent judges. A. tells B. to put into C.'s tea something which B. supposed to be powdered sugar, but which is really arsenic. This is an attempt by A. to murder C., but it is not an inciting B. to commit murder.

This view is strengthened by *Williams' Case*, 1844, 1 Den. C. C. 39, in which it was held that to instigate a person to poison another under such circumstances that the instigator would

have been an accessory before the fact if the poison had been given, was not an attempt to administer poison under 7 Will. 4 and 5 Vict. c. 85, s. 1, with which cf. 24 and 25 Vict. c. 100, s. 11.

### NOTE III.

#### (TO ARTICLE 156 ; MAINTENANCE.)

It is not without hesitation that I have inserted these vague and practically obsolete definitions in this book. As, however, maintenance and champerty hold a place in all the text books, I have not thought it proper to omit all notice of them. A full account of the crimes themselves, of the vagueness of the manner in which they are defined, and of the reasons why they have so long since become obsolete, may be seen in the Fifth Report of the Criminal Law Commissioners, pp. 34-9. The Commissioners observe in conclusion :—" Prosecutions for offences comprehended under the general head of maintenance are so rare that their very rarity has been a protection against the disapproval of judges, and those alterations which a frequent recurrence of doubt and vexation would probably have occasioned. . . . But although no cases have occurred where the doctrine of maintenance has been discussed in the Courts, it is by no means true that this law has not been used as the means of great vexation. Instances of this have fallen within our own professional observation in the case of prosecutions commenced, although not persevered in." The Commissioners recommend that all these offences should be abolished. The definition of barratry in particular is so vague as to be quite absurd ; and the statutory provision as to attorneys practising after a conviction would be utterly intolerable if it had not been long forgotten. I should suppose that there is no other enactment in the whole statute book which authorises any judge to sentence a man to seven years' penal servitude after a summary inquiry conducted by himself in his own way.

These offences, as sufficiently appears from the preambles of the various statutes relating to them, are relics of an age when courts of justice were liable to intimidation by the rich and powerful and their dependants. As long as the verdict of a jury was, more or less, in the nature of a sworn report of local opinion, made by witnesses officially appointed to make such

reports, intimidation must have been possible, and, in many cases, easy. Many statutes on this subject<sup>1</sup> are still in force, and the law relating to it is to be found in 1 Hawkins, 454. The exceptions to the general rule, that a man is not to assist another in a quarrel in which the maintainer has no interest, are so numerous, and, in some cases, so vague (*e.g.* a man may assist his neighbour from charity), that no less vague proposition than the one in the text would faithfully represent the law.

## NOTE IV.

(TO ARTICLES 174, 175.)

These offences have, at least in modern times, been made the subject of few, if of any, prosecutions. The excessive severity of the judgment for misprision of treason no doubt escaped notice when forfeitures for felony were abolished. The 33 & 34 Vict. c. 23 takes no notice of misprisings.

The definition of misprision of felony is extremely vague. I have found no authority as to what amounts to a concealment. The obligation to discover treason to a judge or magistrate is mentioned by Hale. In early times, when the offence was commoner and more important, the obligation was very clearly set forth. "*Si sit aliquis qui alium noverit inde*" (*i.e.* of treason) "*esse culpabilem, vel in aliquo criminosum, statim et sine intervallo aliquo accedere debet ad ipsum regem si possit, vel mittere si venire non possit ad aliquem regi familiarem et omnia ei manifestare per ordinem. Nec enim debet morari in uno loco per duas noctes vel per duos dies antequam personam regis videat, nec debet ad aliqua negotia quamvis urgentissima se convertere, quia vix permittitur ei quod retro aspiat.*" Bracton, Lib. iii., fo. 118 b.

## NOTE V.

(TO ARTICLE 191.)

The latter part of this Article is grounded partly upon general considerations and partly upon the case referred to in the Illustrations. Further illustrations of the same principle

<sup>1</sup> 3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 28 Edw. 1, c. 11; 1 Edw. 3, st. 2, c. 14; 1 Ric. 2, c. 4; 32 Hen. 8, c. 9.

might easily be given. For instance, the publication of an edition of Juvenal, Aristophanes, Swift, Defoe, Bayle's Dictionary, Rabelais, Brantôme, Boccaccio, Chaucer, &c., cannot be regarded as a crime; yet each of these books contains more or less obscenity for which it is impossible to offer any excuse whatever. I know not how the publication of them could be justified except by the consideration that upon the whole it is for the public good that the works of remarkable men should be published as they are, so that we may be able to form as complete an estimate as possible of their characters and of the times in which they lived. On the other hand, a collection of indecencies might be formed from any one of the authors I have mentioned the separate publication of which would deserve severe punishment.

In scientific matters the line between obscenity and purity may be said to trace itself, as is also the case in reference to the administration of justice. It may be more difficult to draw the line in reference to works of art, because it undoubtedly is part of the aim of art to appeal to emotions connected with sexual passion. Practically I do not think any difficulty could ever arise, or has ever arisen. The difference between naked figures which pure-minded men and women could criticise without the slightest sense of impropriety, and figures for the exhibition of which ignominious punishment would be the only appropriate consequence, makes itself felt at once, though it would be difficult to define it.

#### NOTE VI.

(TO ARTICLES 199-204.)

There is a good deal of difficulty in bringing into a clear and systematic form the provisions of the various statutes relating to the suppression of disorderly houses, and especially gaming-houses. I think, however, that the text represents their effect with substantial accuracy.

The matter stands thus. The earliest Act upon the subject now in force is 33 Hen. 8, c. 9, "An Act for Maintenance of Artillery and Debarring of Unlawful Games." This Act was intended to compel people to practise archery by making all other amusements unlawful, and it accordingly forbids by name

bowls, quoits, tennis, and various other games, cards and dice, and all other unlawful games prohibited by any of the statutes which it repealed, as well as all other unlawful games to be subsequently invented. The expression "unlawful games" is nowhere defined, unless it means every amusement except archery.

By the 10 Will. 3, c. 23, lotteries were forbidden. By the 12 Geo. 2, c. 28, "the games of ace of hearts, pharaoh, basset, and hazard" were declared to be lotteries, and, as well as what we now call raffles, were forbidden under penalties. By the 13 Geo. 2, c. 19, the same course was taken as to a game called passage, "and all other games invented or to be invented with one or more die or dice," backgammon only excepted. By 18 Geo. 2, c. 34, these enactments were extended to "a certain pernicious game called roulette or roly poly," and that game and "any game at cards or dice, already prohibited by law," were prohibited afresh.

The 8 & 9 Vict. c. 109 repeals so much of the Act of Henry VIII. as relates to games of mere skill, and provides that upon any information or indictment for keeping a common gaming-house "it shall be sufficient to prove" the matter stated in Article 204.

This enactment was passed in order to dispose of doubts that apart from its provisions it would have been necessary to prove that the parties played at one of the games specifically prohibited by the Acts of Geo. II., or at one of the games of chance prohibited by the Act of Henry VIII.

## NOTE VII.

### (GENERAL NOTE TO PART V.)

The arrangement of this part, and in particular the composition of Chapters XXI. and XXII., has been the most difficult portion of the task of preparing this Digest. No one who has not made a special study of the subject can have any adequate notion of the extreme confusion of the authorities, or of the difficulty of extracting anything systematic and definite from a number of scattered hints and isolated decisions upon particular cases—mostly relating to the law of homicide. Upon a full examination of the authorities on this subject it appeared to me that the law contained in them ought to be divided into four parts—namely :—1. Cases in which it is not criminal to inflict death

or bodily harm intentionally. These are the execution of legal sentences, keeping the peace, prevention of crime, self-defence, the use of lawful force, consent and accident. The expression "lawful force" is unavoidably vague. To enumerate every case in which the use of personal violence may be justified would be inconsistent with the scheme of this work. It would, for instance, be going beyond the limits of criminal law to inquire into the extent of the right of correction vested in parents, masters, captains of merchant ships, &c., or of the right of the owner of a personal chattel to take it away from a trespasser, or to try to enumerate all the cases in which civil and criminal process may be executed by the use of force, and the conditions necessary to make it legal. I have accordingly confined myself to the general principles stated in Articles 220, 221.

2. Cases in which the infliction of death or bodily harm by omissions is or is not criminal. Injuries caused by the omission to do an act which the negligent person is under a legal duty to do stand on the same footing as injuries caused by unlawful acts. It is, therefore, necessary to define the commoner and more important of the legal duties which tend to the preservation of life. I have, therefore, deduced them in Chapter XXII. from the different decisions in which a violation of them has been held to occur. Of course the chapter does not contain an exhaustive list of all the duties which might tend to the preservation of life under particular circumstances, though I hope it notices the most important of them.

3. Cases relating to homicide generally and apart from the distinction between murder and manslaughter. Such are the point of time at which a child becomes a human being, the degree of connection between an act and the death caused by it necessary in order to enable us to say that the agent has killed the deceased, and the case in which the act done is not the sole cause of death. Thus, if an unborn child receives an injury of which it dies before it is fully born, the infliction of the injury cannot be either murder or manslaughter. If it dies after it is fully born, the infliction of the injury may be either justifiable homicide, accidental homicide, manslaughter, or murder, according to circumstances. This makes it possible to enumerate the cases in which homicide is unlawful, and so to give a specific meaning to the expression "unlawful homicide."

4. The definition of malice aforethought. Unlawful homicide must be manslaughter at least, and may be murder if it is accompanied by malice aforethought; and, after dealing with this, the transition to the less serious bodily injuries, felonious or otherwise, is easy.

When this division of the subject is carried out it looks simple; at least I hope so; but any one who will try the experiment of referring to the authorities will believe me when I assert that it cost me weeks of thought and labour to put the matter in this shape. I believe, however, that it is now not very incomplete.

The table on p. 406 shows, I think, that every imaginable kind of homicide has been considered, and has been classified as lawful or unlawful in some parts or other of Chapters XXI., XXII., and XXIII., and if this be so the definitions of murder and manslaughter must also be complete.

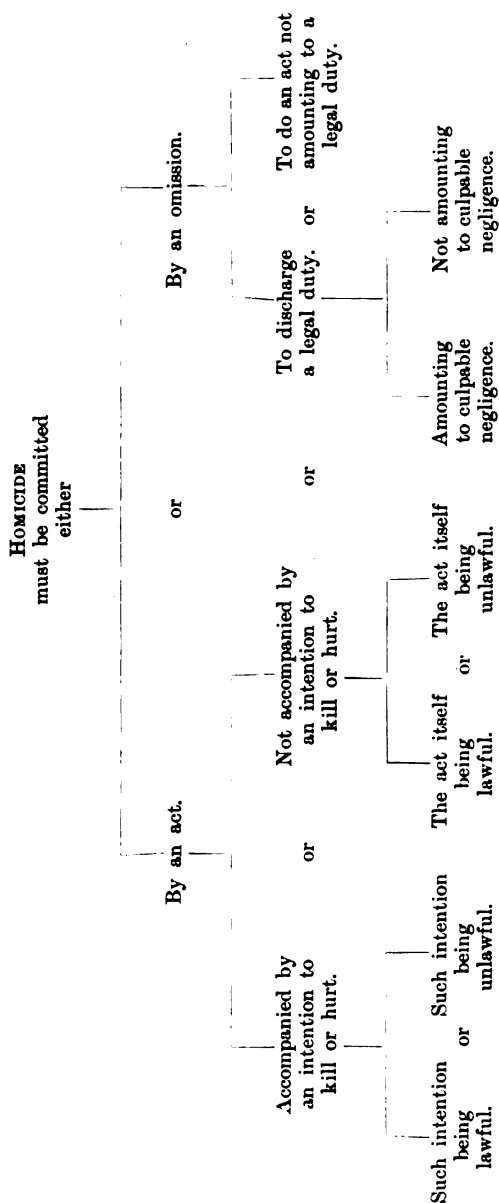
This table gives seven distinct kinds of homicide, as follows:—

1. Homicide by an act accompanied by a lawful intention to kill or hurt (Chapter XXI.)
2. Homicide by an act accompanied by an unlawful intention to kill or hurt (Article 243 (a)).
3. Homicide by an act in itself lawful, and not accompanied by an intention to kill or hurt (Article 231).
4. Homicide by an act in itself unlawful, but not accompanied by an intention to kill or hurt (Article 243 (c)).
5. Homicide by an omission to discharge a legal duty amounting to culpable negligence (Chapter XXII., Article 243 (b)).
6. Homicide by an omission to discharge a legal duty not amounting to culpable negligence (Article 232).
7. Homicide by an omission to do an act not amounting to a legal duty (Article 233).

