A

PRACTICAL TREATISE

ON

MISDEMEANORS.

BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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THIS WORK

IS DEDICATED, BY PERMISSION,

TO

THE RIGHT HONOURABLE THOMAS ERSKINE,

ONE OF THE JUSTICES

OF

HER MAJESTY'S COURT OF COMMON PLEAS.

PREFACE.

THE author of this treatise concerning Misdemeanors had been engaged some years upon a general work, which embraced the whole of the Criminal Law, together with that branch of it which relates to Procedure, when he was led to believe, after enquiry, that an undertaking of that nature, if published, would not be unsatisfactory to the profession.

Having brought his manuscript to a very forward state before the announcement of the new edition of Russell on Crimes, he hopes he will be excused for having exerted himself to obtain a publisher for that which has cost him much time and labour.

The expectation of change, however, together with the growing uncertainty which seems to prevail as to the success of legal publications, occasioned a long delay and hinderance.

Messrs. Shaw have at length ventured to print a portion of the manuscript—that which treats of

Misdemeanors—and should the event prove successful, it is proposed to carry out the plan by publishing another volume, being the remainder of the Criminal Law including the Procedure.

It may be added, that this will not be a long task, because the supplying of the new cases, and the revision of the manuscript, are all which remain towards the accomplishment of this latter portion.

That the author has committed errors, and been guilty of omissions in his work, he is but too apprehensive—still he bespeaks a kind and fair criticism. The subject is extensive, the cases are numerous, the arrangement is perhaps novel, and the profession may rest assured, that should this volume prove of less service than might be wished, it will not be so for want of much attention and toil.

Temple,
November, 1841.

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A PRACTICAL TREATISE

OF

MISDEMEANORS.

CHAPTER I.

OF MISDEMEANORS COMMITTED THROUGH MOTIVES OF GAIN OR ADVANTAGE.

We propose to treat of misdemeanors—

First, with respect to such as are committed for the sake of some personal advantage or gain.

Secondly, of such as have their foundation in malice, whether express or implied.

Thirdly, of misdemeanors against the persons of individuals. And,

Fourthly, of those which militate against the well-being of the government or public policy.

The misdemeanors which will form the subjects of the first chapter will be:—

I. Those which consist of unlawful takings or conversions, with or without violence.
II. Depredations effected by fraud, or attempted through that medium.
III. Advantages unlawfully obtained at the expense of others.

CLASS I.

OF UNLAWFUL TAKINGS OR CONVERSIONS, AND OF ATTEMPTS OF THAT NATURE, WITH OR WITHOUT VIOLENCE.

SECT. I.—*Of stealing Records, Wills and Writings relating to Real Estate.*

Records, &c.] By 7 & 8 Geo. 4, c. 29, s. 21, If any person shall steal, or for any fraudulent purpose, take from its place of deposit for the time being, or from any person having the lawful custody thereof, any record, writ, return, panel, process, interrogatory, deposition,

affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or any oath, 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, he shall be guilty of a misdemeanor, and shall be liable to be transported for seven years, or suffer such other punishment by fine or imprisonment (1), or both, as the court shall award; and it shall not be necessary to allege in any indictment for such an offence that the article, in respect of which the offence was committed, is the property of any person, or that the same is of any value.

By sect. 61, Every person who shall aid, abet, counsel or procure the commission of any misdemeanor, punishable under the act, shall be liable to be indicted and punished as a principal offender. It is to be observed, that although the stealing of records is not felony, yet the jury must be satisfied upon a charge of stealing, that the defendant took them under such circumstances as would have amounted to larceny, had deeds of that kind been the subject of larceny (2). And since the passing of the act 7 & 8 Geo. 4, c. 29, it seems that the records cannot be properly described as parchment in order to support an indictment for larceny, for they are still records (3). The case would be different if it should turn out that owing to some informality or other circumstance the character of record had ceased or had not existed. The prisoner might then be convicted of felony for stealing the parchment.

The venue should be laid in the county where the offence was committed (4).

Wills.] By 7 & 8 Geo. 4, c. 29, s. 22, If any person shall during the lifetime of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy, or conceal (5) any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, he shall be guilty of a misdemeanor, he shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned (6),

(1) With or without hard labour and solitary confinement, 7 & 8 Geo. 4, c. 29, s. 4, provided that the latter do not exceed one month at a time, nor three months in one year, 1 Vict. c. 90, s. 5. But separate confinement under the provisions of the act, for the better ordering of prisons, is not to be deemed solitary confinement, 2 & 3 Vict. c. 56, s. 4.

(2) 7 C. & P. 324; John's C., Patteson, J.

(3) See 1 Moo. C. C. 155; *Walker's* C.

(4) See as to the old law, 1 Hawk. c. 47.

(5) It would be unwise to draw an indictment for destroying *or* concealing such instrument. See 1 Willmore, &c. 418, *R.* v. *Spencer*. The purpose which prompted the concealment ought to be stated in the indictment, 9 C. & P. 89, *Morris's* C. It is made a question, however, whether the objection is available otherwise than upon demurrer. See Note (*a*) to 9 C. & P. 90, and the statute 7 Geo. 4, c. 64, s. 21.

(6) That is under sec. 21. See supra.

and it shall not in any indictment for such offence be necessary to allege that such will, &c. is the property of any person, or that the same is of any value (7).

Writings relating to Real Estate.] By 7 & 8 Geo. 4, c. 29, s. 23, If any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title, or of any part of the title to any real estate, he shall be guilty of a misdemeanor, and liable to any of the punishments thereinbefore last mentioned (8). And in any indictment for such offence it shall be sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the persons or of some one of the persons having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof, and it shall not be necessary to allege the thing stolen to be of any value (9).

By sect. 24, Nothing in the act contained relating to either of the misdemeanors last mentioned, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen or impeach any remedy at law or in equity, which any party aggrieved by any such offence might or would have had if the act had not been passed; but, nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of such misdemeanors by any evidence whatsoever, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been bonâ fide instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

Sect. II.—*Of stealing Dead Bodies.*

The offence of taking up dead bodies, either for the purposes of dissection, or for profit, is considered to be an act of great indecency (1), and it is a misdemeanor at common law (2). But there may be a lawful custody of dead subjects for scientific purposes, which is calculated to work well for society, and the legislature has prescribed certain rules for the possession of bodies, which are designed to confine the practice of receiving such bodies within due limits, and, at the same time, not to offend against the feelings of the multitude (3). However, although the unlawful taking of bodies from the grave is a misdemeanor, yet if the shroud, or

(7) See sect. 24, infra.
(8) Under sect. 21. See ante, p. 2.
(9) See as to the old law upon this subject, Leach, 12, *Westbeer's C.*
(1) 4 Com. 236.
(2) It is said that sixteen attempts at the least have been made in parliament to make this offence felony.
(3) See the statute 2 & 3 W. 4, c. 75.

other covering, or any property placed with the corpse, be taken away by the parties, the offence, as far as the chattels are concerned, is felony. And in such a case, the shroud, or coffin, &c., may be laid in the executors or other persons who buried the deceased, or, under some circumstances, in persons unknown (4).

Upon one occasion, it was attempted to be argued in a case of misdemeanor of this nature, that it was one of ecclesiastical cognizance, if, indeed, it could be treated as a crime in any respect. The indictment charged a surgeon with entering a burying ground and taking a coffin out of the earth, from which it was alleged that the defendant took a dead body and carried it away for the purpose of dissecting it. And it was moved to arrest the judgment. But the court said that common decency required that the practice should be put a stop to; that it was cognizable in a criminal court, as being highly indecorous, and *contra bonos mores*, and that the practice at the Old Bailey had been to try and punish such offences, and the defendant was fined five marks (5). The like decision was come to where the offence was committed for the sake of gain and profit. The indictment charged that the defendant, a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. The evidence was that the defendant had taken a body from some burial ground, but from what particular place was uncertain. He was found guilty, and it was so clear that the indictment well lay, that no case was reserved (6).

Judgment.] The judgment for this misdemeanor is fine or imprisonment, or both, at the discretion of the court.

Sect. III.—*Of Embezzlement.*

1. *Embezzlement by Agents and others.*] By 7 & 8 Geo. 4, c. 29, s. 49, For the punishment of embezzlements committed by agents entrusted with property; If any money or security for the payment of money shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money or any part thereof, or the proceeds, or any part of the proceeds of such security for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, he shall be guilty of a misdemeanor, and be liable to be

(4) 12 Rep. 113, *Haynes's* C.; East, P. C. 652; see also id. 654.

(5) 2 T. R. 733, *R.* v. *Lynn*; S. C. Leach, 497.

(6) 1 Russ. C. M. 415, *Gilles's* C.; S. C. Russ. & Ry. 366, note. This case was mentioned privately to the judge of the King's Bench, who intimated the opinion stated in the text. S. P. 1 Dowl. N. P. C. 18, *R.* v. *Cundick*, where the defendant had illegally sold the body of a capital criminal. In this case the indictment was drawn in the form of a declaration or assumpsit, but the court held it good, the main points being rightly placed on the record.

transported for fourteen years, or not less than seven, or suffer such other punishment by fine or imprisonment (7), or both, as the court shall award. And if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be entrusted to any banker, &c. for safe custody, or for any special purpose without any authority to sell, negociate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, &c. or in any manner convert the same to his own use or benefit, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, he shall be guilty of a misdemeanor, and be liable to be punished as before mentioned (8).

By sect. 50, Nothing thereinbefore contained relating to agents shall effect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or effected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money which shall have become actually due and payable upon or by virtue of any valuluable security, according to the tenure and effect thereof, in such manner as he might have done if the act had not passed, nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim or demand, entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects that shall be requisite for satisfying such lien, claim, or demand.

2. *Embezzlement by Factors or Agents.*] Then by sect. 51, it is enacted, That if any factor or agent entrusted, for the purpose of sale, with any goods or merchandise, or entrusted with any bill of lading, warehouse keepers' or wharfingers' certificate, or warrant or order for delivery of goods or merchandize, shall for his own benefit and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or negociable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall by guilty of a misdemeanor, and being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for any term not exceeding fourteen

(7) With or without hard labour, &c. See note 1, at page 2. As to abettors, see ibid.

(8) That is by transportation for fourteen or seven years, &c.

years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such deposit or pledge was justly due, and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent.

But by sect. 52, Nothing in this act contained, nor any proceeding, conviction, or judgment, to be had or taken thereupon against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity, which any party, aggrieved by any such offence, might or would have had if this act had not been passed, but, nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent, as aforesaid, shall be liable to be convicted by any evidence whatever, as an offender against this act in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been bonâ fide instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupts.

This act is strictly limited to those agents or depositories which it mentions. And it is also confined to such persons when they are exercising their functions or business. Consequently, where a deposit was made with a private friend, and in that capacity, it was held, that the case did not come within the act (9). And if the deposit be made of money, the proceeds of certain securities, for the purpose of being invested in the funds, with a written direction to that effect, in case any accident should happen to a particular individual, and no accident happening, the defendant convert the money to his own use, it seems to be no offence within sect. 49, inasmuch as the contingency did not take place which would have involved the defendant in a violation of the written direction given to him (1). But if the defendant had had the securities themselves in his custody, committed to him for safety, or some special purpose, and had sold them, his case would have been different, and such an offender would now be punishable under the second division of this 49th section for embezzling the securities. The defendant had established a savings bank, each

(9) 2 C. & P. 517, *Prince's* C.; S. C. Moo. & Malk. 21, under the old act, 52 Geo. 3, c. 63.

(1) See 4 C. & P. 46, *White's* C., under the old act, 52 Geo. 3, c. 63.

member of which paid a certain subscription, and the defendant received as a recompence for his trouble an odd penny, which formed part of the subscription. The funds were disposed of once a week by lottery. The defendant absconded after having received the sum of 10*l.* 8*s.* from an individual who had received no benefit from his subscription. It was held that the defendant was not indictable under 52 Geo. 3, c. 63, either as an agent or a person having the "safe custody" of money in his possession (2).

3. *Embezzlement—First Fruits.*] By 26 Hen. 8, c. 3, s. 4, confirmed by 1 Eliz. c. 4, s. 24, If any person or persons to whom any deputation shall be made by commission, to compound and agree for the payment of first fruits, their heirs, executors, or administrators, shall conceal or embezzle any specialties or bonds, taken for the payment of the said first fruits, and do not deliver them according to the tenor of the act, he shall forfeit that office of deputation and over that make fine and ransom at the king's own pleasure and will.

4. *Embezzlement of Public Stores.*] Under the provisions of several acts (3); Embezzling any stores of war, or naval, ordnance, or victualling stores, marked according to particular statutable regulations, or concealing them, or any cordage belonging to his Majesty (4), or any public stores whatsoever under the care, superintendance, or controul of any officer or person in his Majesty's service, or employed in any public department or office, is made punishable by transportation for fourteen years, or by public whipping, fine, or imprisonment, one or all of them, at the discretion of the court. And for a second offence of the kinds mentioned above, the sentence of transportation for fourteen years is to pass at all events. (5)

By 1 Geo. 1, st. 2, c. 25, s. 1 & 3, The commissioners of the navy may cause search to be made for embezzled goods, as justices of peace may do in cases of felony, and may, in cases where the property embezzled does not exceed 20*s.*, fine the offender 20*s.*, and imprison him for one week, and may cause the goods to be brought back. In case of non-payment the offender may be imprisoned with hard labour for two months.

By s. 4, The treasurer and other officers of the navy may also

(2) 1 D. & R. N. P. C. 22, *Mason's* C. In this case it was also held, that an indictment charging generally an embezzlement of 10*l.*, 8*s.* could not be supported upon proof that not more than 2*s.* 1*d.* belonging to the prosecutrix was ever in the defendant's hands at one time.

(3) 9 & 10 W. 3, c. 41; 9 Geo. 1, c. 8; 39 & 40 Geo. 3, c. 89, s. 1 & 7, extended to Ireland as far as they relate to the naval, ordnance, and victualling stores, by 52 Geo. 3, c. 12, but no summary proceeding before justices is to be taken without the consent in writing of the naval storekeeper for the time being, at any port in Ireland. 56 G. 3 c. 138, s. 3.

(4) 54 Geo. 3, c. 60.

(5) See 9 & 10 W. 3, c. 41; 39 & 40 Geo. 3, c. 89, s. 5 & 7; 56 Geo. 3, c. 138, s. 2. As to the unlawful custody of public stores. See post, chap. IV.

punish by fine or imprisonment at their discretion, where the embezzlement does not exceed 20*s*. (6).

5. *Embezzlement.—Warehoused Goods, Customs or Excise.*] By 4 Geo. 4, c. 24, s. 72, If, through any wilful misconduct of any officer or officers of customs or excise, any embezzlement, waste, spoil or destruction, should be made of or in any goods or merchandize, warehoused in warehouses under the authority of 4 Geo. 4, c. 24, (an act which requires payment of duty upon the first entry of such goods) such officer or officers shall be guilty of a misdemeanor (7).

6. *Embezzlement of Materials by Surveyors of Highways.*] If a surveyor of the highways should take gravel and other materials, procured for the parish, and use them upon his own premises, it seems that he is guilty of a misdemeanor at common law (8). The acts should be laid to be done by colour of his office, and in dereliction of his duty as a surveyor of the highways (9).

7. *Post Office.—Embezzlement of Printed Papers.*] By 1 Vict. c. 36, s. 32, For the protection of printed votes and proceedings in parliament, and printed newspapers sent by the post, it is enacted, that every person employed in the post office, who shall steal, or shall for any purpose embezzle, secrete, or destroy, any printed votes or proceedings in parliament, or any printed newspaper, or any other printed paper whatever, sent by the post without covers, or in covers open at the sides, shall, in England and Ireland, be guilty of a misdemeanor; and in Scotland, of a crime and offence, and being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet (1).

(6) Under sect. 3, if the offence be of a higher nature, the commissioners may commit the offender till he enters into recognizances to appear in the Exchequer, to answer any prosecution against him within one year afterwards.

(7) And punishable by fine and imprisonment, or both.

(8) 2 Russ. C. M. 223. 3 Chit. Burn, 104, *R.* v. *Anderson*. And punishable by fine and imprisonment.

(9) Id. ibid. There are also embezzlements punishable upon summary conviction, as under 54 Geo. 3, c. 110, s. 1, where pensioners or nurses belonging to Greenwich Hospital desert, run away, and carry away with them any clothes, &c. belonging to the hospital. The punishment is imprisonment for six calendar months. So under 55 Geo. 3, c. 137, If any person shall desert or run away from any workhouse, and carry away with him any clothes, goods, or things belonging to the overseers or others, in respect of the parish, he shall, upon conviction before any justice of the peace, be committed to gaol or to the House of Correction for three calendar months. And the marks upon such clothing, &c. being duly authenticated, shall be sufficient evidence of property in the overseers or other persons.

(1) With or without hard labour and solitary confinement (sect. 43), provided the latter do not exceed one month at a time, or three months in one year, 1 Vict. c. 90, s. 5. As to the admiralty jurisdiction. See sect. 39. The venue, sect. 37. Abettors may be tried and punished as principals, sect. 37. Laying the property, sect. 40. The

SECT. IV.—*Of Misdemeanors committed by the unlawfully taking or destruction of Game or Rabbits, or by attempts of that nature.*

The offences to which we are now about to invite the reader's attention, are the third act, after prior convictions before justices, of taking or destroying game or rabbits at night, or of attempting to do so; the unlawful entry at night of three or more armed persons on any land, for the purpose of taking or destroying game or rabbits, or being there under such circumstances with a similar design; and the misdemeanor of taking or destroying hares or conies in a warren. The act of assaulting or offering violence to those who are authorized to apprehend persons found in the commission of the first class of these offences, which is a misdemeanor, belongs perhaps to the chapter which treats of assault, although we shall notice it in the present section as being very nearly connected with misdemeanors respecting game.

The most serious offence of the class above alluded to, is that which visits the criminal with transportation for fourteen years. The enactment which contains these provisions is the stat. 9 Geo. 4, c. 69, s. 9; and it ordains, that if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game (2) or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each of such persons shall be guilty of a misdemeanor.

Several questions present themselves to our notice upon reading these passages, and the clause is by no means barren of decisions. Thus it might be enquired whether the entering and being armed could be considered as two substantive offences, or whether both must be proved; or, again, whether it be necessary that all the parties should be actually armed, and further, whether all must be seen in the land, and the description of an offensive weapon is too uncertain not to create discussion.

The first act is the entering or being in the place in question. And it has been held, that these are distinct offences; so that if the entry were not proved, the presence of the defendants upon the land would be sufficient to warrant their conviction (3). The next point is, whether it is indispensable to shew by express evidence that the persons accused of being on the land, were there, or whether the jury may be satisfied of their being so trespassing

interpretation clause, sect. 47. And by sect. 36, Every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor, punishable by the Post-office acts, shall be, in England or Ireland, guilty of a misdemeanor, and in Scotland, of a high crime and offence, and shall be subject to imprisonment not exceeding two years, with or without hard labour, &c.

(2) Game, for the purposes of this act, shall be deemed to include hares, pheasants, partridges, grouse, heath or moorgame, black game, and bustards, 9 Geo. 4, c. 69, s. 13.

(3) 7 C. & P. 184, *R.* v. *Kendrick, and others.*

by circumstantial proof. Charles Worker was tried upon an indictment consisting of three counts. The first charged him with entering a certain wood with intent to kill game, and stated that he was found armed in the night there. The second alleged that he entered the same wood, and that he was found on a certain close, and the third was similar in most respects to the second. There was very strong evidence to shew that the defendant had been in the wood, but he was not seen there, although he was seen in a close which adjoined the wood. The first count, therefore, was negatived, if it were necessary by law to prove either that the defendant was seen in the wood, or that he was found armed there. And as a general verdict of guilty had been returned, if it were proper to satisfy the word "found," a question would arise, in arrest of judgment, as to the need of proving, that the party was found armed in the same close into which he had entered for the purpose of killing the game. For the second and third counts charged the entry to have been into the wood, and the finding in the adjoining close. The judges considered this case, and held, that as there was evidence to satisfy the jury that the defendant had been in the wood armed, or that he was one of a party that had been so, the proof was sufficient, and the conviction right (4). Indeed, if only a portion of a confederated gang are on the spot charged in the indictment, the rest may be looked upon as having participated in the company of the others for the purposes of the act. But if several be associated in an enterprise, and one only enter armed upon the close, those who are not proved to have been on the place in question cannot be connected with the party who is apprehended there, and a conviction cannot be obtained (5). When united for one common intent, namely, that of killing game, all on the spot are guilty, although fewer than three be actually in the close specified (6). Whilst, on the other hand, if two poachers remain in a road sending their dog into the neighbouring field, and a third who goes out with them armed, go into another field belonging to the same person to poach by himself, the union and combination are not made out against the two parties (7). Another ingredient in this offence besides the entry or being upon the close adjoining, is the being armed. It will be observed, that the present act has the words "any of such persons being armed," &c. Under 57 Geo. 3, these expressions meant any one of such persons (8), but it has been held that there cannot be a constructive arming under 9 Geo. 4, c. 69. So that when the indictment charged two defendants with being armed together with another person, it was held insufficient to shew that such third person was armed, but that the two persons were without arms (9). But under 57

(4) 1 Moo. C. C. 165, *Worker's* C. The word "found" does not occur in 9 G. 4, c. 69, s. 9.

(5) 6 C. & P. 398, *R.* v. *Dowsell*, and another.

(6) 7 C. & P. 282, *Passey's* C., S. P; Id. 300, *Lockett's* C., S. P., 2 M. & Rob. 37, *Andrews's* C.

(7) 8 C. & P. 757, *Nickless's* C.

(8) Russ. & Ry. 368; *R.* v. *Smith, and others*; S. C. 1 Russ. C. M. 418.

(9) 8 C. & P. 759, *R.* v. *Davis*, and another.

Geo. 3, it was held to be immaterial whether the defendants were armed at the time they were perceived or not. Two men were discovered shooting in a wood, but before they were actually seen they had abandoned their guns, and were creeping away, and the question was, whether they could be said to have been armed at the time when they were discovered. The defendants neither had the possession of their guns, nor had them within reach. But a keeper had seen the flash of one of the guns before the defendants themselves were seen, and independently of this evidence, the fact of these weapons being very near the spot where the parties had been, would tend to confirm the circumstance of their being found armed. The judges held that the defendants had been rightly convicted (1). However, the principle of one being answerable for the act of another upon these occasions must be taken with one qualification, and it is, that a guilty knowledge can be brought home to that other person. Southern was charged under 57 Geo. 3, with being found armed with intent to destroy game, together with one Johnson, and it was proved that Johnson had a loaded pistol; but it also appeared to the satisfaction of the jury that Southern was entirely ignorant of that fact. A verdict of guilty having been returned, the judges held, that upon the facts stated, the defendant, Southern, could not be legally convicted (2).

We have said, that the term "offensive weapon" is not sufficiently certain to prevent discussion. It occurs in the law of robbery under 1 Vict. c. 87, and also in the act against smuggling (3). Under the latter act it seems that the weapon ought to be one of a dangerous, as well as an offensive nature. But in the clause connected with robbery, and in that of 9 Geo. 4, c. 69, now under our consideration, the idea of danger or mischief does not appear to be so intimately connected with the weapon as in smuggling transactions. Thus, a crutch was clearly considered to be such a weapon in a case under 9 Geo. 4, c. 69, being, in fact, large enough to be called a bludgeon. And it was left to the jury to say whether the defendant had taken out this crutch as an offensive weapon, or for the purpose of using it as a crutch. It appeared that he had been in the habit of walking with it, and he was acquitted (4).

But, to shew the distinction between cases of this nature and of smuggling;—upon another occasion, where a small stick was the weapon in question, it was submitted to the jury, whether it had been taken out for the purpose of offence. And, as it appeared, that the stick had been used in a sudden affray with gamekeepers, it was considered not to be an offensive weapon within the act (5). Had it, therefore, been taken out premeditatedly for a mischievous purpose, the case might have assumed a different complexion. So, again, if large stones be brought for the purpose of offence,

(1) Russ. & Ry. 386, *R.* v. *Nash*, and another; S. C. 1 Russ. C. M. 418.

(2) Russ. & Ry. 444, *Southern's* C.; S. C. 1 Russ. C. M. 418.

(3) 3 & 4 W. 4, c. 53.

(4) 1 M. & Rob. 70, *Palmer's* C.

(5) 2 M. & Rob. 42, *Fry's* C.

and the jury become satisfied that they are capable of inflicting a serious injury, especially if the person assaulted be near enough to be hurt, the defendant who uses them may be convicted of being armed with "offensive weapons" within the meaning of the 9th section (6).

It is, moreover, necessary, that the armed persons should have the intent mentioned in the statute. And we shall see by and by that the proof as to this intent must be confined to the cases specified in the indictment (7). And, lastly, the offence must be committed in the night. By 9 Geo. 4, c. 69, s. 12, the night, for the purposes of this act, shall be considered and is declared to commence at the expiration of the first hour after sun set, and to conclude at the beginning of the last hour before sun rise. We have thus mentioned the entry, or, (as one of the reports has it) being *bodily* upon the land in question,—the nature of proof required to shew the presence of the parties upon the land,—the arming necessary to constitute the offence, together with the kind of weapons forbidden to be used; and we have likewise adverted to the intent, without which the other circumstances of the case would not apply; and lastly, we have cited the clause which declares the time during which such acts as those contemplated by the act can be carried into execution.

Indictment under Sect. 9.] The indictment (8) under section 9 of the act requires a little examination. It states, that A. B. and C., &c., to the number of three, into a certain close of D. called E., and situate in the parish of F. about the hour of ———, unlawfully did enter, the said A. B. and C. &c., being then and there in company, and armed with bludgeons, (for instance) for the purpose then and there of taking and destroying game, &c. (9). It seems that if some certain description be afforded as to the place in question, it will be sufficient, as if the name of the owner or occupier should be stated, without naming the close, but if the prosecutor should particularise the close, accuracy is imperatively demanded. And if all mention of ownership or description is omitted, the indictment will be clearly insufficient. An indictment under 57 Geo. 3, c. 90, contained two counts, one for entering a certain close, and the other for entering certain inclosed ground. But no names, nor ownership, nor occupation, nor abuttals were given. And five learned judges (1) held, that the defendant was entitled to know to what specific place the evidence was to be directed, the offence being substantially local, and judgment was arrested (2). Owen and Prickett were tried and con-

(6) 7 C. & P. 803, *Grice's* C.

(7) See Moo. C. C. 151, *Barham's* C.

(8) A count for going armed in search of game at night may be joined with one for assaulting a gamekeeper in the execution of his duty; and likewise with a count for assaulting such a person when about to apprehend an offender, as well as with a count for a common assault; 5 C. & P. 551, *R.* v. *Finucane*, and another.

(9) Or rabbits.

(1) Burrough, Best, Bayley, Js.; Garrow, and Hullok, Bs.; Contrà—Abbott, C. J., Holroyd, and Park, Js.