Of these Nos. 1, 3, 6, and 7 are not unlawful in the sense of being criminal. Nos. 2, 4, and 5 are unlawful. Every act falling within these definitions must be manslaughter at least, and may be murder if it is accompanied by malice aforethought, as defined in the next chapter, and is not provoked.

Unless some kind of homicide can be suggested which is not comprehended in one or other of these classes, the subject is exhausted in these chapters.





## NOTE VIII.

(ARTICLE 244.)

## DEFINITION OF MURDER AND MANSLAUGHTER.

This definition represents the solution at which I have arrived after much consideration of one of the most difficult problems presented by the criminal law—the problem of giving in a short compass the result of a great number of decisions and statements by authoritative writers upon the subject of murder.

I do not propose in this note to examine the history of the law on this subject, or to enter into any inquiry as to its merits and demerits. I propose simply to show that it is stated correctly in the text.<sup>1</sup> It will be sufficient for this purpose to show that the definition which I have given coincides with the theory laid down by the authorities on the subject, which I shall try to establish by showing that my definition of murder and manslaughter respectively will be found upon examination to be equivalent to what is stated in Coke's 3rd Institute, Chapters VII. and VIII., 1 Hale's Pleas of the Crown, pp. 411—502 (Chapters XXXI.—XLII. both inclusive), and Foster's Discourse on Homicide (Crown Law, 255—337). The existing law on the subject is founded mainly upon these works, and the almost innumerable decisions bearing upon the subject are all applications of the theory which is there laid down. The decisions have been collected more or less fully, and arranged in a more or less satisfactory way, by various writers, but for every practical purpose the collection contained in Russell on Crimes is sufficient, though in point of arrangement it is, I think, inferior to the older work of East.<sup>2</sup> It fills 212 pages (640—852) of the first volume of the 5th edition.

<sup>1</sup> In former editions this note also showed in the words of the author "that all the points decided by the various cases relating to any form of homicide are comprehended in what I have said on the subject in the different Articles contained in Chapters XXI.—XXIV. both inclusive, for the various decisions in question range over all the subjects treated of in those chapters indiscriminately." This was done by a table proving that the text included the effect of all the cases, bearing on the subject mentioned in Russell on crimes, which is now omitted; but if any doubt is felt as to the fact of such inclusion, reference may be made to pp. 385—390 of the edition of 1887.

<sup>2</sup> Two modern decisions on the subject of the law of murder of

The intricacy, confusion, and uncertainty of this branch of the law may be traced to the statute 23 Hen. 8, c. 1, s. 3, which took away benefit of clergy in cases of "wilful murder of malice prepensed," and which thus created the necessity of preserving the expression "malice prepense," and at the same time explaining it away. Coke endeavoured to effect this by the doctrine of constructive or fictitious malice, of which, if not the author, he was the most conspicuous expounder, and he showed in his exposition of it that utter incapacity for anything like correct language or consecutive thought which was one of his great characteristics. Hale amplifies Coke, Foster rationalizes Hale, and the judges have, in an unsystematic occasional way, worked out, bit by bit, the result recorded in the text.

According to Coke, malice aforethought is the criterion by which murder is distinguished from manslaughter. Malice may be either expressed or implied.

<sup>1</sup> "Malice prepensed is where one compasseth to kill, wound, or beat another and doth it *sedato animo*."

<sup>2</sup> "Malice implied is in three cases :—

"First, in respect of the manner of the deed, as if one killeth another without any provocation of the part of him that is slain, the law implieth malice.

"Second, in respect of the person slain. As if a magistrate or known officer, or any other that hath lawful warrant, and in doing or offering to do his office or to execute his warrant, is slain, this is murder by malice implied in law, as the" <sup>3</sup> person killed is "the minister of the king."

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importance were given before 1876, when the 5th edition of Russell was published, but not having been reported in the ordinary law reports have not been noticed in that edition. They are the cases of *R. v. Allen and Others*, the Fenians, tried at Manchester for the murder of the policeman Brett, in 1867, and the case of *R. v. Desmond and Others*, for killing people by blowing up the wall of Clerkenwell Prison, in 1868. Neither of these cases is reported in the common reports. I have quoted what was said by Lord Chief Justice Cockburn in *Desmond's Case* in Art. 244, Illust. (8), and I have reprinted in the note next following from the *Times*, the correspondence which passed between the counsel for the prisoner and Lord (then Mr. Justice) Blackburn, in *R. v. Allen and Others*. Though not in form it constitutes in fact an argument and a written judgment on a very important point.

<sup>1</sup> 3rd Inst. 51.

<sup>2</sup> Ibid. 52.

<sup>3</sup> The sentence here is not even grammatical.

"Third, in respect of the person killing. If A. assaults B. to rob him, and in resisting A. killeth B. (*i.e.* if B. resists and A. kills him) this is murder by malice implied, albeit he" (A.) "never saw or knew him" (B.) "before."

These passages, overloaded, as Coke's manner is, with a quantity of loose rambling gossip, form the essence of his account of murder.

Hale, who arranges his matter more systematically (though he also is exceedingly confused),<sup>1</sup> adopts Coke's theory in slightly different language. "Such a malice, therefore, that makes the killing of a man to be murder is of two kinds: 1. Malice, in fact, or 2, malice in law, or *ex presumptione legis*."

"Malice in fact is a deliberate intention of doing some corporal harm to the person of another."

"Malice in law, or presumed malice, is of several kinds, viz., 1. In respect of the manner of the homicide, when without provocation. 2. In respect of the person killed, viz., a minister of justice in the execution of his office. 3. In respect of the person killing." (As to which he<sup>2</sup> afterwards repeats Coke in an abridged form.)

Manslaughter, Coke<sup>3</sup> tells us (in the middle of a bewildering chapter about homicide in general), is homicide, "not of malice forethought" [but] "upon some sudden falling out."

Manslaughter is treated by Hale in a manner so meagre and yet so confused that no notion of it can be obtained except by reading through Chapters XXXVIII.—XL., and trying to make sense of them. Hale's whole definition of the offence is in these words, "Manslaughter, or simple homicide, is the voluntary killing of another without malice express or implied."

These definitions are open to the remark that the definition of express malice includes all the three cases of implied malice.

Express malice means the deliberate intentional infliction of bodily harm. Malice is implied if the act is done without provocation, or in resisting an officer of justice, or in committing a crime. But in each of these cases the infliction of bodily harm must be intentional, and there is no reason why in each of them it should not be deliberate.

<sup>1</sup> 1 Hale, P. C. 451.

<sup>2</sup> Page 465.

<sup>3</sup> 3rd Inst. 55.

Thus the distinction between express and implied malice is a distinction without a difference.

It has involved the whole subject in an obscurity from which it can never be rescued except by legislation, though I think the way in which it is stated in the text is correct, and may contribute to dispelling the confusion.

Coke's theory, however, and that of Hale may be exhibited in the following propositions :—

1. Unlawful killing by any sort of premeditated intentional personal violence is murder.
2. Premeditation is to be presumed if the violence is intentional and unprovoked.
3. Unlawful killing by unpremeditated intentional personal violence is murder if the violence is employed in the commission of a crime or in resistance to lawful authority.
4. Unlawful killing by unpremeditated intentional violence provoked is manslaughter.

These four propositions may be also stated thus—so as to show their connection :

Unlawful killing by any sort of intentional personal violence is murder, unless such violence is used “upon a sudden falling out,” constituting provocation to the offender, but neither the exercise of force by an officer of justice against an offender, nor resistance to the offender by a person against whom a crime is attempted, constitutes such a provocation, and killing in such cases is murder.

That this proposition is the equivalent of the four propositions given above is thus proved :

<sup>1</sup> All intentional violence must be either provoked or unprovoked.

All intentional violence must be either premeditated or unpremeditated.

<sup>1</sup> This may be expressed thus in a tabular form :—

INTENTIONAL VIOLENCE MUST BE			PREMEDITATED.	or	UNPREMEDITATED.
PROVOKED	...	...	Murder by proposition 1.		Not murder by proposition 4, except in cases under proposition 3.
or					
UNPROVOKED	...	...	Murder by proposition 1.		Murder by proposition 2.

Killing by premeditated intentional personal violence is murder by (1).

Killing by unpremeditated, unprovoked intentional personal violence is, by (2), equivalent to killing by premeditated intentional personal violence, and is therefore murder. Therefore all killing by intentional personal violence is murder, unless such violence is both provoked and unpremeditated.

By (3) killing by intentional personal violence unpremeditated, and provoked only by the exercise of lawful force in the ways mentioned, is murder.

Therefore the four propositions are equivalent to the one last stated.

The legal character of unintentional killing was held by Coke and Hale to depend on the character of the act by which death was caused. If the act was unlawful the offence was murder. If lawful the death was killing by misadventure, which, in Hale's time, seems to have covered, at all events in part, the ground now occupied by manslaughter by negligence. As to this Hale says :—<sup>1</sup> "Though the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, though it was not his crime, but his misfortune, yet, because the King hath lost his subject, *and that men may be more careful*, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed," &c.

Upon the whole, the law as to unlawful homicide, as understood by Coke and Hale (the effect of what they say on justifiable homicide is given in Chapter XXI.), may be summed up as follows :—

Murder is unlawful killing

(a) by any intentional personal violence not inflicted upon a sudden falling out ;

(b) by any unintentional personal violence inflicted in an unlawful act.

Manslaughter is killing by any intentional personal violence inflicted upon a sudden falling out, provided that if a man attempting to commit a crime upon another is resisted, and kills the person resisting, or if a man resists an officer of justice in the exercise of his duty, and kills him, the offence is murder, and not manslaughter, although there is something which may be described as a sudden falling out between the parties.

<sup>1</sup> 1 Hale, P. C. 477.

The following theory was collateral to this definition, and was supposed to be its basis :—

In all murder there is malice aforethought. In murder as defined in (a.) there is express malice aforethought if the circumstances show premeditation. There is implied malice aforethought if the act was done suddenly, and without provocation.

In murder as defined in (b) and in the proviso to the definition of manslaughter, the malice is always implied.

In manslaughter there is no express malice aforethought, and it is not thought proper to imply it.