(2) Russ. & Ry. 515, *Ridley's* C.

victed for entering "a certain wood, called the Old Walk," &c., stating the name of the owner, with intent, &c. But it turned out that the name of the place in question was the "Long Walk," and it was objected that this was a fatal variance. And of this opinion were the judges, who held the conviction wrong (3). So, upon another occasion, the description of "a certain cover in the parish of A," was held to be too vague (4). So, where the defendants were charged with being in a certain field, with intent, *then and there* to take game, it was held, that proof must be tendered of their purpose to trespass on that particular field. Barham and others were charged with entering a certain close in the parish of B. in the occupation of Thomas Quaife, with intent then and there to destroy game, &c. They were observed in Brook Land in the first instance, but when found by the keepers, they were in the Hop garden. The defendant when taken had a brace of pheasants in his pockets, and there was little doubt but that the whole party had been shooting in an adjoining wood. It was objected, that there was no evidence of the defendant having entered the Hop garden with intent to kill game, that, in fact, he was probably returning home, and the learned judge left the matter with the jury, who said, that the defendant was in the pursuit of game when he was found, but they could not say whether in the Hop garden or elsewhere. By this finding, the place mentioned in the indictment was virtually laid out of the question, and the judges accordingly held the conviction wrong, inasmuch as the entry with intent to kill game was confined by the indictment to the close specified, and it became necessary on that account to prove the intent as to that close (5). Had a general verdict of guilty been returned, as in Worker's case, or had the jury found the entry to have been into the close specified in the indictment, the question, afterwards determined in Worker's case, might have presented itself, and the party, although not seen in the specified close, but, on the contrary, found in another, might, nevertheless, have been held properly convicted.

It has also been more than once since decided, that where a particular close is set out in the indictment, evidence must be given to satisfy the jury that the defendants entered into that same close for the purpose of taking game (6).

But it need not be stated whether the place was enclosed or not (7). We have seen, that the defendants are charged with having been armed in the close specified, and Parke, B., is reported to have said, that in addition to the statement of "being then and there by night as aforesaid armed," it ought to be averred that the defendants were armed. The learned judge, however, said that he should leave the defendants to their writ of error (8).

(3) Moo. C. C. 118, *R.* v. *Owen, and another*; S. C. Car. C. L. 309.
(4) 5 C. & P. 508, *Crick's* C.
(5) 1 Moo. C. C. 151, *Barham's* C.
(6) 5 C. & P. 549, *R.* v. *Capewell*, and another; S. C. 7 C. & P. 231, *R.* v. *Gainer*, and another.
(7) 2 M. & Rob. 37, *Andrews's* C.
(8) 7 C. & P. 811, *R.* v. *Wilks* and another.

It is sufficient to say that the offence was committed by night, without adding an allegation as to the hours of sunset and sunrise. It was once objected, that the indictment had failed to express that the entry of the defendants had been before the expiration of the first hour after sunset, and the first hour before sunrise; but Parke, J., held the count good (9). Although the addition of such an allegation has occasionally occurred (10). However, it must be alleged that the persons engaged in the transaction were *by night* armed upon the close mentioned, or land belonging to the prosecutor. And the words "by night," must be so introduced as to govern the whole of the charge. An indictment stated that J. D., &c., on the 17th of December, &c., at, &c., being to the number of three or more persons together, *did by night* unlawfully enter divers closes, being in the occupation of E. C., and were then and there armed in the said closes, with intent, &c. After conviction, a writ of error was brought, and the judgment was reversed, for the words "by night" were so placed, as to be incapable of reaching over the material averments of the count. "If," said Lord Tenterden, "the words 'by night,' had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole, but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed, or the intent with which they entered; the second branch states that they were in the closes armed for the purpose of destroying game, but not that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct, the indictment is bad, and the judgment must be reversed" (1). Had the sentence run thus, "by night did unlawfully enter," &c., it would also have read, "by night were then and there armed." As it stood, the charge virtually was, that J. D., &c., on the 17th of December, by night unlawfully entered a close, and then and there were armed on the day and place aforesaid (2), which was manifestly a bad allegation of the offence contemplated by the statute (3).

With respect to time generally, where, by mistake, the indictment ran thus, "On the 7th day of October, in the year ——," without saying more, it was once objected, that as time in 9 Geo. 4, c. 69, was of the essence of the offence, the defect could not be considered as cured after verdict by 7 Geo. 4, c. 64, c. 20. Upon this, Alderson, J., took the opinion of the judges, who held,

(9) Lew. C. C. 149, *Riley's* C.; S. P. Id. 154; *Pearson's* C., cor. Gurney, B.

(10) 8 Id. 154; *R.* v. *Lee*, and others.

(1) 10 B. & C. 89, *Davies* v. *The King*. (In error.)

(2) See 10 B. & C. 90.

(3) It was also objected by the counsel for the defendant in this case, that the hour should have been mentioned; and that the closes were not particularized, 10 B. & C. 90. But it will be noticed, that the closes were stated to be in the

that the fault was that of time imperfectly stated, and so cured by verdict (4).

Judgment: The judgment for offences under sect. 9, is that the offender be transported for fourteen, or not less than seven years, or imprisoned and kept to hard labour for any term not exceeding three years (5).

Third Offence by Persons in quest of Game by night, *whether singly or in company.*] By sect. 1 of this same act, if any person shall, by night, unlawfully take or destroy any game or rabbits in any land whether open or inclosed (6), or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall *for the third offence* (7), be guilty of a misdemeanor, and be liable to be transported for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years (8).

By sect. 2, where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, that is to say, any offence under the 1st section, it shall be lawful for the owner or occupier of such land, or for any person having a right, or reputed right, of free warren or free chase thereon, or for the lord of the manor, or reputed manor, wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may

occupation of one E. C., Id. 89, and probably that allegation is sufficient. And the hour is matter of evidence.

(4) Lew. C. C. 232, *R.* v. *Hall*, and another.

(5) And the section concludes by prescribing the same punishment for offenders in Scotland.

(6) Which includes forests, chases, parks, woods, and plantations, inasmuch as all these are respectively open and enclosed grounds, Russ. & Ry. 503, *R.* v. *Pankhurst*, and another.

(7) For the first offence a summary conviction is given before two justices with power to imprison for any term not exceeding three calendar months with hard labour, and then to find sureties by recognizances, the offender himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.*, or in Scotland by bond of caution, not to commit the like misdeed for one year. In default of such sureties the party may be imprisoned with hard labour for any term not exceeding six calendar months, unless such sureties be sooner found. For the second offence, the like summary conviction may take place, and a similar judgment may be given, with this difference, that the period of imprisonment may, in the first instance, be for six calendar months, and the suretyship must be in 20*l.*, and 10*l.* respectively, or in 20*l.* if only one surety, to abstain for two years, with the like imprisonment, in case of default of sureties, for one year, unless, &c. By sect. 3, any justice is empowered to issue his warrant in order to bring the person accused before two justices. Sect. 4, limits the time for prosecution by summary conviction to six calendar months after the commission of the offence. Sect. 5 gives the form of the convictions, and sect. 6 the appeal. By sect. 7, the certiorari is taken away, and sect. 8 directs that the convictions shall be returned to the sessions, and there registered. Sections 10 and 11 relate to the Scotch jurisdiction.

(8) And so likewise in Scotland, same sect.

be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence, with any gun, cross-bow, firearms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol, or house of correction, for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

It is observable, that this section is confined to persons having rights as owners and occupiers, and to their gamekeepers or servants, or assistants to the gamekeepers and servants. And, therefore, where a person was allowed by the owner of land to preserve the game, his servant was not considered to be within the protection of this second section. So that there being no right in such servant to apprehend an individual in quest of game, it was held to be only manslaughter in the trespasser to kill the servant who was pursuing him in order to his apprehension (9). It has also been decided upon this section, that where a demand was made by the defendant upon a gamekeeper to give up some wires and pheasants to him, and the defendant accompanied his demand with violence, upon which the gamekeeper gave them up, the jury were instructed to consider whether this interference had not taken place under a bonâ fide impression that the property in question belonged to the defendant (10).

Limitation of time in prosecutions.] By 9 Geo. 4, c. 69, s. 4, The prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of the act, shall be commenced within twelve calendar months after the commission of such offence (11).

Hares and Conies in a Warren.] By 7 & 8 Geo. 4, c. 29, s. 30, If any person shall unlawfully and wilfully, in the night time, take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and punished accordingly (1). Thomas Glover set several wires in a

(9) 6 C. & P. 389, *Addis's* C.; see 5 C. & P. 525, *R.* v. *Warner* and others.

(10) 3 C. & P. 419, *Hall's* C. As to the joinder of an assault upon a gamekeeper with a common assault, see ante, p. 12.

(11) Whether the preferring of an indictment which was ignored be the commencement of a prosecution so as to warrant the conviction of a party upon an indictment preferred four years afterwards—*Qu.?* 7 C. & P. 228, *Killminster's* C.

(1) That is, by fine and imprisonment, with or without hard labour and solitary confinement, (sect. 4.) So that the latter do not exceed one month at a time, nor three months in one year, 1 Vict. c. 90, s. 5. As to abettors, see sect. 61 of the same act. 7 & 8 G. 4. Apprehension of offenders, 7 & 8 G. 4, sect. 63. The section goes on to prescribe a summary

warren at night, and in one of them a rabbit was caught. Just as he was about taking up the wire on the next morning, where the rabbit was caught, the warrener surprised him. The rabbit was not dead. And the question was, whether this catching was a taking within the meaning of the act. Le Blanc, J., thought it was not, and that taking meant, as in larceny, a taking away, but the rest of the judges (absent Dampier, J.) held, that the word "taking" was satisfied by catching, and that the prisoner was rightly convicted (2). And under this section, it is to be remarked, that the habitancy of the game, if such an expression can be admitted, must be exclusive. They must not be in a condition to run loose whether they will. So that where a person was charged with destroying rabbits in the night time, in a rick yard, where they were kept, and ran about at liberty, it was held that he had not committed an offence within the meaning of the clause (3).

SECT. V.—*Of Misdemeanors committed by the unlawful taking or destroying of Fish, or by Attempts of that nature.*

By 7 & 8 Geo. 4, c. 29, s. 34, If any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through, or be 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; every such offender shall be guilty of a misdemeanour, and shall be punished accordingly (4). Provided always, that nothing in the act shall extend to any person angling in the day time (5). And if the boundary of any parish, township, or village, shall happen to be in or by the side of any such water as hereinbefore mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or village, named in the indictment or information, or in any parish, township, or village, adjoining thereunto.

By sect. 35, it is provided, that if any person shall at any time be found fishing against the provisions of this act, it shall be law-

conviction for such as commit this trespass in the day time. And there is a proviso, with regard to the day time, excepting persons taking or killing conies on any sea or river banks in Lincolnshire, so far as the tide shall extend, or within one furlong of such bank. As to penalties, sect. 66, 67. And the appeal, sect. 72.

(2) Russ. & Ry. 269, *Glover's* C.; S. C. 2 Russ. C. M. 189.

(3) 6 C. & P. 369, *Garratt's* C.

(4) That is to say, by fine and imprisonment, with or without hard labour and solitary confinement, (sect. 4), provided the latter do not exceed one month at a time, nor three months in one year, 1 Vict. c. 90, s. 5. As to abettors, see sect. 61 of 7 & 8 G. 4. The apprehension of offenders, sect. 63. The section (34) goes on to prescribe a summary conviction against persons trespassing upon private fisheries elsewhere than in the places mentioned in the text.—See 1 Burr. 682, *R.* v. *Mallinson.*

(5) Which is punishable under the same section by summary conviction with different penalties according to the places where the offender is discovered fishing. As to the apprehension of offenders, see s. 63. Penalties, see s. 66, 67. Appeal, s. 72.

ful for the owner of the ground, water, or fishery, where such offender shall be so found, his servants, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner: Provided always, that any person angling in the day time against the provisions of this act, from whom any implements used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof, be exempted from the payment of any damages or penalty for such angling.

In a case under 5 Geo. 3, c. 14, (now repealed,) where one Hunsdon was indicted for unlawfully entering a garden, and stealing fish "of the goods and chattels of the said J. T;" it was held, that these words were mere surplusage, and, of course, that the introduction of them did not vitiate the count (6). In this case, also, it was admitted, that the defendant might be indicted for a felony at common law, or a misdemeanor upon the statute, at the election of the prosecutor (7). The mode adopted by the defendant in order to take the fish need not be stated. It was so held, where the old statute had the words, "steal, take," &c., "by any ways, means, or devices whatsoever (8). A fortiori, this allegation need not be introduced under a clause which omits all mention of the method.

Oysters.] By 7 & 8 Geo. 4, c. 29, s. 36, If any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster fishery, for the purpose of taking oysters, or oyster brood, although none shall be actually taken, or shall, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and being convicted thereof, shall be punished by fine, or imprisonment, or both, as the court shall award; such fine not to exceed 20*l.*, and such imprisonment not to exceed three calendar months (9) and it shall be sufficient in any indictment, or information, to describe either by name or otherwise the bed, laying, or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill. Provided always, that nothing herein contained, shall prevent any person from catching or fishing for any floating fish, within the limits of any oyster fishery, with any net, instrument, or engine, adapted for taking floating fish only (10).

(6) East, P. C., 611, *Hunsdon's* C. Contrary to an opinion expressed in the *Queen* v. *Steer*, and others, where, however, the court said, that they would not quash the indictment upon motion. 1 Mod. 183, S. C., 3 Salk. 189, 291. See 3 Mod. 97.

(7) See Ibid.

(8) Russ. & Ry. 205, *Caradice's* C.

(9) With or without hard labour and solitary confinement, s. 4, provided the latter be limited to one month at a time, or three months in any one year. 1 Vict. c. 90, s. 5. As to abettors, see s. 61 of 7 & 8 G. 4.

(10) See 5 Esp. 62.

SECT. VI.—*Of Wrecking, and stealing Tackle.*

Supposing that a man, dog, or cat escape alive from a ship, in which case the ship cannot be adjudged a wreck, it is a misdemeanor not to deliver the goods to persons in the neighbouring town, so that the owner may have restoration of them if he sue within a year and a day. And by 2 & 3 Vict. c. 47, s. 27, whoever shall unlawfully cut, damage, or destroy any rope, cable, cordage, tackle, head-fasts, or other furniture belonging to any ship, boat, or vessel, lying in the river Thames, or in any of the docks or creeks adjacent thereto, with intent to steal or otherwise unlawfully obtain the same, or any part thereof, shall be deemed guilty of a misdemeanor (1).

CLASS II.

OF DEPREDATIONS EFFECTED BY FRAUD, OR ATTEMPTED THROUGH THAT MEDIUM.

The offences we propose to treat of in this class, are those which consist in obtaining property through fraud; and they are occasionally accompanied by a species of force, which, although short of robbery, operates so powerfully upon the mind, as to induce an individual to part with his property rather than encounter the consequences of a refusal. The offence of extortion very particularly applies to offences of this nature. Extortion, considered as a misdemeanor, is but an artifice of a violent character successfully practised upon the mind.

The principle which pervades all the crimes of this class seems to be, that the party plundered, whether the transaction be of a public or private nature, should appear, nominally at least, to assent to the imposition which effects the transit of property from the one hand to the other. Even in extortion, this apparent acquiescence forms a part of the transaction, although it is wrung from the victim under the influence of mental terror. And to take the other extreme, where false accounts are rendered, or false entries made in books of account for purposes of fraud, it is plain, that the trick is so carried on as *primâ facie* to exhibit an assent, either express or implied, on the part of those whose money is thus tampered with.

The machinery of cheating, in cases independent of extortion, seems to be so worked as more or less to lull the suspicions of the other party. Whether the offence be an intrigue to defraud the government, or an individual, a specious and false appearance is put forward in various ways, and with different degrees of art, greater or less according to the likelihood of discovery, or the awakening of apprehension.

(1) Punishable by fine and imprisonment. See sect. 33, 34.

Unless it be a matter relating to the public welfare the law will not recognize a bare lie as a misdemeanor, nor such a trick as the commonest caution can detect and provide against (1). But as soon as the semblance becomes more deceitful, so that care and vigilance are less liable to be called into action, the law will punish the transgression thus attempted or accomplished as a *cheat and a fraud*. Very frequently, in addition to the art which the rogue adopts in order to attain his ends, he uses a false token of some kind, either with reference to himself or a third person, so as to invest the proceeding with greater credit than if he had contented himself with a simple act of knavery. This is a *false pretence*, punishable both at common law and by statute. In order to make the purpose in view more attainable, the dishonest individual sometimes throws a still deeper shade over his plan, more calculated to silence suspicion, and advance credit, and tenders with this idea a counterfeit writing. This act is in very many instances deemed *forgery* both at common law, and by statute. And where the false token is one of public exchange, the same principle which we have above mentioned is still present, and we find the fraudulent and frequently successful *utterer of counterfeit coin*. If a solemn oath or affirmation be employed to verify still further the apparent integrity of the affair, it is an act of *perjury*. And if in order to gain more completely the unlawful booty which is hoped for, the party calls another person or more than one other to his councils, in order to perpetrate one common design of fraud, both, or all, as the case may be, may be indicted for a *conspiracy*. Lastly, we shall have to speak of acts which are done *extorsively*, where the property is, indeed, acquired through the medium of terror, but, at the same time, where the transaction, although apparently free from deceit upon the surface, is nevertheless bottomed in fraud and falsehood.

Sect. I.—*Of Cheats and Frauds.*

At common law.] First, we have to speak of cheats and frauds in their more simple state. And these are either of a public or a private nature, to which may be added the observation, that the same defence as to want of caution which will avail a defendant upon a private prosecution, will be of no use to him when the public interest is concerned.

Public.] An early case concerning frauds affecting the community was where the defendant pretended that he had a power to discharge soldiers. A soldier being deluded by his representation paid him money for a discharge, and the court held the indictment well enough (2). Joseph Jones, an apprentice, who

(1) Much less a letter written for the purpose of drawing a man to a certain town, where no mischief was done nor intended, 2 Show. 20, *R.* v. *Emerton*. Information for deceit. But the court were divided; *Wylde* and *Jones*, Js. for arresting the judgment, *Scroggs*, C. J., and *Twisden*, J. contrà. No judgment was given.

(2) Latch, 202; *Serlested's*, C.

had not served out his term, enlisted himself as a soldier, and received a sum as bounty money. Being discharged, he was indicted for the fraud, his master having it in his power to reclaim his servant, and no objection was made to the subject of the indictment, although the conviction was subsequently set aside for want of due proof of the indenture (3)

In both these cases it is probable that if the transaction had been of a private nature, the charge could not have been sustained, because the soldier must have been very simple to have been so duped in *the absence of a false* token which would have altered the case, and the person who enlisted the apprentice might have made inquiries by which the disqualification of the recruit would have manifested itself. But the matters being of public moment, the dishonesty became immediately punishable.

Again, the sellers of unwholesome victuals (4), or bad wine (5), or dealers who use false weights (6), are liable to be punished for those respective misdemeanors. The case of furnishing bad provisions to the French prisoners, is one which caused some discussion at the time. The charge against the defendant, a contractor consisted in supplying 500lbs. of unwholesome and insufficient bread, the bread being composed of bad and filthy materials, whereby the health of the French prisoners became endangered. The defendant was convicted, but it was moved to arrest the judgment, because it did not appear that the act done was in breach of any contract with the public, or of any moral or civil duty, and the case was submitted to the judges. But the conviction was held right (7), and it is added, that it was not stated in the indictment that the defendant was a contractor, and, moreover, that such an allegation was not by any means necessary by reason of the enormity of the offence which, under any circumstances, would have been indictable (8). So where the baker of the Royal Military Asylum at Chelsea, introduced alum into his bread in such quantities as strongly to impregnate the food, and thus to make it pernicious, it was held, that he was indictable for a misdemeanor, and that his defence of dissolving the alum, and mixing it with the yeast so that it might be equally divided over the batch, was not to be admitted (9). For by Lord Ellenborough, "if a baker will introduce such a substance into his bread, he must do it at his own hazard, and he must take especial care that the benefit he proposes to himself does not produce mischief to others (1)." A new trial was, however, moved for upon the ground, that the proportion of alum used was not only innoxious but wholesome; and it was moved to arrest the judgment, because the indictment had failed to set out the noxious

(3) Leach, 174, *Jones's* C.; S. C, East, P. C. 822.

(4) East, P. C. 822; 4 M. & S. 220, by Lord Ellenborough.

(5) By Lord Ellenborough, 6 East, 133, commenting upon the *Queen* v. *M'Carty* and another, 2 Lord Raym. 1179.

(6) But the quantity of the article so sold must appear in the indictment, although the name of the party to whom it was sold need not be alleged, Str. 497, *R.* v. *Gibbs*.

(7) East, P. C. 822, *Treeve's* C.

(8) Id. 822.

(9) 4 Campb. 12, *R.* v. *Dixon*.

(1) Id. 14.

materials, so that the defendant could not ascertain the nature of the case he had to defend himself against; and secondly, because, although it alleged that he delivered the loaves for the use and supply of the children of the asylum, it omitted to add that he intended to injure the health of the children, or that he intended the children should eat the bread, and, consequently, the *malus animus* did not appear, as it might have done, upon the record. But the court was against the defendant upon all these points. The new trial was refused upon the ground taken at the trial by Lord Ellenborough, and the first point in arrest of judgment was repelled, because a party may allege generally what is within the knowledge of the other party: and the second ground was deemed untenable, for the intention is an inference of law resulting from the act done, and if the loaves were for the use and supply of the children, they must have been delivered with an intention that the children should eat them (2).

The same rule as to cheats prevails with respect to false weights and measures, for these are instruments calculated for deceit, and as the public may be imposed upon by them without any imputation of folly or negligence (3), the matter becomes one which concerns the community at large, and not the mere interests of private men. Thus, cases are cited where cloth was sold with the counterfeited seal of the alnager or public officer (4); and, again, with the seal of the trade fabricated upon the cloth for the purpose of fraud (5). These were false tokens superadded to the deceit, or false representation that the cloth was genuine. So if a man produce a measure, or a bushel, and fraudulently fill it with some other material than that which is the subject of the bargain, he is indictable (6). So the selling of coals by a false measure, is a subject for indictment (7). And the delivery of bread deficient in weight (8). So the selling of ale in black pots not marked (9). So if the owner of a soke mill, where the inhabitants of the vicinage were compellable to grind their corn, were to make his privilege a colour for practising fraud, he might probably be indicted (1). So, again, independently of the question of forgery, the use of false stamps or marks upon plate is indictable (2). And on the other hand, the fraudulent affix of public and authentic marks on goods of a value inferior to such tokens is in itself a cheat at common law (3). As when Fabian put too much alloy into plate, and then corrupted one of the assay master's servants to help him to the proper marks,—he was convicted and sentenced as at common law (4).

(2) 3 M. & S. 11, *R.* v. *Dixon.*
(3) East, P. C. 820.
(4) Id. ib. citing Trem. P. C. 103, *R.* v. *Edwards.*
(5) Id. ib. citing Trem. P. C. 106, *R.* v. *Worrel.*
(6) See id. ib.
(7) Cowp. 324, by Aston, J. See also 2 Russ. C. M. 289, 290.
(8) 2 Russ. C. M. 290, citing 2 Ch. Crim. L. 559. See also 6 & 7 W. 4, c. 52, s. 8, penalty for not obliterating labels under the paper duties.
(9) 1 Ventr. 13 *Burgen's* C.; S. C. 1 Sid. 309; see 2 Keb. 539, *R.* v. *Marsh.*
(1) By Lord Ellenborough, 4 M. & S. 220.
(2) East. P. C. 820.
(3) Id. 194.
(4) Kel. 39, *Fabian's* C.; East, P. C. 194.

The use of false dice is ranged by writers under the same head (5). And one Leeser was called by the court a common cozener of the king's people, because he had been detected in such practices, and he was punished at common law (6).

Moreover false news which are likely to be detrimental to the public are deemed to be cheats. Therefore the writers of such fabricated intelligence have been deemed by all the judges worthy of punishment, and the subjects of a criminal proceeding (7).

And Hawkins observes, that if a person maim himself in order to have a more specious pretence for asking charity, or preventing his being impressed as a sailor, or enlisted as a soldier, he may be fined and imprisoned (8).

Public Officers.] There is no point more plain than that public officers are liable to be called to account for malversations, falsities of accounts, or other fraudulent conduct in the course of their employment; and it makes no difference whether they may happen to be connected with the government, or whether they are engaged in other employments of a public nature. Two parties were charged with enabling persons to pass their accounts with the pay-office, so as to defraud the government, and it was objected that this was only a private matter of account, and so not indictable, but the court held otherwise, as the matter related to the public revenue (9).

So again, the major commandant of a battalion of volunteers was convicted of charging and receiving pay from government for a greater number of men than had mustered in his corps, within certain periods mentioned in his returns to the war-office (1).

So proceedings were taken without objection against a commissary of stores abroad, under 42 Geo. 3, c. 85, for misconduct (2). So an overseer of the poor who omitted to give credit in his account with the parish, for a sum paid by the putative father of a bastard child, although liable to the father, was yet held likewise indictable for a fraud, by reason of his false account (3). So where the minister and churchwardens of a parish returned a smaller sum on the back of a brief for relieving sufferers by fire than they had received, the court referred the prosecutors to their remedy by indictment (4).

So it seems, that an indictment at common law will lie against

(5) East, P. C. 820; 2 Russ. C. M. 289, 7 Mod. 40.

(6) Cro. Jac. 497; *Leeser's* C. P. S. 1; 1 Ro. Rep. 107; *Maddocke's* C.

(7) 2 Russ. C. M. 289.

(8) 1 Hawk. c. 55. s. 4. An indictment for bringing a bastard child privately into a parish, with intent to burden the parish, was quashed only because the bastard being settled where born, could not become so chargeable, 1 Str. 644. *R.* v. *Warne.*

(9) 6 East, 136. *R.* v. *Bembridge* and another; S. C. 3 Dougl. 327.

(1) 2 Campb .513, *R.* v. *Gardner*, prosecuted by information.

(2) 8 East, 31, *R.* v. *Jones*,

(3) 2 Campb. 268, *R.* v. *Martin.*

(4) 1 Sir Wm. Bl. 443, *R.* v. *The Minister, &c. of St. Botolph.* The court refused an information, although it appeared that some of the money collected had been spent at tavern entertainments.

an overseer for not accounting, or refusing to account (5). And the act of procuring a man to marry a single woman, for the sake of getting the child to follow the husband's settlement, has always been deemed fraudulent (6).

It must, however, be carefully set out in the indictment, that the individual in question was a public officer when he committed the breach of duty imputed to him. Where the defendants, collectors of the property tax, were charged with having taken from A. P., a person not named in the commissioner's assessment, the sum of 5*l.* 5*s.*, *under colour and pretence* of their being collectors, and it appeared that, in fact, they had been appointed collectors, though in an informal manner, the court made the rule absolute for a new trial; for it is not competent to the commissioners to prosecute men whom they had in reality appointed, under a statement of their having acted as such by colour and pretence (7). And it was likewise questioned in this case, whether as the statute 43 Geo. 3, c. 99, s. 19, had ordained, that no collector should be liable to any penalty, in respect of the execution of that act, other than the act and one other act inflicted, the common law remedy by indictment was not taken away (8). The decision of the court upon the other point made it unnecessary to determine the latter point (9).

So where the defendant was prosecuted under 49 Geo. 3, c. 123, s. 35, for receiving prize money from seamen without a licence, and it appeared that he had been licensed by the treasurer of the navy, but that his licence had expired and had not been renewed, Lord Ellenborough interposed, and directed an acquittal. The defendant advanced money upon the orders, and although he had received the prize money before the expiration of his licence, still he bore the character of a licensed prize agent, and the learned chief justice said, it could not be intended that those orders should become nullities at the expiration of the licence, and that receiving payment of them afterwards should be an indictable offence (1).

(5) See Comb. 374, *R.* v. *Hummings*; S. C. 5 Mod. 179, nom. *R.* v. *Cummings* and another; 3 Salk. 187, nom. *R.* v. *Hemmings* and another. The court doubted because another remedy had been given by statute. And the court declined to *quash* an indictment against overseers for not paying money over to their successors, 2 Str. 1268, *R.* v. *King*.