These explanations show the true nature and real use of the expression "malice aforethought"—a mere popular phrase unluckily introduced into an Act of Parliament, and half explained away by the judges. It throws no light whatever on the nature of the crime of murder, and never was used in its natural sense of premeditation. On the other hand, it served as a sort of standing hint at the kind of definition which was wanted, for it was equivalent to saying that there were two degrees of homicide—homicide with premeditation, or other circumstances indicating the same sort of malignity ; and homicide provoked by a sudden quarrel, or accompanied with other circumstances indicative of a less degree of malignity.

Foster's discourse on Homicide is little more than an amplification of this thesis. He goes through all the principal cases which have been decided in his time, and compares them with the theories of Hale and Coke, drawing the conclusion that malice means "that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit ; a heart regardless of a social duty, and fatally bent upon mischief ;"<sup>1</sup> a principle more shortly expressed by Holt, L.C.J., in the words, "He that doth a cruel act voluntarily doth it of malice prepensed."<sup>2</sup>

This principle gives its due prominence to a distinction which appears to have been quite unknown to Coke, though it had attracted the attention of Hale, and is, one would think, obvious enough in itself—the distinction, namely, between causing death

<sup>1</sup> Foster, 256.

<sup>2</sup> *R. v. Mawgridge*, 1706, Kelyng (3rd ed.), 174. This judgment contains an admirable summary of the law of murder and manslaughter as it was understood in the beginning of the eighteenth century.

unintentionally by an act likely to cause death, and causing death unintentionally by an act unlikely to cause death.

According to Coke<sup>1</sup> and Hale<sup>2</sup> a settled design to beat a man makes killing him by such beating murder. Hale, however, seems to doubt whether, if the beating was moderate, the killing might not be manslaughter, and mentions<sup>3</sup> one case in which a soldier having killed a woman who abused him by throwing a broomstick at her, the judges were divided on the question whether the act was murder or not, and recommended a pardon. This view of the matter is developed at length by Foster, who discusses many cases in connection with it, and may be regarded as having laid the foundation of the modern doctrine on the subject, which has since his time been recognised in a vast number of cases, that the general presumption of malice which arises from the fact of killing is rebutted if it appear that the means used were not likely to cause death.

Foster to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence, by confining it to cases in which the unintentional violence is offered in the commission of a felony. This rule has in modern times had a singular and unexpected effect. When Coke and Hale wrote, the infliction of hardly any bodily injury<sup>4</sup> short of a maim was a felony. Cutting with intent to disfigure was made felony by the Coventry Act; shooting was made felony by what was called the Black Act; and by later statutes it has been provided that the intentional infliction of grievous bodily harm in any way whatever shall be felony (see Article 257 (a)). The result is that Foster's rule as to the intent to do grievous, as distinguished from the minor, bodily harm being essential to malice aforethought now rests on statutory authority, for no one can intentionally inflict on another grievous bodily harm without committing a felony, and to cause death by a felonious act is murder.

The law as to homicide by omission is more modern, but closely follows the lines of the older part of the law. The authorities on it will be found in the Illustrations.

<sup>1</sup> 3rd Inst. 50.

<sup>2</sup> 1 Hale, P. C. 472.

<sup>3</sup> 1 Hale, P. C. 456.

<sup>4</sup> Cutting out the tongue, or putting out the eyes, was felony by 5 Hen. 4, c. 5.



## NOTE IX.

(TO ARTICLES 246 (c), 247.)

The following correspondence was published in the *Times* of Nov. 21, 1867. It refers to the case of *R. v. Allen and Others*, convicted at the Manchester Special Commission of the murder of Brett, a police officer, whom they shot in an attempt to rescue a Fenian prisoner from a police van in Manchester. There is no legal report of the case so far as I know, but, as will be seen, the letter of the prisoners' counsel, and the reply of Lord (then Mr. Justice) Blackburn are substantially an argument and a judgment on a matter of very great importance. I have, therefore, republished them from the *Times*, with Lord Blackburn's permission.

STATEMENT submitted to MR. JUSTICE BLACKBURN and MR. JUSTICE MELLOR.

## "REGINA v. ALLEN AND OTHERS.

"Upon the trial of Allen and Others for the murder of Sergeant Brett, two points of law arose, under the following circumstances:—

"On the morning of the 11th of September last, two men, who turned out afterwards to be Kelly and Deasy, were arrested by a Manchester policeman, as he alleged, under section 216 of the Manchester Police Act (7 & 8 Vict. c. 40), which enacts that it shall be lawful for any constable belonging to the police force of the borough to take into custody, without a warrant, all loose, idle, or disorderly persons whom he may find disturbing the public peace, or in his own view committing an offence against this Act, or whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor, or breach of the peace, or to instigate or abet any such breach.

"The two men, who gave the names of White and Williams, were taken before a magistrate on the 11th, and remanded until the 18th by a warrant, which stated the charges against them to be, not for suspicion of felony, on which charge they were arrested, but for 'felony,' and omitted to specify what felony or other offence they were charged with. They were brought up again on the 18th, when no evidence whatever was given

upon the charge on which they were alleged to have been arrested, but an inspector of detectives from London, who stated he had a warrant against Kelly for treasonable practices, alleged to have been committed in Ireland, and a constable from Ireland, who was stated to have a similar warrant against Deasy, appeared, and on their application, without the production of either of the warrants, which, in fact, were not then backed as the statute required, the prisoners were again remanded for a week.

"No warrant for such second remand was produced upon the trial, but it was stated that a warrant had been signed, a copy of that signed on the 11th inst., and had been destroyed by the police after the escape of the prisoners.

"Kelly and Deasy were then placed in the prison van, for the purpose of being taken to prison, and on the way the van was attacked, the prisoners rescued, and Brett killed.

"The two questions were: 1st, whether or not Kelly and Deasy were in legal custody; and 2nd, if they were not in legal custody, whether the crime of killing Brett, in the act of rescuing them, amounted to murder or manslaughter.

"As to the first point, it would seem (1st) that the magistrate had no jurisdiction to commit for felony, no charge of felony having been made; and (2nd) that the magistrate had no jurisdiction to entertain the charge of treasonable practices committed in Ireland, or to remand the prisoners upon such a charge. By the 11 & 12 Vict. c. 42, s. 22, justices are empowered to take the examination of witnesses against persons who are brought before them charged with an offence alleged to have been committed in any county or place within England and Wales wherein they have not jurisdiction. By sect. 2 of the same Act they are empowered to issue their warrant to apprehend any one within their jurisdiction charged with having committed any crime or offence on the high seas, or in any creek, harbour, &c., or any 'crimes or offences committed on lands beyond the seas for which an indictment may legally be preferred in any place within England or Wales.' By sect. 11, where an English warrant is backed in England, the offender, when apprehended, may be taken before the justice who issues the warrant, or, if so directed by the justice backing the warrant, before such last-mentioned justice, or any other justice of the same county or place; but by sect. 12, where an

Irish warrant is backed in England, the offender must be taken before the justice who granted the warrant, and there is no power to take him before the magistrate who has backed it. It would seem, therefore, that in this case the proper course would have been, in the case of Deasy at least, for the magistrate to have backed the Irish warrant, and for the prisoner to have been taken, under the authority of the warrant so backed, to Ireland, and that the magistrate had no jurisdiction to examine any witnesses against Deasy, or to remand him upon the charge of felony.

"Thirdly.—It is laid down in Coke's Second Institute, p. 591, when speaking of prison breaking, that a *mittimus* must 'contain the cause, but not so certainly as an indictment ought, and yet with such convenient certainty as it may appear judicially that the offence (prison breaking), *tale judicium requirit* as *pro alia proditione*, viz. *in personam domini regis*, &c., or *pro feloniam*, viz., *pro morte talis*, &c.,' and he lays it down that a *mittimus pro feloniam* generally is bad. So again, Hale (P. C. vol. ii. p. 122) says that a *mittimus* 'must contain the certainty of the cause, and therefore if it be for felony it ought not to be generally *pro feloniam*, but it must contain the especial nature of the felony briefly, as for felony for the death of J. S., or for burglary in breaking the house of J. S., &c., and the reason is because it may appear to the Judges of the King's Bench upon an *habeas corpus* whether it be a felony or not.' Hale, however, adds, that he does not think the absence of such particularity would make the warrant void. It is worthy of notice that in the forms of remand given by Chitty in his Criminal Law, vol. iv. pp. 33, 116, and in the form given in the 11 & 12 Vict. c. 42 (Q. 1), the felony is specifically described.

"The second point, which appears to be of the greater importance, looking at the actual direction to the jury, and to the fact that they were not asked to find the existence, contents, or form of the warrant, is whether, assuming the detention of one or both of the prisoners to have been illegal, the killing of Brett amounted to murder.

"The first case on the subject is that of Sir H. Ferrers (Cro. Car. 371), who was arrested for debt, and thereupon Nightingale, his servant, in seeking to rescue him, as was pretended, killed the bailiff, 'but because the warrant to arrest him was by the name of Henry Ferrers, Knight, and he never was a knight, it

was held by all the Court that it was a variance in an essential part of the name, and they had no authority by that warrant to arrest Sir Henry Ferrers, Baronet, so it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder.' This case is also reported by Sir W. Jones (p. 346), where it is said to have been held not to be murder either in the servant or in the prisoner, because the warrant was not good.

"The next case is that of *Hopkin Hugget*, which was tried in 1666, and is best reported in Kelyng (p. 59). In that case, Hugget and three others pursued three constables who had impressed a man, and demanded to see their warrant. The constables showed a paper which the prisoner said was no warrant, and thereupon they drew their swords, and Hugget killed one of the constables. Of the twelve judges eight delivered their opinion that this was no murder, but only manslaughter, and they said that if a man be unduly arrested or restrained of his liberty by three men, although he be quiet himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends, but strangers also, for common humanity's sake, as my Lord Bridgman said, to endeavour his rescue; and if in such endeavour of rescue they kill any one, that is no murder, but only manslaughter. The four other judges held it murder, and thought the case in question to be much the stronger, because the party himself who was impressed was quiet and made no resistance, and they who meddled were no friends of his or acquaintances, but mere strangers, and did not so much as desire them which had him in custody to let him go. Although all the Judges of the King's Bench thought it murder, they conformed to the opinion of the other eight, and gave judgment of imprisonment for eleven months.

"In *Reg. v. Mawgridge*, which was tried in 1707 (Kelyng, 136), the Chief Justice alludes to *Hugget's Case* as having settled the law upon the point.

"In *Tooley's Case* (2 Lord Raymond, 1296), which was tried in 1710, Ann Dakin was in custody of one Bray, when the prisoners, who were strangers to Dakin, assaulted Bray, but withdrew. They afterwards assaulted Bray again, after the woman had been locked up, and killed one Dent, whom Bray had called to his assistance. One of the prisoners gave the stroke, the two others were aiding and abetting. Seven of the

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twelve judges held this to be manslaughter, and five held it to be murder, one of the five thinking that the constable had authority. Those judges who held the offence to be manslaughter only so held on the opinion that the prisoners had sufficient provocation, for if, say they, one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, much more where it is done under a colour of justice, and where the liberty of the subject is invaded it is a provocation to all the subjects of England.

"In *Reg. v. Aday* (1 Leach, 206), which was tried in 1779, a somewhat similar point arose, and the presiding judge, on the authority of *Tooley's Case*, reserved the point for the consideration of the twelve judges. The prisoner escaped in the riots of 1780, and no judgment was given, but Leach says that it was understood the judges held it to be manslaughter only.