(6) Cald. 246, *R.* v. *Compton* and others; 4 Burr. 2116, *R.* v. *Tarrant*, East, P. C. 461, *R.* v. *Herbert* and others. In this case, proof of the consent of the parties was equivalent to an acquittal; for some violence, threat, or contrivance was necessary in order to constitute the offence, East, P. C. 461, *R.* v. *Fowler* and others. But it was deemed sufficient to allege the threat or menace, without adding that the marriage was against the will or consent of the parties, although evidence to that effect was indispensable, id. 462, *R.* v. *Perkhouse* and another; see also 8 Mod. 320, *R.* v. *Edwards* and others. The new act for the amendment of the laws relating to the poor has, in a great measure, put an end to the temptation on the part of overseers to carry out this species of fraud, see 4 & 5 W. 4, c. 76, s. 1.

(7) 7 East, 218, *R.* v. *Dobson* and another. By information for a misdemeanor at common law, filed by the attorney-general, S. C. 3 Smith, 213.

(8) S. C.

(9) Collectors however, who have jointly received money contrary to law, may be indicted jointly, 11 Mod. 79, *R.* v. *Atkinson* and others.

(1) 4 Campb. 46, *R. v. Davis*.

It was made a question upon one occasion, upon an indictment against a public officer, whether the counsel for the crown could avail themselves of two counts, so as to give evidence of part of the sums which the defendant had illegally obtained, under one count, and of the residue, under another. And by Lord Ellenborough, "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual in felonies for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanors. It is the daily usage to receive evidence of several libels, and of several assaults upon the same indictment; and here I see not the slightest objection to evidence of various acts of fraud committed by the defendant in his office of commissary general, though ranged under different counts as distinct and substantive misdemeanors (2).

Public Justice.] Frauds against public justice, as the doing of judicial acts in the name of another, are cheats (3). So where the defendant personated a justice's clerk with intent to extort money from several persons, in order to procure their discharge from certain misdemeanors, the court, from a notion that the matter concerned the public justice of the kingdom, would not quash the indictment, but put the defendant to demur to it (4). So the use of a false instrument connected with the administration of the law is punishable. As a counterfeit fine levied by a fictitious person (5). Putting in bail in a feigned name (6). And uttering a false affidavit to hold to bail, or making or knowingly using it is a misdemeanor, and punishable, whether the instrument be made here or abroad (7).

So the execution of a bail-bond by a married woman, under the pretence of her being a widow, was held to be a fraud at common law (8). And the fraudulent acknowledgment of any recognizance, bail, &c., in the name of another is a *felony* (9)

Private Cheats and Frauds.] We now proceed to th econsideration of private cheating. One principle, upon the subject of fraud,—that of seducing the party cheated to yield his assent, is in the reader's remembrance as having been submitted to his notice. And another principle was, that the same ordinary caution need not be called into action in the case of a public transaction, which is absolutely necessary when a private person is assailed for individual purposes. Accordingly, however base, dishonourable, discreditable, and even infamous a lie may appear to

(2) 2 Campb. 132, *R.* v. *Jones.*
(3) East, P. C. 821.
(4) East, P. C. 1010, *Dupee's* C.
(5) Cro. Eliz. 531, *Hubert's* C.
(6) See 1 Str. 384; and also Tho. Jones, 64, 1 Mod. 46.
(7) 8 East, 364, *Omealy* v. *Newell*; see 1 Russ. C. M. 285.
(8) East, P. C. 821; citing Trem. P. C. 101, *R.* v. *Blackburn.*
(9) 1 Wm. 4, c. 66. s. 11.

the mind of an educated man, a bare lie in private transactions is not the subject of a criminal proceeding at common law. If, however, it be accompanied by a false token, it becomes so punishable (1), and if by a false pretence, it is for the most part within the stat. 7 & 8 Geo. 4, c. 29, s. 53, which preceded 30 Geo. 2, c. 24 (2).

First, to take the instances of mere falsehood. The defendant came to a person, and said he had been commissioned by B. to receive 20*l.* due from that person to B., and he received it. Being indicted, the court said, that unless there were a false token, the case was not punishable, and the party was left to his action (3). So where a rogue persuaded a woman to give him several sums of money upon the plea of his having sold part of a ship to her husband, the same doctrine obtained (4). The defendant delivered so many bushels less than he had contracted for, and the prosecutor was left to his action (5). Pinkney sold a sack of corn at Ripon market, and falsely affirmed that the measure was a Winchester bushel, but the court quashed the indictment upon motion (6). Driffield delivered a quantity of coals, purporting to be two bushels, but there were only one bushel and three pecks; and the rule for quashing the indictment was made absolute (7). So it was where the defendant delivered a deficient quantity of beer (8). The offence of selling by *false* measure must be made out before the indictment can be maintained (9). The cases on the subject were much considered where a brewer had been convicted for delivering sixteen gallons instead of eighteen, and fraudulently receiving the difference. It was insisted, that all the old cases were decided before verdict, whereas here the jury having found the defendant guilty, it might be presumed that he had sold by false measure (10). But the court arrested the judgment, and Denison, J., mentioned to the court the case of one Wilders, who was indicted for sending so many vessels of ale *marked* as containing a certain measure, and writing a letter assuring the buyer that they did contain that measure, and yet the indictment was quashed,

(1) See post, in this section.

(2) See post, sect. 2.

(3) 6 Mod. 311, *The Queen* v. *Hannon*. But this is a false pretence within 7 & 8 Geo. 4, c. 29, s. 53.

(4) 1 Salk. 379, *Reg.* v. *Jones*. See also 7 Mod. 317. (Lord Hale had laid down a contrary doctrine, 1 Hale, 506.) To the same effect, *Holt's* Ca. 354, *Glanvill's* C. 11 Mod. 222, *R.* v. *Grantham*, Sembl. S. C. But this would be a false pretence within 7 & 8 Geo. 4, c. 29, s. 53; if there were, in reality, a debt due to B., and the money were paid to the defendant.

(5) East, P. C. 818, note (a), *R.* v. *Nicholson*.

(6) 2 Burr. 1129, *Pinkney's* C.; cited by Wilmot, J., 2 Barnard. 244; Semb. S. C. On the other hand, it must not be understood, that where the court has refused, on these occasions, to quash the indictment, they have necessarily considered that the charge was well founded, East, P. C., 818, note (b).

(7) Say. Rep. 146, *Driffield's* C.

(8) 1 Wils. 301, *R.* v. *Combrune*.

(9) 3 Burr. 1697, *R.* v. *Osborn*, a case of coals. See also as to false pretences, sect. 2. 7 C. & P. 848, *R.* v. *Reed*.

(10) An indictment for using false weights and measures, should state that they were used in trade, 1 Freem. 524.

after argument, upon motion (2), "a stronger case than the present" (3).

In all these cases, the prosecutor might have detected the cheat by investigating the circumstances at the time, and at all events, he might have had his action. And now by various statutes, penalties are ordained against persons who sell goods below the due measure.

The law is the same if a tradesman be requested to send goods by the hands of the defendant, who falsely pretends that he has been directed by another person to give the order (4). And, on the other hand, if the tradesman should sell goods of an inferior quality, affirming them to be the best, it is a mere lie, and not a cheat at common law (5). So where a servant sold a gold chain for his master to a customer, affirming that the chain was of real gold, whereas it was under the standard, and not marked, the defendant, a pawnbroker, was held not to be indictable for a misdemeanor (6). The case of an unsound horse sold upon a false warranty, is governed by the same rule (7).

So again, the fraudulent deposit of goods in pawn under false representations of their value is a mere lie, as far as an indictment at common law is concerned. As where Lewis in consideration of an advance of money, deposited some gum with the lender, which he pretended to be gum seneca, and which he subsequently sold to the prosecutor for 7*l.*, whereas it was worth but 3*l.* (8). And a breach of promise with reference to a pawn, is within the same construction. A woman was sufficiently foolish to lend 600*l.*, upon the faith of a pledge that the defendant would send her fine cloth and gold dust. The defendant sent her neither, but only some coarse cloth worth little or nothing. And the court granted a certiorari, observing, that it was the prosecutor's fault to repose such a confidence in the defendant (9).

An indictment was once preferred against a person for taking and detaining wheat. He was the keeper of a common grist mill,

(2) 2 Burr. 1125, *R.* v. *Wheatly*; S. C. 1 Sir Wm. Bl. 273; S. P. 2 Burr. 1130, *R.* v. *Dunnage*. Id. 1128, *R.* v. *Wilders*. To the same effect, Say. Rep. 147. *R.* v. *Botwright*.

(3) By Lord Mansfield in giving judgment upon *R.* v. *Wheatly*.

(4) 2 Str. 866, *R.* v. *Bryan*; 5 Mod. 18, *R.* v. *Wood*. But if the goods are obtained, these are false pretences within 7 & 8 Geo. 4, c. 23, s. 53.

(5) 6 Mod. 61, *The Queen* v. *Dixon*.

(6) Cowp. 323, *R.* v. *Bower*.

(7) 2 Burr. 1128, in Marg.; 1 Stark. N. P. C. 402, *R.* v. *Pywell* and others. Where the indictment was for conspiracy, but there being no evidence of concert amongst the parties to effect a fraud, Lord Ellenborough said, that all the defendants in actions upon warranties ought to be indicted as cheats, if the charge as it then turned out could be supported.

(8) Say. Rep. 205, *R.* v. *Lewis*. However, in a case for selling goat's hair instead of human hair, the defendant had judgment against him, but it was subsequently arrested because of a want of venue, Cun. Rep. 94, *R.* v. *Mayor*.

(9) 1 Salk. 151, *Nehuff's* C. Whether a pawnbroker could be properly convicted of fraud, for refusing to deliver up pledged goods upon a tender of the money, seems to have been doubtful, Holt, C. J. & Eyre, J., were in favour of the affirmative upon one occasion. 2 Salk. 522, Anon. But at another time, the

and kept back 42lbs. weight of the wheat, but as there was neither any allegation of actual force, nor of taking, as for unreasonable toll, it was held, that no indictment would lie, and the prosecutor was left to his action of trover (1). So where a miller received good barley to grind, and delivered in return a musty and unwholesome mixture of barley meal, there being no allegation that the bad material was for the food of man, the judgment at quarter sessions against the miller was reversed upon error brought. The indictment was likewise held bad for want of stating a place where the defendant received the barley, and likewise for uncertainty in not stating to which of two separate parcels of four bushels alleged to have been received, the three bushels of mixed oat and barley meal (the subject of the charge) applied (2). After these numerous instances of moral offences, which the common law of misdemeanor could not reach, it might almost be questioned whether any common cheat could be said to be at all punishable, or whether every deceit might not be qualified as a bare lie, and so escape retribution upon the plea of due want of caution. However, we have seen, that in public matters this distinction is not admitted, and, in private transactions, as soon as a false token is introduced a new feature is immediately communicated to the offence (3). Govers, intending to cheat the prosecutor, falsely assumed to himself the character of a merchant, and affirmed that he was such a trader, and that he had received commissions from Spain.

court quashed an indictment for refusing to deliver up gold rings under such circumstances, 1 Salk. 379, *Bainham's* C.

(1) 2 Str. 793, *R.* v. *Channel.*

(2) 4 M. & S. 214, *R.* v. *Haynes.* In *R.* v. *Wood*, 1 Sess. Ca. 217, the court were unanimous not to quash an indictment against a miller for changing corn, apparently on the ground, that as it was a cheat in the way of trade, it concerned the public; but unless the mill were a soke mill, *R.* v. *Haynes* is an authority against this decision, if put upon the footing of public interest. If it were intended to put the defendant to demur, in order that the matter might be further considered, or by reason of the enormity of the offence, the case would be different. See 2 Russ. C. M. 296 note (z). It was once held, that the tearing by the defendant of a settled account, of which he had contrived to get possession by fraudulent insinuations, was an indictable offence, but as it is now understood that an indictment will not lie for a mere trespass, that case cannot be considered of much authority. 6 Mod. 175, The *Queen* v. *Crisp.* The prisoners in another case used force in taking away a horse, which the prosecutor said in a passion was not worth more than 5*l.* The prisoners had just asked him what he would take for the horse, and upon his answer, tendered him the money. The prosecutor then said the horse was borrowed, and that he could not sell it, but not being able to get it back, he charged the prisoners with horse stealing. The jury upon being told that the indictment could not be supported, were inclined to find a verdict "guilty of fraud," but Lord Ellenborough expressed his opinion, that had there been an indictment for fraud it could not have succeeded, and of course an acquittal was directed in respect of the felony. 3 Ch. Burn. 336, *R.* v. *Alexander*, and another. For other cases see 1 Sid. 451, *R* v. *Parris* and others. Obtaining goods upon the pretence of a treaty of marriage, Lofft. 146, Anon. See 1 Barnard. 87.

(3) See 1 East, 185, by Lord Kenyon.

If he had stopped there, his subsequent conduct would have been no offence at common law. But he produced several paper writings which he declared to be letters from Spain, containing commissions for goods to a large amount, and thus obtained two watches from the prosecutor. And by reason of the tendering of these paper writings, the court refused to arrest the judgment (4), for here were the counterfeit tokens superadded to the falsehoods. So, before the uttering of a forged instrument was made felony, one who produced a promissory note with a counterfeit indorsement was held to have obtained the money which formed the subject of the charge, by a false token, and Pengelly, C. B., directed the jury to convict (5). So where the defendant brought a bill of exchange to the prosecutors, and shewing the indorsement, declared that he was the payee, it seems, although he was not convicted of the bare cheat, but of a conspiracy, that he might have been charged with the misdemeanor first mentioned, by reason of the false token, had it been necessary (6). But the defendant's own cheque upon a banker with whom he had no effects when he drew it, is not such a fraudulent token as will support an indictment at common law, although it is a false pretence under 7 & 8 Geo. 4, c. 29 (7). The defendant had a note given upon condition. He brought an action upon it, and tore off the condition, and an information was granted against him for the fraud (8). One Lara obtained some lottery tickets by a fictitious order, and Lord Kenyon in pronouncing his opinion that the judgment should be arrested, observed, that it would be ridiculous to call the cheque a false token, "that left the defendant's credit just where it was before." Grose, J., said that the offer of the false draft was "only adding another lie." And Lawrence, J., cited Nehuff's case (9), where the court found fault with the prosecutor for reposing confidence improperly in the defendant (1). Where the defendants had made a person drunk in order to induce him to sign a note for 20*l.*, the court considered the matter as one belonging to civil rights, and refused an information (2).

Indictment.] With respect to the form of the indictment, it may be remarked, that the false token must be set out, and, consequently, that a general allegation of cheating by false tokens is insufficient (3). But it does not appear necessary to describe them more particularly than they were shewn or described to the

(4) Say. Rep. 206, *R.* v. *Govers.*
(5) East, P. C. 825, *Hales's* C. citing 9 St. Tr. 75. See 1 Barnard. 112.
(6) Leach, 229, 232, *Heweys'* C.; East, P. C. 1010.
(7) 3 Campb. 370, *R.* v. *Jackson* and another; 1 Moo. C. C. 228, and post, sect. 2.
(8) 1 Barnard. 126.
(9) Ante p. 27.
(1) 6 T. R. 565, *R.* v. *Lara*, S. C. Leach, 647. There are many other instances of private frauds which, although not indictable as simple misdemeanors, become the subjects of a criminal proceeding as soon as they are attempted, through the medium of a conspiracy. See East, 823.
(2) 1 Barnard. 87, *R.* v. *Roo* and another. See also Sty. 145, *R.* v *Wood*, and East, P. C. 817, note (b).
(3) East, P. C. 837.

party at the time, and in consequence of which he was imposed upon (4). Vi et armis is not necessary (5). Several may be joined in the same indictment with reference to the same cheat as if they were present and concurring with those who employed the false tokens (6).

An objection was once taken to a count which described the false pretence as having been made to J. S., but alleged that the cheat and fraud were practised upon another person, thus making the pretence which was used to deceive one man operate to the prejudice of another (7). But the defendant was convicted notwithstanding this objection; although the judgment was ultimately arrested upon another ground (8).

Judgment.] The judgment for a cheat or fraud at common law, is fine and imprisonment (9), and the punishment of the pillory might formerly have been added, but that corporal pain has been abolished (1).

Cheats and Frauds by Statute.] There are certain fraudulent practices which have been provided for by various statutes, independently of the act which particularly regards false pretences, and which will be the subject of the next section.

Insolvent Debtors.] Thus, in the case of insolvent debtors, it is enacted by 1 & 2 Vict. c. 110, s. 99 (2), that in case any prisoner whose estate shall, by an order under the act, have been vested in the said provisional assignee, shall, with intent to defraud the creditors or creditor of such prisoner wilfully and fraudulently omit in his schedule, so sworn to as aforesaid, any effects or property whatsoever, or retain or except out of such schedule, as wearing apparel, bedding, working tools, and implements, or other necessaries, property of greater value than twenty pounds, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor, and thereupon it shall be lawful for the court before whom such offender shall have been so tried and convicted, to sentence such offender to be imprisoned and kept to hard labour for any period of time not exceeding three years; and that in every indictment or information against any person for any offence under this act, it shall be sufficient to

(4) East, P. C. 837.
(5) 1 Freem. 523.
(6) East, 838.
(7) Leach, 652, *Lara's* C.
(8) The trial may be either where the cheat is performed, or where it comes into fraudulent operation. As where one Munton, a government storekeeper in Antigua, was indicted for transmitting false vouchers to his agent in London, which *were delivered by the agent at the Custom-house in London.* He was tried and convicted in Middlesex, 6 East, 590, *R.* v. *Munton* cited. 1 Esp. 62, *R.* v. *Munton.*
(9) East, P. C. 838.
(1) The power of restitution on the part of the court is confined to the case of felony, or misdemeanors under the stat. 7 & 8 Geo. 4, c. 29, and does not, therefore, extend to the offence of cheating at common law.
(2) An Act for abolishing arrest on mesne process in civil actions, &c.

set forth the substance of the offence charged on the defendant, without setting forth the petition or order vesting such prisoner's estate in the provisional assignee; appointment of assignee or assignees or balance-sheet, order for hearing, adjudication, order of discharge or remand, or any warrant, order or proceeding of or in the said court, except so much of the schedule of such prisoner, as may be necessary for the purpose. (3)

A plea of aut. acq. cannot be maintained by an insolvent debtor, if he be charged with omitting goods in his schedule, which were not specified in the indictment upon which he was acquitted, but Patteson, J., observed, that such a course ought not to be taken, except under very peculiar circumstances (4).

Witchcraft.] There is still an act in force respecting witchcraft. By 9 Geo. 2, c. 5, s. 4, if any person shall pretend to exercise, or use any kind of witchcraft, sorcery, inchantment or conjuration, or undertake to tell fortunes, or pretend from his or her 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; every person so offending, being thereof lawfully convicted on indictment or information in that part of Great Britain called England, or on indictment or libel, in that part of Great Britain called Scotland, shall for every such offence, suffer imprisonment by the space of one whole year, without bail or mainprize; and once in every quarter of the said year, in some market town of the proper county, upon the market day, there stand openly in the pillory for the space of one hour (5), and also shall, if the court by which the judgment shall be given shall think fit, be obliged to give sureties for his or her good behaviour, in such sum, and for such time, as the said court shall judge proper according to the circumstances of the offence, and in such case shall be further imprisoned until such sureties be given. And an information at common law will lie for imposture (6).

False Pleading.] False pleas may be called cheats. As to plead any manner of recovery in bar of a popular action, such recovery having been obtained by covin (7).

Games.] Cheating at games has likewise attracted the notice of the legislature. By 9 Ann, c. 14, s. 5, if any person or persons whatsoever, at any time or times after the said first day of

(3) Debts due to the insolvent, have been considered to be effects or property under the 7 Geo. 4, c. 57. s. 70; 5 C. & P. 23, *R.* v. *Moody.*

(4) 2 M. & Rob. 26, *R.* v. *Champneys.*

(5) But note, that the punishment of the pillory is abolished, 56 Geo. 3, c. 138, s. 2.

(6) See 12 Mod. 556, *Hathaway's* C.

(7) 4 Hen. 7, c. 20, punishable by imprisonment for two years. See likewise the old act, 20 Hen. 3, c. 1, concerning the deforcing of widows, which punished that offence by amercement. The statute is still unrepealed.

May, 1711, do or shall by any fraud or shift, cozenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any of the games aforesaid, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall at any one time or sitting, win of any one or more person or persons whatsoever above the sum or value of 10*l.*, then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of 10*l.*, and being convicted of any of the said offences upon an indictment or information, to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money or other thing so won as aforesaid: and in case of such ill practice as aforesaid shall be deemed infamous, and suffer such corporal punishment, as in cases of wilful perjury (8), and such penalty to be recovered by such person or persons as shall sue for the same by such action as aforesaid (9).

By 39 & 40 Geo. 3, c. 60, s. 14, to certify or declare any thing which shall be untrue in any certificate or declaration made to the committee of the corporation of orphan girls, the settlement of whose parents cannot be found, or in any certificate, &c., which any three or more of such committee may require previously to the admission of a girl, is a misdemeanor punishable by imprisonment, for not less than six months, nor more than two years, at the discretion of the court.

By 50 Geo. 3, c. 59, s. 2, any officer, collector, or receiver, intrusted with the receipt, custody, or management of any part of the public revenues, who knowingly furnishes false statements or returns of the sums of money collected by him or instrusted to his care, or of the balances of money in his hands or under his controul, shall be punished by fine and imprisonment, and become incapable of holding any office under the crown.

So in the case of assessed taxes, false declarations are punishable, by 50 Geo. 3, c. 105, s. 9, with six months' imprisonment, and a fine not exceeding treble the amount of duty with which the officer may have been charged, as the court shall think fit.

Millbank: *Fraudulent entries.*] By 56 Geo. 3, c. 63, s. 12, if upon inquiry, any false entry shall appear to have been knowingly made by the governor, or other officer or servant in their respective accounts, or any fraudulent omission, or other fraud or collusion, shall in like manner be discovered, they may dismiss the officer, and cause an indictment to be preferred at the sessions for the county where the prison is situate, or in any adjoining

(8) Note, that the pillory is abolished, 1 Vict. c. 23.

(9) See the case of *R.* v. *Luckup*, Str. 1048; and 7 T. R. 461, note, and post chap. 4.

county; and, upon conviction, the party shall be punished by fine and imprisonment, at the discretion of the court (1).

Excise.] By 7 & 8 Geo. 4, c. 53, s. 44, if any collector or other officer of excise, shall neglect to keep distinct accounts, and according to the form prescribed, of all duties, &c., and penalties received by him, and of all balances of money in his hand, or shall knowingly render false accounts thereof, he shall be punished upon conviction by fine and imprisonment.

Officer of Excise fraudulently delivering out false Permits.] By 2 W. 4, c. 16, s. 15, it is enacted, that every officer of excise who shall deliver out, or suffer to be delivered out any paper, prepared or provided, or appointed by the commissioners of excise, to be used for permits in blank, or before such permit shall be filled up and issued, agreeable to and in conformity with a request note; and every officer who shall knowingly give or grant any permit to any person not entitled to receive the same, or shall knowingly give or grant any false or untrue permit, or shall make any false or untrue entry in the counterpart of any permit given or granted by him, or shall knowingly or willingly receive or take any goods or commodities into the stock of any person or persons, brought in with any false or untrue or fraudulent permit, or shall knowingly or willingly grant any permit for the removal of any goods or commodities out of or from the stock of any person or persons who shall have received or retained such goods or commodities, or any of them, under or by virtue or pretext of any false, untrue, forged, or fraudulent permit, or shall knowingly or willingly give any false credit in the stock of any person or persons, beyond the credit to which such stock is justly and truly entitled, so as to enable such person or persons falsely and fraudulently to obtain a permit or permits; or if any such officer shall knowingly or willingly suffer the same to be done directly or indirectly; every officer so offending in any of the cases aforesaid, shall be guilty of a misdemeanor, and on conviction, shall suffer such punishment by fine and imprisonment, or fine or imprisonment, as the court shall award; and every officer so convicted, shall from thence-

(1) By 32 Geo. 3, c. 56, If any person shall falsely personate any master or mistress, executor, administrator, wife, relation, housekeeper, agent, steward, or servant of a master or mistress, and either personally, or in writing, give a false character to a servant, or pretend, or falsely assert in writing, that a servant had been hired for a period of time, or in a station, or was discharged at any other time, or had not been hired in any previous service, contrary to truth; and if any person shall offer as a servant, with a pretence of service contrary to truth, or a false, or altered certificate of character; and if any person having been before in service, shall pretend not to have been in any previous service, on conviction before two justices, these respective offenders shall forfeit 20*l.*

But assuming the name of another person who had been a servant in the same place with the offender, is not within the provisions of the act. 2 Russ. C. M. 315, note (q), citing 8 Ev. Stat. 909.

forth be incapable of holding any office or place in or relating to any of the revenues of the united kingdom.

Ecclesiastical Leases, false Recitals, &c.] By 6 & 7 W. 4, c. 20, s. 3, To execute an ecclesiastical lease knowingly with false recitals therein, or wilfully to introduce any such false recitals therein, or aid in so doing, or to prepare and ingross or cause to be prepared, &c., any such lease or counterpart containing such false recitals, is a misdemeanor (2).

Chelsea Hospital Certificate.] By 7 Geo. 4, c. 16, s. 25, To obtain, or endeavour to obtain, any pension or allowance from Chelsea Hospital, by means of a false or altered certificate, is punishable by fine and imprisonment as a common law misdemeanor.

By 11 Geo. 4, c. 20, s. 89, Any petty officer or seaman, non-commissioned officer of marines or marine obtaining or attempting to obtain pay, by means of a false or forged certificate, purporting to be a certificate of discharge, shall incur the penalties of perjury.

Post Office.] By 1 Vict. c. 36, s. 31, "Whereas post letters are sometimes delivered to the wrong person, and post letters and post letter bags are lost in the course of conveyance or delivery thereof, and are detained by the finders in the expectation of gain and reward;" it is enacted, that every person who shall fraudulently retain a post letter or post letter bag, whether he shall have found it or not, shall be guilty of a misdemeanor, and liable to be punished by fine and imprisonment (3).

Public Frauds—Metropolis Police Act, 2 & 3 Vict. c. 47.] By 2 & 3 Vict. c. 47, s. 28, any constable, may take into custody every person who for the purpose of preventing the seizure or discovery of any materials, furniture, stores, or merchandize belonging to or having been part of the cargo of a ship, boat, or vessel lying in the Thames, or in the docks or creeks adjacent, or of any other articles unlawfully obtained from any such ship or vessel, shall wilfully let fall or throw into the river, or in any other manner convey away from any ship, &c., wharf, quay or landing place, any such article, or who shall be accessory to any such offence, and also may seize and detain any boat in which such person shall be found, or out of which any article shall be so let fall, &c., and every such person shall be deemed to be guilty of a misdemeanor (4).

By sect. 29, Every person who for the purpose of protecting or preventing any thing whatsoever from being seized within the

(2) And the offender shall be punished by a fine of 500*l.*, in addition to any other punishment for misdemeanor, or, at his option, he may in lieu of the penalty of 500*l.*, forfeit five years improved annual value of the hereditaments comprised in such lease.

(3) With or without hard labour, &c, see note (1) at p. 8.