"Again, in *Reg. v. Osmer* (5 East, 304), argued in 1804, Lord Ellenborough, C.J., says, that 'if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.'

"In *Reg. v. Phelps* (Car. & M. 180), tried in 1841, a policeman attempted to apprehend a man on suspicion of having stolen growing potatoes. He resisted, and some persons came to his aid and killed one Southwood, whom the policeman had called to his assistance. Upon proof of these facts, Coltman, J., directed the jury that as the policeman had no right to apprehend the man the offence of those who killed Southwood was manslaughter only, and not murder.

"These appear to be the cases bearing most closely on the subject, but turning to the authority of text writers, and the *dicta* of judges, we find Hawkins, in his *Pleas of the Crown* (Book I. chap. xxxi. sec. 60), stating the law as it was laid down in *Hugget's* and *Tooley's Cases*, and adding that 'since in the event it appears that the persons slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.'

"Hale (P.C. vol. i. p. 465) also cites *Hugget's Case*, and apparently with approval.

"On the other hand, Foster, J., in his *Discourse upon Crown*

Law (p. 312), while he appears to approve of the law as laid down in *Hugget's Case*, combats the doctrine of the majority of the judges in *Tooley's Case*, and appears to doubt the propriety of that decision, partly upon general principles, and partly because the second assault on the constable seemed to him rather to have been grounded upon resentment or a principle of revenge for what had before passed, than upon any hope or endeavour to assist the woman.

"It is these observations of Foster, J., which Alderson, B., appears to have had in his mind when he is reported to have said in *Reg. v. Warner* (1 Moo. C. C. 385) that *Tooley's Case* had been overruled. *Tooley's Case* had, in fact, no bearing upon *Warner's Case*, in which no attempt was made to arrest the prisoners at all, and Alderson, B., does not refer to any authority for his statement. A similar remark was made by Pollock, C.B., in *Reg. v. Davis* (Leigh & Cave, C. C. 71), but there again no authority is given.

"East, in his *Pleas of the Crown*, vol. i. p. 325, states the question with the arguments on either side, without showing much leaning either way; and so does Russell (*Criminal Law*, vol. i. p. 632), although his editor, Mr. Greaves, from his note (p. 848 of the 4th edition), appears to have been convinced by the arguments adduced by Foster.

"It would thus seem that the doctrine laid down by the majority of the judges in the cases of *Ferrers*, *Hugget*, and *Tooley* has been acted upon, not only in those cases, but also in *R. v. Adey* and *Reg. v. Phelps*, and recognised in *R. v. Mawgridge* and *R. v. Osmer*, and by Hawkins and Hale.

"The opposite doctrine is supported by a minority of the Judges in *Hugget* and *Tooley's Cases*, and by Foster, J., and receives some sort of sanction from the observations of Alderson, B., and Pollock, C.B., if they can be considered to display a sufficiently accurate knowledge of the subject to entitle them to any weight. This view of the law, however, has never once been acted upon, and it follows that if the prisoners convicted at Manchester be executed without any discussion of the law, they will be put to death in opposition to the decided cases on the subject, upon the authority solely of extra-judicial arguments and *dicta*.

"In some of these arguments a distinction has been taken between the interference of a friend or a relative and that of a

mere stranger ; but this distinction does not appear to rest on any authority. Hawkins, in his *Pleas of the Crown* (Book I. ch. xxxi. ss. 56 and 57), says that 'if a man's servant, or friend, or even a stranger, coming suddenly and, seeing him fighting with another, side with him and kill the other—or, seeing his sword broken, send him another wherewith he kills the other—he is guilty of manslaughter only.' Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c., in the due execution of his duty, such friend, or servant, &c., are guilty of murder, whether they knew that the person slain were an officer or not.

"For these and other reasons, we are of opinion that the points raised in this case are of such a grave and serious character as to demand further discussion and consideration, and that they ought only to be decided after full and deliberate argument before the Court of Criminal Appeal.

"W. DIGBY SEYMOUR, Q.C.

"MICHAEL O'BRIEN, S.L.

"ERNEST JONES.

"JAMES COTTINGHAM.

"LEWIS W. CAVE."

#### REPLY OF MR. JUSTICE BLACKBURN.

"November 20, 1867.

"DEAR MR. SEYMOUR,

"Mr. Justice Mellor and I have received and carefully perused the paper signed by you, my brother O'Brien, and Mr. Cave.

"It contains nothing that is new to us, but it puts all the authorities in the light most favourable for your clients, and I need not say that it is a great satisfaction to us to think that nothing has been overlooked which could bear on so grave a question.

"The Legislature have by the 11th and 12th of Victoria, cap. 78, cast upon the presiding Judges the very disagreeable and invidious duty of determining whether their own view of the law at the trial is or is not so questionable as to justify an appeal. If they refuse to reserve any point made, it is still open to the prisoners to appeal to the equitable consideration of the Sovereign, but no appeal lies to any Court of law.

"In the present case my brother Mellor and I considered the

points raised before us on the trial, and entertained no doubt that the direction which we then gave was strictly according to law. We, therefore, reserved no question for the Court of Appeal at the time, but simply postponed our final determination on the subject until we had the means of referring to the authorities and considering the case more at leisure. We have now considered the authorities, and have consulted the other Judges, not with a view of dividing our responsibility, nor in order to obtain a judicial opinion from them which they could not give on a point not regularly before them, but because, in a case so serious, we were very anxious to have the best advice and assistance that we could obtain for our guidance. I do not say, that if the result of such consultation and research had been to lead to the conclusion that there was doubt enough to justify a further appeal, it would have relieved us from a most painful responsibility. I regret to say that the result has been to satisfy us that the law is too clear to justify us in reserving any point for the consideration of the Court of Criminal Appeal.

"Entertaining that opinion, we have officially informed the Secretary of State for the Home Department that there will be no further appeal to a Court of law, and that it is now for Her Majesty's Government alone to determine what shall be done with the convicts.

"This decision of ours is final; but, as a satisfaction to you and the other Counsel for the prisoners, I will briefly state the reasons which have induced us to think the law too clear for argument.

"When a constable, or other person properly authorised, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently, if he is killed in the execution of his duty, it is in general murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But where the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and consequently the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation.

"The cases which you have cited are authorities that where the affray is sudden, and not premeditated, when, as Lord Holt



says in *R. v. Tooley* (2 Lord Raymond, 1300), 'it is acting without any precedent malice or apparent design of doing hurt,' the mere fact that the arrest was not warranted may be a sufficient provocation.

"But in every one of these cases the affray was sudden and unpremeditated.

"In the present case the form of warrants adopted may be open to objection, and probably might, on application to the Court for a writ of *habeas*, have entitled the prisoners to be discharged from custody; but we entirely agree with the opinion of Lord Hale (2 Pleas of the Crown) that, though defective in form, the gaoler or officer is bound to obey a warrant in this general form, and consequently is protected by it. This is a point which, had the affray been sudden and unpremeditated, we probably should have thought it right to reserve.

"In the present case, however, it was clearly proved that there was on the part of the convicts a deliberate, prearranged conspiracy to attack the police with firearms, and shoot them, if necessary, for the purpose of rescuing the two prisoners in their custody, and that they were all well aware that the police were acting in obedience to the commands of a justice of the peace, who had full power to remand the prisoners to gaol if he made a proper warrant for the purpose. It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant, and that they knew well that if there was any defect in the warrant, or illegality in the custody, the courts of law were open to an application for their release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter.

"To cast any doubt upon this subject would, we think, be productive of the most serious mischief, by discouraging the police in the performance of their duties, and by encouraging the lawless in a disregard of the authority of the law.

"We feel bound, under these circumstances, to decline to take a course which might lead to the belief that we considered the matter as open to doubt.

"COLIN BLACKBURN."

## NOTE X.

(TO CHAPTER XXXIII.)

## LIBEL.

The statement of the law of libel contained in this chapter is, I believe, complete, though it is very short in comparison to the standard works on the subject.

Folkard's edition of Starkie on Slander and Libel consists of 870 large 8vo pages, besides an appendix of statutes. It contains much other matter besides a definition of the crime of libel ; but that definition, and the explanation of the offence itself, fill more than 190 pages

The greater part of this mass of matter consists of illustrations, but something is also due to the singularly complicated manner in which the law has grown up.

The word "malicious" in reference to the offence of libel has been elaborated by the judges into a whole body of doctrine on the subject in the same sort of way as the words "malice aforethought" in the definition of murder.

The process was of this sort. Malice was first divided into malice in fact and malice in law—malice in fact being personal spite, and malice in law being defined to be "a wrongful act done intentionally, and without just cause or excuse."

Inasmuch as the publication of a libel must always be intentional, and inasmuch as the Courts held that to publish defamatory matter of another was, generally speaking, a wrongful act, the result of this was that every publication of defamatory matter was a crime, unless there was some just cause or excuse for it. What amounts to a "just cause or excuse" was decided by a multitude of cases. The phraseology employed in their decision has been as follows. Defamatory matter which it was considered lawful to publish has been described as a "privileged communication." This "privilege" has been regarded as rebutting the presumption of malice arising from the fact of publication ; and it has further been divided into absolute privilege and qualified privilege—absolute if it justifies the publication, whatever may be the state of mind of the publisher ; qualified if it justifies such publication only under particular circumstances, as, for instance, when the publisher in good faith believes the

defamatory matter to be true, when the defamatory matter actually is true, and its publication is for the public good, &c.

The law thus falls into the singular condition of a see-saw between two legal fictions, Implied Malice on the one hand, and privilege absolute or qualified on the other.

I will give a single instance of the intricacy to which this leads. A. writes of B. to C., "B. is a thief." Here the law implies malice from the words used. It appears that B. was a servant, who had been employed by A., and was trying to get into C.'s employment, and that A.'s letter was in answer to an inquiry from C. Here the occasion of publication raises a qualified privilege in A.—viz., the privilege of saying to C. that B. is a thief qualified by the condition that A. really thinks that he is one, and the qualified privilege rebuts the implied malice presumed from the fact of publishing the defamatory matter. B., however, proves not only that he was not a thief, but that A. must have known it when he said that he was. This raises a presumption of express malice, or malice in fact in A., and proof of the existence of express malice overturns the presumption against implied malice raised by the proof of the qualified privilege.

This machinery of express and implied malice and qualified and absolute privilege is only a roundabout and intricate way of saying that as a general rule it is a crime to publish defamatory matter; that there are, however, certain exceptions to that rule by virtue of which it is not a crime to defame a man—

(a) If the defamatory matter is true, and its publication is for the public good.

(b) Although the defamatory matter is false,

(i.) if the libeller in good faith believes it to be true, and publishes it for certain specified reasons.

(ii.) Although he knows it to be false, if he publishes it in a particular character.

By working out this scheme, and stating in general terms that the publication of a libel is always malicious unless it falls within one or more of the specified exceptions, the intricate fictions about malice in law and in fact, and absolute and qualified privilege, may be dispensed with. They are merely the scaffolding behind which the house was built, and now that the house is convenient and proximately complete, the scaffold may be taken down.

## NOTE XI.

(TO ARTICLE 306, ON POSSESSION IN RELATION TO THE LAW OF LARCENY.)

I do not think it would be possible to assign to the expressions "possession," "actual possession," "constructive possession," "legal possession," senses which would explain and reconcile all the passages in which these phrases occur in works of authority. Some of them indeed are absolutely contradictory. Thus is it said that the taking in larceny must be a taking out of the possession of the owner. It is also said that the owner retains the legal possession notwithstanding the larceny. If both of these propositions were true, it would follow that larceny could never be committed at all. Again, we are told on the other hand that the taking in larceny must be a taking out of the possession of the owner, the inference from which would naturally be that when a thing is out of the owner's possession it cannot be stolen. We are then told, in order to avoid this conclusion, that a thing is always in its owner's possession; so that a box of plate at the bottom of the Thames, things of the existence of which the owner is not aware, as money vested in him as executor, and which without his knowledge is in the actual custody of another person,<sup>1</sup> or a dead rabbit in his wood, are all in the owner's possession and capable of being taken out of it. This way of stating the matter makes the assertion that the taking in larceny must be a taking out of the owner's possession insignificant. If, from the nature of the case, every taking must be a taking out of the possession of the owner, it is impossible to see how the takings which do, differ from those which do not, constitute larceny. All men being mortal, it is useless to define an Englishman as a mortal man living in England. However, though it is impossible either to justify the manner in which the word "possession" is used, or to free it entirely from the fictions with which it has been connected, it is, I think, not impossible to define it in such a manner as to express all the

<sup>1</sup> A. put 900 guineas in a secret drawer in a bureau and died. B., her son and executor, lent the bureau to his brother C., who took it to India, kept it there for several years, and brought it back. B. then sold it to D., who gave it to E. to repair, who found the money. This was held to be such a taking by E. out of the possession of A. as to constitute larceny. *Cartwright v. Green*, 1803, 8 Ves. 405.

distinctions which it is intended to mark in language differing very slightly, if at all, from that which has generally been used upon the subject.

As I have shown in the articles on theft, and in the notes upon them, there are five different ways in which theft can be committed, viz. :—

1. By taking and carrying away goods which do not belong to the thief from any place where they happen to be.

2. By converting property intrusted by the owner to a servant.

3. By obtaining the possession of property (as distinguished from the right of property) from the owner by fraud with intent to convert it.

4. By converting property given by the owner to the thief under a mistake.

5. By converting property bailed to the thief.

It will be found upon consideration that the distinctions between these cases all arise out of the doctrine of possession, but it is, I think, less generally perceived that the important point is not the taking out of the possession of the owner, but the taking into the possession of the thief. The five cases in question may be thus arranged :—

In No. 1 (common larceny) the thief has neither the possession nor the custody of the stolen property at the time when the theft is committed, and it is immaterial whether the owner has it or not.

In No. 2 (larceny by a servant) the thief at the time of his offence may have either the custody or the possession. If he has the custody his offence is theft. If he has the possession his offence is embezzlement.

In No. 3 (larceny by trick) the thief obtains the possession by a mistake, caused by his own fraud.

In No. 4 (larceny by taking advantage of a mistake) the thief receives the possession by a mistake not caused by his own fraud.

In No. 5 (larceny by a bailiff) the thief receives the possession under a contract of bailment.

Besides this view of the subject, the doctrine of possession is important in relation to procedure, and in that case the matter to be considered is not the possession of the thief but the possession of the owner. It is necessary in indictments for theft that the

ownership of the stolen property should be correctly stated, and as possession constitutes special ownership (at all events, as against a thief) it is important, with a view to this subject, to understand what possession implies.

Passing from the law upon this subject, let us examine the facts to which the law applies—the different relations which, as a fact, exist between men and things—in reference to the common use of language.

The most obvious case of possession is that of a person who holds something in his hand. But it must appear upon the slightest consideration that neither this nor any other physical act whatever can be accepted as more than an outward symbol of the state of things which the word denotes. Unless the article possessed is very small, part of it only can be held in the hand, trodden on by the foot, or so dealt with by any other part of the possessor's body as to exclude a similar dealing with it by others. It would however, I think, be felt by every one that neither actual bodily contact with an object, nor even exclusive bodily contact with it, was essential to what, in the common use of language, is meant by possession. No one would think of using different words to express the relation of a man to a coin clenched in his fist, to a pocketbook in his pocket, to a portmanteau of which he carried one end and a railway porter the other, to a carriage in which he was seated whilst his servant was driving it, to a book on the shelves of his library, and to the plate in his pantry under the charge of his butler. He would, in the common use of language, be said to be in possession of all these things, and no one would feel any difficulty in perceiving the correctness of the expression even if it were added that he was not the owner of any one of them, that some had been lent, and others let to hire to him. On the other hand, any one but a lawyer would be surprised at the assertion that a man, whether the owner or not, was in possession of a watch which he had dropped into the Thames, of sheep which had been stolen from his field and driven to a distance by the thief, of a dead grouse which, having been wounded at a distance from his moor, had managed to reach it and die there without his knowledge or that of any other person.

The common feature of all the cases to which the word "possession" would obviously be applicable is easily recognised.

It is to be found in the fact that the person called the possessor has in each instance the power to act as if he were the owner of the thing possessed, whether he actually is the owner or not. Several of the illustrations given, however, show that though this is one of the things which the word conveys, it is not the only thing conveyed by it. The butler in charge of the plate, the porter helping to carry the portmanteau, the coachman who is driving the coach, have the physical power of acting as the owner of those things as much as their master or employer. Indeed, in two of the three cases their physical control over the object is more direct than his. The difference is that the circumstances are such as to raise a presumption that their intention is to act under the orders of their superior, and that he (at least for the present) has no definite superior whose orders he intends to obey. Take, for instance, the case of a dinner party: there is no visible difference between the master of the house and his guests; each uses the article which he requires for the moment, and they are, from time to time, removed from place to place by the servants; as, however, the master retains throughout not merely the legal right to dispose of them absolutely, but the immediate means of enforcing that right if from any strange circumstance it should become necessary to do so, the assertion that the plate is in his possession, and that his guests and servants have merely a permission to use it under his control, has a plain meaning: nor would that meaning be altered or obscured if the fact were added that the plate did not belong to the master of the house, but was hired by him for the occasion. Indeed, if he had stolen the plate, or received it knowing it to be stolen, the fact denoted by the word "possession" would remain. These illustrations, which might be multiplied to any extent, appear to me to show clearly that possession means, in the common use of language, a power to act as the owner of a thing, coupled with a presumable intention to do so in case of need; and that the custody of a servant, or person, in a similar position, does not exclude the possession by another, but differs from it in the presumable intention of the custodian to act under the orders of the possessor with reference to the thing possessed, and to give it up to him if he requires it. Thus far, I think, my definitions correspond with the common use of language, though of course popular language upon such a

subject is not, nor is there any reason why it should be, minutely exact.<sup>1</sup>

I will now compare it with the way in which the word is used by legal authorities. I know of no set dissertations on the subject of the use of the word "possession" in English law like those which are to be found in abundance upon the corresponding word in Roman law. It would be an endless and a useless labour to go through the cases in which the word has been used—endless on account of their great number, useless because it is the characteristic of English judges to care little for technical niceties of language in comparison with substantial clearness of statement in reference to the actual matter in hand. Upon such a matter as this, accordingly, it is better to consider the different authorities in groups than individually.

Possession (in reference to the subject of theft) is usually divided into two branches—actual possession and constructive possession.

It seems to have been pretty generally assumed that the words "actual possession" were sufficiently plain for practical purposes without further explanation; but it would be easy to show, by a multitude of cases, that actual possession differs from possession as I have defined it only in one point. It is usual to say that a thing in the possession of a servant on account of his master is only constructively in the possession of the master. But the expression "constructive possession" has another meaning besides this. As it was considered necessary that a thing stolen should be taken out of the possession of the owner, and as in very many instances goods are stolen which are not in any natural sense in the possession of any one whatever, it has become a maxim that goods are always in the possession of the owner; if not in his actual, then in his constructive possession, or, as it is sometimes called, in his legal possession.

Thus, constructive possession means:—

1. The possession of goods in the custody of a servant on account of his master, and
2. The purely fictitious possession which the owner of goods

<sup>1</sup> This view was suggested by a study of Savigny's *Recht des Besitzes*, which, however, deals with many topics to which nothing in English law corresponds. Mr. George Long's article on "Possessio" in the *Dictionary of Greek and Roman Antiquities* contains the substance of Savigny in a very convenient form. Mr. Hunter's *Roman Law*, pp. 195-222, may also be consulted.



is supposed to have, although they are in reality possessed by no one at all.

The phrase thus appears to me to be objectionable, not only because it is ambiguous, but because, in the first of its two senses, it conceals a truth, whilst in the second it needlessly conveys a false impression. The truth concealed is that a man may have, and may intend to use, the power implied in the word "possession," although he acts through a servant. The false impression conveyed is that things cannot be out of possession, or that if they are they cannot be stolen.

I avoid this by abstaining altogether from the use of the expression "constructive possession." In "possession" I include that which has to be exercised through a servant, and my language implies that a person may commit theft on objects which are not in the possession of any one at the time of the theft. The existing law may by these means be expressed in well-recognised and established phraseology, without any resort to legal fictions.

The point upon which the most subtle questions as to possession arise is the distinction between theft and embezzlement—a perfectly useless distinction, no doubt, and one which the legislature has on two separate occasions vainly tried to abolish. So long, however, as it is allowed to exist, it is necessary to understand it.

I have already explained how a man may retain the possession of a thing of which he gives his servant the custody. He retains a power over the thing which is not the less real or effective because he has to exercise it through the will of another person, who has undertaken to be the instrument of his will. Suppose, however, that instead of the master's having given his horse to his groom or his plate to his butler, a horsedealer has delivered the horse to the groom, or a silversmith has delivered plate to the butler for his master: I should have thought that there was no real difference between these cases; that inasmuch as the servant in each case was acting for the master in the discharge of a duty towards him, and under an agreement to execute his orders, the master would come into possession of the horse or the plate as soon as his servant received it from the dealer or the silversmith, just as he remains in possession of the horse or the plate when he gives the custody of it to his groom or his butler. I should also have thought that the servant who

appropriated his master's property to his own use, after receiving it from another on his master's account, was for all purposes in precisely the same position as the servant who did the same thing after receiving it from his master. The Courts, however, decided otherwise. They have held on many occasions that, though the master's possession continues when he gives the custody of a thing to his servant, it does not begin when the servant receives anything on account of his master; on the contrary, the servant has the possession, as distinguished from the custody, until he does some act which vests the possession in his master, though it may leave the custody in himself. If during that interval he appropriates the thing, he commits embezzlement. If afterwards, theft. The most pointed illustration of this singular doctrine which can be given occurs in the case of *R. v. Reed* 1854; D. and P. 256. B. sent A., his servant, with a cart to fetch coals. A. put the coals into the cart, and on the way home sold some of them and kept the money. A. was convicted of larceny, and the question was whether he ought to have been convicted of embezzlement. It was held that the conviction was right, because, though A. had the custody of the cart all along, yet the possession of it and its contents was in B., and though A. had the possession of the coals whilst he was carrying them to the cart, that possession was reduced to a mere custody when they were deposited in the cart, so that A.'s offence was larceny, and not embezzlement, which it would have been if he had misappropriated the coals before they were put into the cart.