(4) Punishable by fine and imprisonment, see sect. 33, 34.

metropolitan police district, on suspicion of its being stolen or otherwise unlawfully obtained, or of preventing the same from being produced or made to serve as evidence concerning any felony or misdemeanor committed or supposed to be committed within the metropolitan police district, shall frame or caused to be framed any bill of parcels, containing any false statement in regard of the name or abode of any alleged vendor, the quantity or quality of any such thing; the place whence, or the conveyance by which the same was furnished, the price agreed upon or charged for the same, or any other particular, knowing such statement to be false, or who shall fraudulently produce such bill of parcels, knowing the same to have been fraudulently framed, shall be deemed guilty of a midemeanor (5).

By sect. 30, Every person who shall be found within the metropolitan police district, in or upon any canal, dock, warehouse, wharf, quay, or bank, or on board any ship or vessel, having in his or her possession any tub or other instrument for the purpose of unlawfully obtaining any wine, spirits, or other liquors, or having in his or her possession any skin, bladder, or other material or utensil, for the purpose of unlawfully secreting or carrying away any such wine, spirit, or other liquors, and any person who shall attempt unlawfully to obtain any such wine, &c. shall be deemed guilty of a misdemeanor (6).

By sect. 31, Every person within the metropolitan police district, who shall bore, pierce, break, cut, open, or otherwise injure any cask, box, or package, containing wine, spirits, or other liquors, on board any ship, boat, or vessel, or in or upon any warehouse, wharf, quay, or bank, with intent feloniously to steal, or otherwise unlawfully obtain any part of the contents thereof; or shall unlawfully drink, or wilfully spill, or allow to run to waste any part of the contents thereof, shall be guilty of a misdemeanor (7).

And by sect. 32, Every person who shall within the metropolitan police district, wilfully cause to be broken, pierced, started, cut, torn, or otherwise injured any cask, chest, bag, or other package, containing or prepared for containing any goods while on board of any barge, lighter, or other craft, lying in the said river, or any dock, creek, quay, wharf, or landing place adjacent to the same, or in the way to or from any warehouse, with intent that the contents of such package or any part thereof, may be spilled or dropped from such package, shall be deemed guilty of a misdemeanor (8).

Sect. II.—*Of False Pretences under the Statute* 7 *&* 8 *Geo.* 4, *c.* 29, *s.* 53.

In the last section it has been shewn that the common law requires a certain degree of caution from individuals who possess

(5) Punishable with fine and imprisonment.
(6) Punishable with fine and imprisonment, see sect. 33, 34.
(7) Id.
(8) Id.

property so as to throw a shelter round them in cases of ordinary intrigue, and likewise to operate as a check upon those who might be tempted to commit frauds through the facility of access. But it was discovered, that the proportion of those who possessed this necessary vigilance was not so great but that numerous and gross cheats were constantly put in action to the prejudice of the less wary, and the legislature, therefore, interfered to protect a class which have been called "the weaker part of mankind" (9).

Still, it was considered, that the statutes had not made such a change as entirely to exempt individuals from using the most common prudence. If the pretence be absurd or irrational upon the face of it, or such as the party has, at the very time, the means at hand of detecting (1), it has been deemed proper to exclude his case from the operation of the enactments (2). Consequently, the legislature contemplated three kinds of persons in framing the provisions upon this subject of false pretences. First, those who easily become dupes to the artifices of others, although the pretence be such as a little caution and foresight might guard against. 2ndly. Those of strong minds, whose duty it is to be vigilant, and of whom it is expected that they should not be readily beguiled. 3rdly. Such as are so thoughtless and incautious as to be the prey of a trick, however shallow. It was on behalf of the first of these classes that the parliament interfered. If the second were entrapped by a common cheat, they would naturally be the objects of ridicule rather than of pity; and if the line were drawn so closely as to meet the infirmities of the last class, the most ordinary care in the management of men's affairs might be disregarded. Such pretences, therefore, as are calculated to throw those off their guard who, through defect of education or of natural quickness, are not so shrewd as some of their neighbours, are the offences which the statutes have proposed to punish. In the first instance, by the 33 Hen. 8, c. 1, privy tokens and counterfeit letters in other men's names were made the subjects of attention, as a key, a ring, or something denoting a real visible mark (3). And writings generally, if made in the names of third persons, seem to have been within the purview of the statute (4). But a false affirmation or promise was held not to be within that act. As when one Munoes persuaded a woman to let him have a note for 500*l*. upon the false pretence of finding a person in the next room who would discount it (5). The next act was the 30 Geo. 2, c. 24. It is to be observed, that both these statutes are repealed. The act of 30 Geo. 2, punished upon conviction, all those who knowingly and designedly obtained from any person, money, goods, wares, or merchandizes, with intent to defraud any person of the same, and designated them as offenders against law and the public peace. The decisions upon this latter enactment are very applica-

(9) 3 T. R. 105, by Ashurst, J.
(1) East, P. C. 828.
(2) See post in this section.
(3) East, P. C. 826; 7 Mod. 315; S. P. Id. 316, *The Q.* v. *Gratland*, 8 Ann., cited.
(4) East, P. C. 827.
(5) 7 Mod. 315, *R.* v. *Munoes*, S. C. Str. 1127.

ble to the present state of the law, and we shall, therefore, refer to them immediately. The third act, and that which governs the law of false pretences now is the 7 & 8 Geo. 4, c. 29. By sect. 53, [after reciting that a failure of justice frequently arises from the subtle distinction between larceny and fraud; it is enacted that, If any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor; Provided always, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by certiorari (6); and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

However, if the case turn out to be a misdemeanor, the prisoner must be acquitted of the larceny. Whilst, on the other hand, the statute goes no further than larceny, and, therefore, where the charge was for obtaining certain linen upon false pretences, and a letter was produced in evidence with this request:—"Please to let the bearer (A. B.) have, for (C. D.), four yards of linen." Signed, (C. D,) it was held, that the indictment could not stand, for this proof disclosed the heavier crime of forgery under 1 Will. 4, c. 66, s. 10 (7). Sometimes there is a statutable direction as to what shall be called a false pretence. As in the case of fraudulent desertion under the mutiny acts.

Before we enter upon the consideration of this important statute, it may be as well to remark, that the old doctrine laid down by several of the judges in Pear's case (8); and which confined the operation of a similar statute to this (the 30 Geo. 2, c. 24), to cases where credit was obtained in the name of a third person, is now exploded. The learned judges upon that occasion, were of opinion, that the stat. 30 Geo. 2 did not extend to cases where a man, on his own account, got goods with an intention to steal them (9). And Sir Edward East observes, that this latter position is undoubtedly true as to both the statutes of Hen. 8 and Geo. 2, in the sense applied to it in Pear's case, in contradistinguishing cases of larceny from cheats (1). "And," continues Sir Edward East, "the former branch (that is the limitation of credit to the names of third persons) is also clearly founded upon the express words of the stat. of Hen. 8, which speaks of privy tokens, &c., in other men's names. But it cannot fail to be noted, that the words of the statute of Geo. 2 are much more general, and have no such restrictive words; and, indeed, it was purposely passed in order to supply the deficiencies of the former statute. Besides, such an interpretation seems scarcely consistent with the

(6) In all cases whether larceny or misdemeanor, 9 Dowl. P. C. 135, *R.* v. *Butcher*,
(7) 5 C. & P. 553, *R.* v. *Evans*.
(8) East, P. C. 689.
(9) Ibid.
(1) Id. 832.

doctrine in Young's case, in Witchell's case, and other authorities. In the former, Buller, J., said, that the ingredients of the offence within the statutes were the obtaining by false pretences, with intent to defraud; that if the intent were made out, and the false pretence used to effect it, the case was brought within the statute" (2). Having thus brought to the attention of the reader the generality of the statute of 30 Geo. 2, which is followed by the present act of 7 & 8 Geo. 4, we will proceed to mention some instances of the more enlarged view which the statute takes. Two men bought some goods of a jeweller at Cheltenham, and tendered their own check upon some London bankers, which was accepted. It was proved, however, that they kept no cash with the bankers, nor had any account with them. For the defendants, *R.* v. *Lara*, 6 T. R. 565, was cited, but Bayley, J., said, that the point had lately been before the judges (3), and overruled the objection (4). Upon a previous occasion, Freeth had uttered a counterfeit note for 10*s.* 6*d.* for which he obtained change, but without saying that the note was genuine, or making any representation respecting it, and the judges held, that he had been properly convicted under 30 Geo. 2, c. 24 (5). So where the defendant availed himself of a post dated cheque, drawn by himself, to obtain a watch and chain, accompanying the cheat by false representations, the judges were of opinion, that the conviction was proper (6). The prisoner accepted a bill which the drawer negociated, and then under pretence of being prepared to pay the residue, the prisoner borrowed money from the drawer in order to pay a part of the bill. It was in evidence that the prisoner was not so prepared, and did not intend to apply the money to the service of the bill. Patteson, J., held this to be an offence within 7 & 8 Geo. 4, c. 29 s. 53 (7).

Having thus shewn that the statute 7 & 8 Geo. 4, c. 29, may be considered as general in its operation, we proceed to shew more particularly what the false pretences are which the act contemplates. Thus, if A. come to B. and pretend that he has been sent by C. to receive a debt due from B. to C., and receive it, however secure A. may be from an indictment for a fraud at common law, he must be considered as guilty of a false pretence within 7 & 8 Geo. 4, c. 29 (8). So, if a tradesman be imposed upon by a defendant under a pretence that the defendant was sent by a customer to order goods, it is a false pretence, if the goods be obtained, within 7 & 8 Geo. 4, c. 29 (9). So, where the prisoner went to a tradesman, as from a neighbour, requesting a loan of

(2) Ibid. And see these cases post in this section.

(3) See 1 Moo. C. C. 229, where *R.* v. *Freeth*, Russ. & Ry. 127 is mentioned as the case in question.

(4) 3 Camp. 370, *R.* v. *Jackson*, and another. The defendants were sentenced to be transported for seven years; see also 1 Moo. C. C. 228.

(5) Russ. & Ry. 127, *Freeth's* C.

(6) 7 C. & P. 825, *Parker's* C.

(7) 2 Moo. & Rob. 17, *Crossley's* C.

(8) See ante, p. 26.

(9) See ante, p. 27, Leach 498, *Cockwaine's* C.; S. P. Russ. & Ry. 225, *Adams's* C.

some silver, which was granted, the court held, that it was not a felonious taking, but a false pretence (1). So, again, where the prisoner wrote a letter in another's name, to a third person, in order to borrow money, in which he succeeded, it was held to be a misdemeanor, and not felony (2). Here the name and credit of a third person were employed. So, where Young and others contrived to get from the prosecutor the sum of twenty guineas under a pretence of a bet with a colonel in the army, the defendants having made themselves the depositaries of the supposed stakes, the court of king's bench was clear, after much argument, that the indictment for false pretences had been well preferred, and that the conviction was right (3). So, again, Count Villeneuve was convicted, and sentenced to hard labour on the Thames for obtaining money from Sir T. Broughton, upon the plea of the Count having been intrusted by the Duke de Lauzun to take some horses from Ireland to London, that he had been detained by contrary winds, and had spent his money (4). So, where the owner of goods had intrusted them to a carrier in order that they should be delivered to the consignee, and the carrier, instead of delivering them, went to the consignor and demanded 16*s.* for the carriage, pretending that he had lost or mislaid the receipt; the carrier was held, upon error brought, to have been rightly convicted (5). And so it was, where an attorney persuaded a person to make up a matter punishable upon summary conviction upon condition of receiving some money which was never paid, but the attorney obtained money from the prosecutor by reason of the composition (6). A fortiori, where the false token is produced, the offence comes within the act. As in the case of Witchell, who was employed by certain clothiers to keep the account of shearmen's work, which he delivered in to a clerk weekly, and received the amount. He was not authorized to draw from the clerk for money generally on account, but only for so much as the shearmen actually earned. On the occasion which gave rise to the charge, he gave in a note to the clerk for 44*l.* 10*s.*, the general account of the week's wages, and received it. But, it appeared from a book, in which he kept the items of account, that he had charged not only for men who had not been employed at all, but likewise for more work than those who had been working had really earned, and he was found guilty. And the judges said, that as the defendant would not have obtained the credit but for the false account he had delivered in, the false pretence had created the credit, and they affirmed the conviction, one of judges observing, that the defendant was not to have any sum that he thought fit on account, but only so much as was worked out (7). So, the porter who delivered a false ticket

(1) East, P. C. 672, *Coleman's* C. S. C. cited Leach, 303, note.
(2) East, P. C. 673, *Atkinson's* C.
(3) 3 T. R. 98, *Young* and others v. *The King*. (In error.)
(4) Id. 104, *Count Villeneuve's* C. cited by Buller, J. with approbation, as having been tried at Chester before himself and Moreton, C. J., of Chester.
(5) East, P. C. 831, *R.* v. *Airey*.
(6) 7 C. & P. 191, *R.* v. *Asterley*.
(7) East, P. C. 830, *Witchell's* C.

with a basket of fish, was held clearly to be within the old act of 30 Geo. 2 (8). We have now shewn, that whether the pretence be put forward under a colourable deceit connected with a third person or not, the defendant comes equally within the provisions of the 7 & 8 Geo. 4, c. 29.