These explanations will, I hope, render the article in the Digest intelligible. In order to justify it legally, it is necessary to state the manner in which I arrived at it. I examined a large number of cases, of which I have put eleven in the form of illustrations to the article. In some of these cases it was decided that the offence was theft; in others, that the offence was embezzlement. I have assumed (as I was entitled to do, as appears from the explanations given above) that whenever an offence was held to be theft the property stolen was in the possession of the owner or master, although it might be in the custody of a guest or servant; and that whenever the offence was held to be embezzlement the property embezzled was in the possession, as distinguished from the custody, of the servant. I might easily have enlarged the number of illustrations to any

conceivable extent ; but if those given are not enough to make the matter plain, I despair of making it plain or understanding it, and I do not wish to make it darker than it is. It is, perhaps, just worth while to add once more that I am in this work merely stating, and not attempting to justify, the law. The technicalities on this subject appear to me to be altogether superfluous, and I think they might be easily dispensed with by re-defining the offence of theft, or even by removing the distinction between theft, embezzlement, and false pretences.

# ALPHABETICAL TABLE OF INDICTABLE OFFENCES

## TABLE OF INDICTABLE OFFENCES

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<i>Abduction</i> — with intent to marry of any woman under 21 of girls under 16 of girls under 18	F. 24 & 25 V. c. 100, s. 53. F. _____ s. 54. M. _____ s. 53. M. 48 & 49 V. c. 69, s. 7.	P. S. 14 yrs. " " Impr. h. l. 2 yrs. " "	No. No. No. No.	215 215 216 218
<i>Abortion</i> — committing or procuring supplying poison or instruments for	F. 24 & 25 V. c. 100, s. 58. M. _____ s. 59.	P. S. life P. S. 5 yrs.	No. Yes	197 199
<i>Accounts</i> , see "Falsification of Accounts."				
<i>Accusing of Crime</i> — by letter or otherwise, with intent to extort... with intent to compel execution of a valuable security.	F. 24 & 25 V. c. 96, ss. 40, 47 F. _____ s. 48	P. S. life " "	No. No.	280 280
<i>Adulteration</i> — of food or drugs injuriously, or selling such food; on a second conviction. forging a certificate purporting to contain a warranty.	M. 38 & 39 V. c. 63, ss. 3, 4... M. _____ s. 27	Impr. h. l. 6 mo. Impr. h. l. 2 yrs.	Yes Yes	147 —
<i>Affray</i> —	M. Common Law.	Fine or impr. or recognoes.	Yes	54
<i>Agents</i> — conversion by, of money or valuable security after instruction in writing. misappropriation by, of property intrusted to him for safe custody. pledge by, of goods, document of title to goods, &c., intrusted to him.	M. 24 & 25 V. c. 96, s. 75 M. _____ s. 76 M. _____ s. 78	P. S. 7 yrs. " " " "	No. No. No.	310, 311 311 312

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<i>Arms</i> — unlawfully training or being trained to the use of.	M. 60 G. 3 & 1, G. 4 c. 1, s. 1	P. S. 7 yrs. or impr. h. 12 yrs. for being trained	No.....	63
<i>Arson</i> — church, &c., or place of worship..... dwelling house, any person being therein..... house, farm, building, &c., with intent to injure or defraud. station or building belonging to a railway or canal, &c. any public building ..... any other building ..... anything in, against, or under, a building to set fire to which would be felony. mine to set fire to a building, ship, or mine to set fire to which would be felony... arson of a crop of corn, &c., or cultivated vegetable produce, or any wood, &c., or furze. of a stack the same ..... attempting to set fire to a crop or stack as above to set fire to which would be felony. setting fire to any mine of coal, &c., or other mineral fuel. attempting to set fire to a mine to set fire to which would be felony.	F. 24 & 25 V. c. 97, s. 1 F. _____ s. 2 F. _____ s. 3 F. _____ s. 4 F. _____ s. 5 F. _____ s. 6 F. _____ s. 7 F. _____ s. 8 F. _____ s. 10 F. _____ s. 17 F. _____ s. 18 F. _____ s. 26 F. _____ s. 27	P. S. life ..... " ..... " ..... " ..... " ..... " ..... " ..... " ..... " ..... " ..... P. S. life ..... P. S. 7 yrs. .... P. S. life ..... P. S. 14 yrs.....	No..... No..... No..... No..... No..... Yes ..... Yes ..... Yes ..... Yes ..... Yes ..... No..... Yes ..... No..... Yes .....	364 364 365 365 365 367 367 368 368 368 365 370 365 368
<i>Assault</i> — hindering any person endeavouring to save his life from a ship in distress. wounding with intent to do grievous bodily harm malicious wounding ..... attempting to choke with intent to commit an indictable offence.	F. 24 & 25 V. c. 100, s. 17 F. _____ s. 18 M. _____ s. 20 F. _____ s. 21	P. S. life ..... " ..... P. S. 5 yrs. .... P. S. life .....	No..... No..... Yes ..... No.....	197 195 199 196

<i>Assaults—continued</i> on any person exercising his duty in the preservation of a ship in distress. with intent to commit a felony .....	M. 24 & 25 Vict. c. 100, s. 37	P. S. 7 yrs. ....	Yes .....	204
.....	M. ————— s. 38	2 yrs. h. l. (s. 31) fine and surety (s. 71).	Yes .....	205
on a peace officer in the execution of his duty. occasioning actual bodily harm .....	M. ————— s. 38	Id. ....	Yes .....	205
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on a deer-keeper .....	M. ————— s. 62	P. S. 10 yrs. ....	Yes .....	204
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.....	M. 1 & 2 W. 4, c. 41, s. 11 and 2 & 3 V. c. 93, s. 8...	Impr. h. l. 2 yrs.; fine & sureties.	Yes .....	205
on a special or county constable.....	M. 14 & 15 V. c. 19, s. 2 ...	Impr. h. l. 3 yrs.	Yes .....	204
any person committing an indictable offence by night assaulting any person authorised to arrest him.	F. 24 & 25 V. c. 100, ss. 11-15 M. Com. Law .....	P. S. life .....	No.....	192
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<i>Ballot Act—</i> offences against .....	M. 32 & 33 V. c. 62, s. 11...	Impr. h. l. 2 yrs..	Yes .....	379-383
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<i>Blasphemy</i> —.....	M. Com. Law .....	Fine or impr. or both and re-cogces.	No. ....	126
<i>Bribery</i> —see “Elections.” attempting to bribe a judicial officer, or judicial officer accepting bribes .....	M. Com. Law .....	Id....	No. ....	97
<i>Bridges</i> , pulling down—see “Malicious Injuries.”				
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<i>Canal</i> , destroying works of—see “Malicious Injuries.”				
<i>Carnal knowledge</i> —see “Women and Girls.”				
<i>Cattle</i> — stealing or killing with intent to steal .....	F. 24 & 25 V. c. 96, ss. 10, 11	P. S. 14 yrs. ....	Yes.....	289
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<i>Clergymen</i> — obstructing or arresting a clergyman or minister engaged in his duty.	M. 24 & 25 V. c. 100, s. 36...	Impr. h. 1. 2 yrs. or fine; or both and recognoes.	Yes .....	205
<i>Coining</i> — counterfeiting, or washing, colouring, &c., in imitation of gold or silver coin.	F. 24 & 25 V. c. 99, ss. 2, 3	P. S. life .....	No.....	355
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uttering counterfeit gold or silver coin .....	M. ——— s. 9.	Impr. h. 1. 1 yr.; on 2nd conv. police supervi- sion (34 & 35 V. c. 112, ss. 8, 20)	Yes .....	358
the same having other counterfeit coin, or within ten days tendering like counterfeit coin.	M. ——— s. 10.	Impr. h. 1. 2 yrs.; on 2nd conv. as above.	Yes .....	358
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uttering counterfeit copper coin or possessing three pieces with intent to utter.	M. ——— s. 15...	Impr. h. 1. 1 yr.	Yes .....	357
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tendering such coin .....	M. ——— ss. 20, 21...	Impr. h. 1. 6 mo.; 2nd off. 2 yrs. h. l.; 3rd off. F. P. S. life.	Yes .....	358, 359



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<i>Compounding—</i> .....	M. Com. Law; 18 Eliz. c. 5, s. 4...	Fine or impr. or both and rgees..	No.....	122
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<i>Constable—</i> refusing to assist when called upon .....	M. Com. Law .....	Fine or impr. or both and rgees.	Yes .....	95
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seditious conspiracy .....	M. ——— .....	Id. ....	No.....	70
to pervert the course of, or defeat justice.....	M. ——— .....	Id. ....	No.....	113
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<i>Conspiracy—continued</i> to break a contract of service for supply of gas or water. the same as to a contract of service ..... intimidation .....	M. 38 & 39 V. c. 86, s. 4 ... M. ————— s. 5 ... M. ————— s. 7 ...	Pen. £20, or impr. h. l. 3 mo. .... Id. .... Id. ....	Yes ..... Yes ..... Yes .....	392 391, 392 392, 393
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<i>Explosives</i> — causing grievous bodily harm by explosion ... causing explosion, or sending or throwing corrosive fluid or explosive with intent to do grievous bodily harm. placing explosive near a building with intent to do any bodily injury.	F. 24 & 25 V. c. 100, s. 28. F. ——— s. 29. F. ——— s. 30.	P. S. life .....	No .....	196
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director fraudulently publishing a false statement or account.	M. _____ s. 84...	" .....	No .....	315
<i>Game (Night Poaching)—</i>				
taking game or rabbits by night, or entering land to take or destroy game, after two convictions.	M. 9 G. 4, c. 69, s. 1 ...	" .....	Yes .....	376
offender committing the above offence assaulting a person authorised to arrest him.	M. _____ s. 2 ...	" .....	Yes .....	376
three or more persons entering land to take game or rabbits, armed.	M. _____ s. 9 ...	P. S. 14 yrs., or impr. h. l. 3 yrs.	No .....	60
killing a hare or rabbit in a warren by night.	M. 24 & 25 V. c. 96, s. 17...	Fine & impr. or both & attestation	Yes .....	378

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<i>Gaming</i> — cheating at play .....	M. 8 & 9 V. c. 109, s. 17...	P. S. 5 yrs. ....	Yes .....	303
<i>Girls</i> , see "Women and Girls."				
<i>Gunpowder</i> , see "Explosives."				
<i>Hopbinds</i> , see "Malicious Injuries."				
<i>Housebreaking</i> , see "Burglary" and "Larceny"— entering a house at night to commit a felony ... breaking and entering a building within the curtilage of a, or a dwelling house, and com- mitting a felony, or committing a felony and breaking out.	F. 24 & 25 V. c. 96, s. 54... F. ——— ss. 55, 56...	P. S. 7 yrs. .... P. S. 14 yrs. ....	Yes .....	284 284
breaking and entering a dwelling house with intent to commit a felony.	F. ——— s. 57...	P. S. 7 yrs. ....	Yes .....	284
being found by night armed, with intent to break into a building and commit a felony, or having an implement of housebreaking without excuse, or with face blackened, or in a building with intent to commit any felony thereon.	M. ——— s. 58...	P. S. 5 yrs.; or (s. 59) after pre- vious conviction of F. or like misd. 10 yrs.	Yes .....	285
<i>Incitement</i> to commit a crime.....	M. Com. Law .....	Impr. 2 yrs. or fine or both.	Yes .....	39
<i>Indecency</i> — in public.....	M. ——— .....	Impr. h. 1. or fine or both.	Yes .....	132
publishing an obscene book, &c.....	M. ——— .....	Fine or impr. h. 1. or both.	Yes .....	133
committing gross act of between males.....	M. 48 & 49 V. c. 69, s. 11...	Impr. h. 1. 2 yrs.	Yes .....	131
<i>Indecent Assaults</i> , see "Assaults."				
<i>Inland Revenue</i> — officer of dealing in goods subject to duty.....	M. 53 & 54 V. c. 21, s. 7....	Impr. h. 1. 2 yrs. or fine or both; incapacity.	Yes .....	93
collector omitting to keep accounts.....	M. ——— s. 14...	Id. ....	Yes .....	94

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<i>Jesuits entering England, &amp;c.</i> .....	M. 10 (G. 4, c. 7, ss. 28, 20, 31, 32, 34-37.	Impr. 2 yrs. or fine or both and banishment.	Yes .....	68-70
<i>Larceny, see "Robbery"—generally</i> .....	F. 24 & 25 V. c. 96, s. 4....	P. S. 5 yrs. or impr., W.; after conv. for Felony 10 yrs. p. s. (s. 7); after conv. of M. under this Act, or 2 summary convictions, 7 yrs. p. s. (ss. 8, 9).	Yes .....	286
as a bullee .....	F. _____ s. 3....	Id. ....	Yes .....	262
of deer, or hunting them, &c., in uninclosed ground after p. c. of offence relating to deer entailing a fine.	F. _____ s. 12....	Impr. h. l. 2 yrs. W.	Yes .....	377
of deer, or hunting them, &c., in inclosed ground.	F. _____ s. 13....	Impr. h. l. 2 yrs.	Yes .....	377
of dog after p. c. summarily .....	M. _____ s. 18....	Impr. h. l. 18 mo.	Yes .....	295
possessing stolen dog after p. c. summarily ...	M. _____ s. 19....	Id. ....	Yes .....	295
taking a reward for the discovery of the foregoing.	M. _____ s. 20....	Id. ....	Yes .....	—
of oysters from a bed, or unlawfully using dredge.	F. _____ s. 26....	P. S. 5 yrs. W...	Yes .....	293
of valuable security other than a document of title to lands.	F. _____ s. 27....	" .....	Yes .....	287
of document of title to lands .....	F. _____ s. 28....	" .....	No .....	292
of a will, or destroying it, &c. ....	F. _____ s. 29....	P. S. life.....	No .....	288
of record of a court or public office .....	F. _____ s. 30....	P. S. 5 yrs. ....	No .....	292
of glass, wood, or metal from a building, &c. ...	M. _____ s. 31....	" .....	Yes .....	292
of a tree growing in a garden, &c., if its value exceeds £1, or damaging it with intent to steal.	F. _____ s. 32....	" .....	Yes .....	293

the like if tree grows elsewhere and its value exceeds £5.	F. 24 & 25 V. c. 90, s. 32...	F. .... s. 33...	Yes .....	293
the like after two convictions at s. j. wherever the tree is growing and if value exceeds 1s.	F. ....	..... s. 36...	Yes .....	293
the same as the two last offences as to plants, &c., in a garden.	F. ....	..... s. 38...	Yes .....	294
of ore, coal, &c., from a mine.....	F. ....	..... s. 39...	Yes .....	308
being employed in a mine taking the ore, &c., with intent to defraud.	F. ....	..... s. 23...	Yes .....	294
of electricity .....	F. 45 & 46 V. c. 56, s. 40...	..... s. 40...	Yes .....	289
from the person.....	F. 24 & 25 V. c. 96, s. 45...	..... s. 45...	Yes .....	281
by menaces and threats.....	F. .... ss. 60, 61	..... s. 62...	Yes .....	290
in a dwelling-house to the value of £5 or causing bodily fear.	F. .... s. 62...	..... s. 63...	Yes .....	290
of certain materials in course of manufacture.	F. .... s. 63...	..... s. 64...	Yes .....	290
of goods in a vessel, on a wharf, &c. ....	F. .... s. 64...	..... s. 67...	Yes .....	290
of part of or the goods in a vessel in distress.	F. .... s. 67...	..... s. 74...	Yes .....	291
by a clerk or servant.....	F. .... s. 74...	..... s. 74...	Yes .....	291
by a tenant or lodger.....	F. .... s. 74...	..... s. 74...	Yes .....	291
the like if value exceeds £5.....	F. .... s. 74...	..... s. 116, s. 1...	Yes .....	272
by members of a partnership .....	F. 31 & 32 V. c. 116, s. 1...	..... s. 16...	Yes .....	193
<i>Letter, threatening—</i>				
to kill.....	F. 24 & 25 V. c. 100, s. 50...	..... s. 50...	Yes .....	369
to burn .....	F. .... c. 97, s. 50...	..... s. 44...	No .....	280
demanding money with menaces.....	F. .... c. 96, s. 44...	..... s. 46...	No .....	280
to accuse of crime.....	F. .... s. 46...	..... s. 4...	Yes .....	135
sending indecent .....	M. 47 & 48 V. c. 76, s. 4...	.....	No .....	70, 227
<i>Libel—</i>				
seditious or personal.....	M. Com. Law .....	.....	No .....	239
publishing or threatening to publish with a view to extort money.	M. 6 & 7 V. c. 96, s. 3 .....	.....	No .....	240
publishing, knowing it to be false .....	M. .... s. 4 .....	.....	No .....	240
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<i>Lunacy</i> — illegally presenting a second petition.....	M. 53 V. c. 5, s. 7 (4) .....	Fine or impr. or both and rges.	Yes .....	226
using mechanical means of restraint unlawfully not forwarding a Commissioner's minute .....	M. _____ s. 40 .....	" .....	Yes .....	226
giving incorrect information to obtain renewal of a licence.	M. _____ s. 197 (3) .....	" .....	Yes .....	226
detention of lunatics after expiration of licence superintendent receiving patients illegally ...	M. _____ s. 222 .....	" .....	Yes .....	226
the same housing patients improperly .....	M. _____ s. 231 (1).....	" .....	Yes .....	226
detention in a hospital after it is closed .....	M. _____ s. 233 .....	" .....	Yes .....	226
detention in an unlicensed house .....	M. _____ s. 237 (1).....	" .....	Yes .....	226
not sending documents to the Commissioners, or not making entries.	M. _____ s. 315 .....	" .....	Yes .....	224
making misstatements in a petition, &c. ....	M. _____ s. 316 .....	" .....	Yes .....	224
making a false entry under the Act .....	M. _____ s. 317 .....	Fine or impr. or both and rges.	Yes .....	224
not sending coroner notice of death .....	M. _____ s. 318 .....	Id. ....	Yes .....	225
obstructing a Commissioner .....	M. _____ s. 319 .....	Id. ....	Yes .....	225
ill-treating a lunatic.....	M. _____ s. 321 .....	Id. ....	Yes .....	225
person in charge of a lunatic having carnal knowledge of her.	M. _____ s. 322 .....	Fine or impr. or both.	Yes .....	225
	M. _____ s. 324 .....	Impr. h. 1. 2 yrs.	Yes .....	225
<i>Maintenance</i> .....	M. Com. Law .....	Fine or impr. or both and rges.	Yes .....	112
<i>Malicious Injuries</i> — to buildings, &c., by tenants .....	M. 24 & 25 V. c. 97, s. 13...	Id. ....	Yes .....	375
to certain manufactures, machinery, &c. ....	F. _____ s. 14...	P. S. life W. ...	No .....	365
to agricultural or other machinery.....	F. _____ s. 15...	P. S. 7 yrs. W. ...	Yes .....	370
to hoplands .....	F. _____ s. 19...	P. S. 14 yrs. W. ...	Yes .....	360
to trees in a garden, &c., to value exceeding £1 .....	F. _____ s. 20...	P. S. 5 yrs. W. ...	Yes .....	372
to trees elsewhere than in a garden, &c., to value exceeding £5.	F. _____ s. 21...	" .....	Yes .....	372

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<i>Mines</i> —see “Arson,” “Larceny,” and “Malicious Injuries.” forging or uttering certificates .....	M. 50 & 51 V. c. 58, s. 33 (1)	Imp. h. 1. 2 yrs...	Yes .....	329
<i>Municipal Corporations</i> — misappropriating securities .....	M. 45 & 46 V. c. 50, s. 117.	P. S. 7 yrs.....	Yes .....	312
authorizing misapplication of securities .....	M. .... s. 124.	As the court directs.	Yes .....	312
forging seals or signatures to bye-laws, &c., of <i>Murder</i> —.....	M. .... s. 235.	Imp. h. 1. 2 yrs...	No .....	—
accessory to after the fact .....	F. Com. Law .....	Death .....	No .....	191
conspiracy to .....	F. 24 & 25 V. c. 100, s. 67..	P. S. life .....	No .....	193
signing false certificate of death of person hanged for .....	M. 24 & 25 V. c. 100, s. 4..	P. S. 10 yrs.....	No .....	193
.....	M. 31 V. c. 24, s. 9.....	Impr. h. 1. 2 yrs.	Yes .....	—
<i>Nuisance</i> — committing common .....	M. Com. Law .....	Fine or impr. or both and re- cooges.	Yes .....	141
<i>Oaths, unlawful</i> — administering, to commit treason, murder, or felony .....	F. 52 G. 3, c. 104, s. 1 .....	P. S. life .....	No .....	64
taking without compulsion .....	F. .... s. 1 .....	No .....	No .....	65
administering or taking without compulsion, to disturb public peace or engage in sedi- tious purposes .....	F. 37 G. 3, c. 123, s. 1 .....	P. S. 7 yrs. ....	No .....	64
<i>Officer</i> — extortion by .....	M. Com. Law .....	Fine or impr. or both and reges.	Yes .....	88
<i>Officers, Public</i> — neglect of duty by .....	M. ....	Id. ....	Yes .....	90
refusing to serve as .....	M. ....	Id. ....	Yes .....	94

<i>Official Secrets—</i> disclosing information .....	M. 52 & 53 V. c. 52, s. 1 (1) (a)	Impr. h. l. 1 yr. or fine, or both.	No .....	48
communicating a document or knowledge un- lawfully obtained.	M. ——— s. 1 (1) (b)	Id. ....	No .....	48
communicating a document or information in- trusted to him.	M. ——— s. 1 (1) (c)	Id. ....	No .....	49
possessor of documents or information disclos- ing them.	M. ——— s. 1 (2) ...	Id. ....	No .....	49
disclosing information to a foreign state .....	F. ——— s. 1 (3) ...	P. S. life .....	No .....	49
breach of official trust .....	F. ——— s. 2 (2) (a)	Id. ....	No .....	49
inciting to commit an offence .....	M. ——— s. 3 .....	As if he had com- mitted the of- fence.	No .....	50
<i>Perjury—</i> .....	M. Com. Law .....	P. S. life, or impr. h. l. 7 yrs.	No .....	109
subornation of .....	M. ——— .....	Id. ....	No .....	109
false swearing .....	M. ——— .....	Impr. h. l. 2 yrs. or fine; and recogees.	Yes .....	109
forging certain instruments of proof .....	F. 8 & 9 V. c. 113, s. 4; 52 V. c. 10, s. 8.	P. S. 7 yrs. ....	No .....	110
giving certain false certificates .....	M. 14 & 15 V. c. 99, s. 15...	Impr. 18 mo. ...	No .....	111
<i>Person, Larceny from, see "Larceny" and "Robbery."</i> .....				
<i>Persecution, see "Elections" and "Military Law."</i> of soldiers for their prize money.....	F. 2 W. 4, c. 53, s. 19, 7 G. 4, c. 16, s. 38.	P. S. life .....	No .....	351
in respect of execution of a legal document ...	F. 24 & 25 V. c. 98, s. 34 ...	P. S. 7 yrs. ....	Yes .....	352
with intent to obtain property.....	F. 37 & 38 V. c. 36, s. 1.....	P. S. life .....	No .....	351
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<i>Piracy—</i> .....	F. Com. Law .....	As if committed on land.	No .....	78
assault with intent to commit.....	F. 7 W. 4 & 1 V. c. 88, s. 2.	Death .....	No .....	79

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<i>Piracy—continued</i>				
acting with the Queen's enemies.....	F. 18 G. 2, c. 30 .....	P. S. life .....	No.....	79
boarding and throwing cargo overboard.....	F. 8 G. 1, c. 24, s. 1 .....	P. S. life .....	No.....	80
favouring pirates.....	F. 11 & 12, W. 3, c. 7, s. 8 .....	P. S. life .....	No.....	80
trading with pirates.....	F. 8 G. 1, c. 24, s. 1 .....	P. S. life .....	No.....	81
not fighting pirates.....	M. ———— s. 6 .....	Impr. 6 mo. ....	Yes .....	81
piratical slave trading .....	F. 5 G. 4, c. 113, s. 9 .....	P. S. life .....	No.....	83
<i>Poison—</i>				
administering so as to inflict grievous bodily harm.....	F. 24 & 25 V. c. 100, s. 23. ....	P. S. 10 yrs. ....	Yes .....	198
administering with intent to injure .....	M. ———— s. 24. ....	P. S. 5 yrs. ....	Yes .....	199
<i>Poor—</i>				
parish officer promoting marriage .....	M. 7 & 8 V. c. 101, s. 8.....	Fine or impr. or both and rges. ....	Yes .....	223
injuring rate book or giving false evidence to Assessment Committee.....	M. 25 & 26 V. c. 103, s. 40 .....	Id.....	Yes .....	338
wilfully deserting pauper on journey to Ireland.....	M. 26 & 27 V. c. 89, s. 4 ...	Fine £10, in default impr. 3 mo. ....	Yes .....	223
<i>Port's, see " Malicious Injuries."</i>				
<i>Post Office—</i>				
person employed stealing a post letter .....	F. 7 W. 4 & 1 V. c. 36, s. 26 .....	P. S. 7 yrs. ....	Yes .....	291
the like if the letter contains money .....	F. ———— s. 27 .....	P. S. life .....	No.....	288
stealing from a letter .....	F. ———— s. 28 .....	Id.....	No.....	288
stealing from a letter bag or from a post office, &c. ....	F. ———— s. 29 .....	Id.....	No.....	288
taking a letter from, or opening a letter bag ...	F. ———— s. 29 .....	P. S. 14 yrs. ....	Yes .....	291
person employed in, opening or delaying letters.....	M. ———— s. 25 .....	Fine or impr. h. l. or both. ....	Yes .....	—
receiving stolen letters, &c.....	F. ———— s. 30 .....	P. S. life .....	No.....	320
fraudulently retaining letters .....	M. ———— s. 31 .....	Fine or impr. h. l. ....	Yes .....	204
injuring letter boxes.....	M. 47 & 48 V. c. 70, s. 3 ...	Impr. h. l. 12 mo. ....	Yes .....	150

<i>Post Office</i> —continued sending explosives or indecent prints by post unlawfully opening or impeding letters..... soliciting commission of offence under the Post Office laws.	M. 47 & 48 V. c. 76, s. 4 (1) M. 54 & 55 V. c. 46, s. 10... M. 7 W. 4 & 1 V. c. 36, s. 36	Impr. h. l. 12 ms. Fine £50 or impr. h. l. 6 mo. Impr. h. l. 2 yrs.	Q. S. Yes Yes	150 295 296
<i>Pound-breach</i> —	M. Com. Law .....	Fine or impr. or both and recognices.	Yes	121
<i>Public Service</i> — larceny or embezzlement by persons in .....	F. 24 & 25 V. c. 96, ss. 69, 70, 97.	P. S. 14 yrs.....	Yes	291
<i>Public Stores</i> — applying marks of, without authority ..... destroying marks of, with intent to conceal H.M.'s property in.	M. 38 & 39 V. c. 25, s. 4 ... F. ————— s. 5 ...	Impr. h. l. 2 yrs. P. S. 7 yrs. ....	Yes Yes	51 308
<i>Quay</i> , see "Malicious Injuries."				
<i>Rabbits</i> , see "Game (Night Poaching)."				
<i>Railways</i> — misconduct and neglect by servants of ..... obstructing engines on ..... endangering safety of person on ..... placing anything on a railway to obstruct an engine, &c. the like with intent to endanger travellers ... throwing anything at an engine ..... signing false accounts ..... signing false returns.....	M. 3 & 4 V. c. 97, ss. 13, 14 M. 24 & 25 V. c. 97, s. 36... M. ————— c. 100, s. 34. F. ————— c. 97, s. 35... F. ————— c. 100, s. 32 F. ————— s. 33 M. 31 & 32 V. c. 119, s. 5... M. 34 & 35 V. c. 78, s. 10...	Imp. h. l. 2 yrs... " " " " P. S. life, W. ... " " P. S. life ..... Fine & impr..... " "	Yes Yes Yes No No No Yes Yes	201 375 290 366 197 197 315 315
<i>Rape</i> , see "Women and Girls."				
<i>Real Estate</i> — concealment by vendors of .....	M. 22 & 23 V. c. 35, s. 24...	Fine or impr. h. l. 2 yrs. or both.	Yes	304

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<i>Real Estate—continued</i> false statements on registration of .....	M. 25 & 26 V. c. 53, s. 105...	Imp. h. 1. 3 yrs., or fine.	Yes .....	304
fraudulently procuring the order of the Court offences as to declaration of title .....	M. ——— s. 138.. M. or F. 25 & 26 V. c. 67, ss. 44, 45.	Id. .... Id. ....	Yes .....	304 304
<i>Receiving</i> , see "Agents," "False Pretences," "Fraudulent Trustees," "Larceny"— where theft was a felony .....	F. 24 & 25 V. c. 96, s. 91 ...	P. S. 14 yrs., W.	Yes .....	320
where theft was a misdemeanor .....	M. ——— s. 95 ...	P. S. 7 yrs., W...	Yes .....	320
<i>Register—</i> defacing, forging, as to birth, baptism, marriage, death or burial, or giving a false certificate. similar offences as to a copy of a register re- quired to be transmitted.	F. 24 & 25 V. c. 98, s. 36.. F. ——— s. 37...	P. S. life .....	No .....	332
<i>Registration and Marriage Acts—</i> false declarations and representations .....		" .....	No .....	333
false statement for insertion in register of birth, death, or marriage. registrar issuing licence for a void marriage ...	M. 3 & 4 V. c. 72, s. 4 ; 19 & 20 V. c. 119, s. 18. M. 6 & 7 W. 4, c. 86, s. 41...	Punishables per- jury. Id. ....	No .....	— —
<i>Rescue</i> , see "Escape." <i>Reservoirs</i> , see "Malicious Injuries."	F. 7 W. 4 & 1 V. c. 22, s. 3.	P. S. 7 yrs. ....	Yes .....	213
<i>Reward—</i> taking a, to discover stolen property .....	F. 24 & 25 V. c. 96, s. 101...	P. S. 7 yrs., W...	Yes .....	320
<i>Riot—</i> taking part in .....	M. Common Law.....	Fine or impr. h. 1. and recognoes.	Yes .....	56
opposing proclamation, or remaining one hour after it is made.	F. 1 (i. 1, st. 2, c. 5 .....	P. S. life .....	No .....	56

rioters injuring buildings.....	M. ——— s. 12 ...	P. S. 7 yrs.....	Yes .....	58
seamen preventing loading .....	M. 33 G. 3, c. 67, ss. 1, 2 ...	Impr. h. l. (compulsory) 12 mo.; 2nd conv. p. s. 14 yrs.....	Yes .....	60
<i>Rivers, Banks of, see "Malicious Injuries."</i>				
<i>Robbery, see "Larceny"</i> .....	F. 24 & 25 V. c. 96, s. 40 ...	P. S. 14 yrs.....	Yes .....	279
assault with intent to rob .....	F. ——— s. 42 ...	" .....	Yes .....	279
being armed, or with another person, or with personal violence.	F. ——— s. 43 ...	P. S. life, W. ...	No .....	279
<i>Sacrilege</i> .....	F. 24 & 25 V. c. 96, s. 50 ...	P. S. life .....	No.....	283
<i>Savings Banks—</i>				
adopting title of unlawfully.....	M. 26 & 27 V. c. 87, s. 5 ...	Fine or impr. or both.	Yes .....	—
actuary not accounting for deposits .....	F. ——— s. 9 ...	Id.....	Yes .....	315
<i>Sedition, see "Arms," "Combinations," "Libel," "Oaths," and "Treason."</i>				
<i>Servants—</i>				
not providing food for or endangering life or health of.	M. 24 & 25 V. c. 100, s. 26..	P. S. 5 yrs. ....	Yes .....	200
<i>Ship—</i>				
impeding any person endeavouring to save his life from ship in distress.	F. 24 & 25 V. c. 100, s. 17...	P. S. life. ....	No.....	197
<i>Shipping, see "Arson," "Assaults," "Attempts to Murder," "Explosives," "Larceny," and "Malicious Injuries"—</i>				
owner using register unlawfully .....	M. 57 & 58 V. c. 60, s. 16...	Fine or impr. h. l. 2 yrs.	Yes .....	384
owner guilty of a default as to collision regulations.	M. ——— s. 419.	Id.....	Yes .....	384



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<i>Shipping—continued</i>				
owner obstructing service of process.....	M. 57 & 58 V. c. 60, s. 696 (2)	Fine or impr. h. l. 2 yrs.	Yes .....	384
master of British ship concealing nationality..	M. ——— s. 70....	Id.....	Yes .....	385
the same deserting seaman or apprentice .....	M. ——— ss. 187, 188	Id.....	Yes .....	385, 386
the same taking an unseaworthy ship to sea...	M. ——— s. 457...	Fine or impr. h. l. 2 yrs.	Yes .....	385
destruction, &c., of a log.....	M. ——— s. 241....	Id.....	Yes .....	389
embezzlement by servant of local marine board	F. ——— s. 248...	P. S. 14 yrs. ....	Yes .....	389
taking money for apprentice to sea-service.....	M. ——— s. 398...	Fine or impr. h. l. 2 yrs.	Yes .....	390
neglect of duty in case of collision.....	M. ——— s. 422...	Id.....	Yes .....	385
sending unseaworthy ship to sea .....	M. ——— s. 457...	Id.....	Yes .....	386
selling wreck abroad.....	M. ——— s. 535...	Id.....	Yes .....	390
offences by pilots .....	M. ——— s. 607...	Id.....	Yes .....	386
not extinguishing misleading lights.....	M. ——— s. 667...	As for "Nuisance."	Yes .....	390
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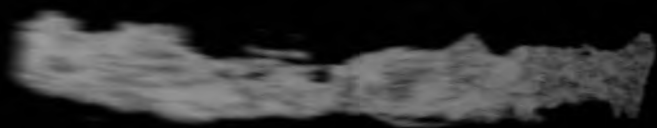
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