The trick may be carried on without words. The production of a false token is, therefore, sufficient, without a representation of its truth. The defendant wanted a loaf and some tobacco, and threw down a forged note for 10*s.* 6*d.*, (which was not, however, the subject of an indictment for forgery); the baker said he had no change but in copper, but the prisoner replied that it would do, and having obtained the change, he went away. It was held, at the trial, by Graham, B., that this uttering of the note as a genuine note, was tantamount to a representation that it was so (9). In another case, the prisoner went to the postmistress at Nottingham, and asked for letters addressed to John Story, which was his name. There was one for John Storer, and the postmistress gave this, by mistake, to the prisoner. He made some observation as to the amount of postage, and retired, but soon appeared with a money order, which he tendered to the postmistress. She then bade him write his name on the back of the order, and he wrote his real name, John Story, upon which she paid him 1*l.* The prisoner then begged the woman to look again, and she would find another letter for him, which turned out to be the case. The order was in favour of John Storer. It was objected, that as no untrue declaration nor assertion had been made, the case was not within the statute, but the learned judge allowed a conviction to take place, reserving the point in question, as well as a question whether this was not a forgery of a receipt for money. The judges considered the case, and were of opinion, that as the prisoner had signed his real name, it could not be a forgery; but they held, that as he had represented himself to be the person mentioned in the money order by presenting it for payment, he had been properly convicted of obtaining the 1*l.* by a false pretence (1). So, where the count charged that the defendant pretended a certain paper writing to be a good and genuine note for 25*l.*, by which pretence he obtained a gold watch-chain, the majority of the judges held, that he had committed an offence within 7 & 8 Geo. 4, c. 29, although it was contended that the pretence did not refer to any existing fact, but to a future event—namely, that the cheque

(8) 1 Camp. 212, *R.* v. *Douglass.* In this case it was contended, that the act 39 Geo. 3, c. lviii., for regulating the rates of porterage in London and Westminster, and other places, had provided for the offence; and so, in this instance, had superseded the 30 Geo. 2. But Lord Ellenborough held, that the remedy given by the stat. of 39, Geo. 3, was cumulative, and the objection was overruled. 1 Campb. 214.

To collect subscriptions for a public company under colour of being their secretary was said by Lord Ellenborough to come so near obtaining money by false pretences, that if a man were indicted for so doing, he could not be considered as prosecuted without any reasonable or probable cause. 1 Camp. 549, note.

(9) Russ. & Ry. 127, *Freeth's* C.

(1) Russ. & Ry. 91, *Story's* C.

would be paid in a month (2). So where a person obtained goods by the cheat of wearing a commoner's cap and gown at Oxford, although nothing passed in words, he was held to have committed an offence within the act (3).

Notwithstanding the general scope of these decisions, there are, nevertheless, several instances where defendants have obtained verdicts of acquittal upon these charges. It has, for example, been carefully explained, that although the act was passed originally for the protection of the less provident and strong-minded class, it never had been the meaning of the legislature to dispense with the most ordinary caution in dealings between man and man. The prisoner came to Thomas Perks's shop to buy meat, and being told that he could have it upon trust, he promised, if the meat were sent, to remit the money by the bearer. The butcher's servant took the meat, and informed the prisoner, that it must go back again if payment were not made. "Aye, sure," said the prisoner, and wrote a note as follows:—"Mr. Perks—Sir, I have a bill of Walsall bank, which is a very good one, if you will send me the change, or I'll see you on Wednesday certain. Yours, M. G." The prisoner obtained the meat, and the jury found that he intended to cheat Perks. The judges, however, held the conviction wrong, for the prisoner's behaviour and note merely amounted to a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it (4). And it is very doubtful whether the false affirmation in Munoes's case (5), could be brought within 7 & 8 Geo. 4, c, 29, unless the woman had been persuaded to give up the note under the pretence of there being an individual known to her in the house, or by some similar deceit. This last was a very different case from the following. The prosecutor lost his mare and gelding, and the prisoner, a horse dealer, pretended to be a police officer, said he knew where the animals were, and would tell him upon the receipt of a sovereign. After much hesitation and reluctance, the prosecutor gave two half sovereigns to the defendant, who took them, and then refused to tell. Here the statement of knowledge as to an important fact, which might lie exclusively within the defendant's means of information, formed a very sufficient ground for throwing a vigilant man off his guard. But when the judges came to examine the indictment they found that the pretence laid was that the prisoner pretended he would tell where the horses were, and not, as it ought to have been stated, that he pretended he *knew*, &c., and the conviction was held improper (6), for here was but a bare affirmation and lie. So, in the case of falsehoods re-

(2) By Lord Denman, C. J., Tindal, C. J., Vaughan, J., Bolland, B., Patteson, J., Williams, J., Coltman, J., Coleridge, J. Diss.—Lord Abinger, C. B., Parke, J., Littledale, J., Parke, B., Bosanquet, J., Alderson, B. Absent, Gurney, B. 2 Moo. C. C. 1 *Parker's* C. The prisoner referred to S. & Co. as his bankers, but, in fact, he never had an account with S. & Co. The judges likewise held the statement in the indictment, that the cheque was a good and genuine order for the sum specified, correct.

(3) 7 C. & P. 784, *Barnard's* C.

(4) Russ. & Ry. 461, *Goodhall's* C

(5) Ante, p. 36.

(6) 1 Moo. C. C. 462, *Douglas's* C.

specting weights. If there be a use of the bad weight, it is an offence at common law, and a false token under the statute; but an affirmation concerning a weight belongs to a different consideration. Thus, the defendant falsely pretended to sell 16 cwt. of coals by a delivery of 8 cwt. only, and producing a weight of 28 lbs., pretended it was one of 56 lbs., whereby, instead of 10*s*., he obtained a sovereign. It was objected, that these were, for the most part, false affirmations, and that the indictment did not sufficiently connect the sale of the coals with the use of the weight so as to bring the defendant into the predicament of having sold by a false measure. And the judges held the conviction wrong (7).

It may likewise be a question how far the tender of notes, illegal, useless, or absurd on the face of them, can be called an offence within this act. Certainly, where the instrument is rightly executed, although it be such as a plaintiff could not sue upon, or one in respect of which a penalty might accrue, it is a false pretence to utter and obtain money upon the faith of it. It was so held in the case of the note for 10*s*. 6*d*. which has already been more than once before the reader. The note was of good credit, and rightly made, but it was void, and prohibited by law, and Lawrence, J., at the meeting of the judges, was of opinion, that the shopkeeper was not cheated if he parted with his goods for a piece of paper which he must be presumed in law to know was worth nothing, if true (8). But all the other judges (Rooke, J., absent) were of another opinion, and held the conviction right (9). Upon another occasion, the defendant was apprehended for offering notes of the Oundle bank in exchange for a horse, that bank having failed some years since. The prosecutor parted with his horse upon the faith of the prisoner's assurance that the notes were good, but he did not present them at Oundle, nor in London, where they were made payable. It was sworn that the bank in question had stopped payment about seven years before, and that the notes had been exhibited under a commission of bankrupt against that firm, that the words importing the memorandum of exhibit had been attempted to be obliterated, but that the names of the commissioners remained on each of the notes. The jury found the notes to be of no value, and that the prisoner meant to cheat the prosecutor of his horse. But the judges held, that sufficient evidence had not been given of the badness of the notes, and the conviction was set aside. Upon the point, whether the offence would have been indictable had the evidence been sufficient, they gave no opinion. It is not improbable but that the learned judges might have considered the stamped marks on the note as sufficient to have required a certain degree of caution on the part of the prosecutor, which he had not used, and that the note not being sound in all its parts as in Freeth's case, ought to have raised a suspicion which further inquiry would have satisfied (1). Again, a defendant was charged

(7) 7 C. & P. 848, *Reed's* C.
(8) Russ. & Ry. 130.
(9) Id. 127, *Freeth's* C.
(1) Id. 460, *Flint's* C. The bank might have resumed its payments, and its notes, if presented, might have been paid. See also 3 C. & P. 420, *Spencer's* C., and post.

with attempting to obtain money under false pretences under colour of a promissory note, which was as follows :

" £100. " Worcester, July, 23rd, 1805.

" Three months after date pay to Mr. Thomas Darrell, Esq., or order, the sum of one hundred pounds, value received of Mrs. Mary May. " And your obedient servant,

" JOSEPH ELLIS.

" No. 11, Stewart-street, Spitalfields,

" London.

" Indorsed, Thomas Darrell.

" Mr. Philip Gresly, Esq., Salworth."

The trick was discovered before any money was paid. And it being deemed impossible to support a charge for forgery or uttering upon an instrument so imperfect either as a draft or bill of exchange (2), the prisoner was convicted upon an indictment for a false pretence. But the judges took notice, that the indictment stated the note to purport to be an order for money, which was not the case, and they held the conviction wrong (3). But an unstamped order for the payment of money is not a *valuable* security within 7 & 8 Geo. 4, c. 29, the obtaining of which would make a person liable to an indictment under that statute, inasmuch as the banker, who was the drawee, would have rendered himself liable to a penalty of 50*l.* by paying it (4). The distinction is quite evident between an apparently good note which deceives an ordinary eye, and an instrument which must satisfy the word " valuable" in an act of parliament.

A diversity has been established between a false pretence, and a mere excuse to avoid trouble or work of any kind. As, where a pauper informed the overseer, who bade him go to work to maintain his family, that he had no shoes, when, in fact, he had two new pairs, and thus induced the overseer to give him a pair. The judges held, that this was rather a false excuse for not working than a false pretence to obtain goods, and they set aside the conviction (5). If there be two pretences, by virtue of which property has been obtained, they must be taken together. As, where the defendant represented himself as being a captain, and as holding a valuable security for 21*l.* There was no proof that the defendant knew this note to be of no value, or, indeed, that it was not his own promissory note; so that the false pretence in that

(2) A note was made upon the case by Le Blanc, J., whether this paper, if presented to a banker with whom the person appearing as the drawer kept cash, for the purpose of getting payment of it as a draft, would not have fallen within the description of a bill of exchange, or order for the payment of money so as to subject the utterer to a capital conviction. Russ. & Ry. 107, note, (b).

(3) Russ. & Ry. 106, *Cartwright's* C. Independently of this question, there was another which was not decided, and which, indeed, was the principal question intended for the judges—whether an attempt to commit a statutable misdemeanor were punishable as an attempt to commit a common law misdemeanor. See post. *Roderick's* C.

(4) Moo. C. C. 170, *Yates's* C.

(5) *Russ* v. *Ry.* 504. *Wakeling's* C.

respect was not proved. And, although it was shewn that he was not a captain, yet, as the pretences ought to have been taken in concert, the judgment against him was reversed upon error (6).

We have now explained the general nature of this statute 7 & 8 Geo. 4, c. 29, s. 53, and have likewise brought forward cases where the credit of third persons has been interposed for fraudulent purposes, and we have adduced instances where the absence of common caution has made a difference in the consideration of the offence. One or two very evident principles remain to be mentioned. It has been said, that something must be obtained, or, at all events, that an attempt must be made to gain something, whether money, goods, or a valuable security. Credit in account, therefore, will not do. The prisoner overdrew his bankers, with their consent, pretending that he had good bills which would exceed the debt. He actually sent one good bill to them, but another bill was not accepted, and as the bankers suspected that the prisoner knew he had no title to draw upon the party mentioned in this last bill, they prosecuted him for the supposed fraud, after paying his cheques upon the faith of the bill so dishonoured. The jury found him guilty. But it was urged on his behalf before the judges, that he had not obtained any chattel, money, nor valuable thing; he only got credit from the bankers so as to induce them to honour his cheques. And by Lord Tenterden, "He only obtains credit in account, somebody else receives the money." The judges were of opinion, that the prisoner could not be said to have obtained any specific sum on the bill; all that was obtained was credit in account, and they held the conviction wrong (7).

Another principle equally plain is, that the property must be surrendered under the influence of the false pretence. So, that where a man, professing to sell an interest in a certain estate, received the purchase money, and gave the usual covenant for title, having previously sold his interest to a third person, it was held, that as the purchaser had accepted the covenant for his security, the false pretence was gone. Had the prosecutor advanced his money upon the defendant's verbal pretence alone, the case would have been different (8). And so it was where the defendant sold to A. and then sold the same property conditionally to B., and did not return B's. money, it was held not to be a false pretence (9). It is true, that it seems to have been held in Ady's case, that it was no answer to an indictment for the misdemeanor to say that the prosecutor had laid a trap to ensnare the defendant into the commission of the offence (1). But, as it is well observed in a note to a publication of some value, the prosecutor could hardly

(6) 2 Per. & D. 333, *Wickham* v. *The Queen*. (In error.) S. C. 10 Ad. & El. 34. The indictment should have shewn how the note was of no value, and should have described the note.

(7) 1 Moo. C. C. 224, *Wavell's* C.

(8) 1 C. & P. 661, *R.* v. *Codrington*. There was ground for a civil action, but the act was not a misdemeanor. See S. P. 7, C. & P. 352, *R.* v. *Dale*.

(9) Lofft. 271, Anon.

(1) 7 C. & P. 140, *Ady's* C.

be said to have parted with his money through the inducement of the false pretence (2), and the act is express that the property shall be so obtained (3).

The last principle we have to mention is the very common point, that there must be an intent to defraud. A. owed B. some money. C., the servant, obtained a sack of malt from A. under a pretence that B. had bought it. There being no intent to defraud, but rather to get an equivalent for the debt, this was held not to be a false pretence within the statute (4).

Indictment.] An indictment upon the statute of 7 & 8 Geo. 4, c. 29, s. 53, commonly states, that A. unlawfully, knowingly, and designedly, and falsely, did pretend to B. that he would do such an act, or had certain property to dispose of, &c., &c., by which false pretence A. knowingly and designedly obtained the goods or money or valuable security, which respectively may be the subject of the indictment, with intent to defraud B., &c. By mistake, after "unlawfully, knowingly and designedly," the words "did feloniously pretend," crept in upon one occasion, and were held to vitiate the charge (5). But the words "knowingly and designedly did obtain," are the chief terms. Where, by accident, the indictment ran thus: "knowingly and designedly did pretend," and "knowingly and designedly did obtain," it was held that the gist of the expressions lay in the allegation of a guilty acquisition (6). And by Best, J., "All that was necessary was to shew the false pretences used, and that by means of those false pretences, the defendant knowingly and designedly obtained the goods in question, negativing also the pretences" (7). It had been, indeed, previously determined, that the omission of the word "falsely," where it was said that the defendant pretended, &c., was not material, there being averments that the pretences were false (8). This doctrine of setting out the pretences is so correct, that if it be departed from, the indictment is absolutely defective. Therefore, where the charge was, that Thomas Mason obtained from Robert Scofield two guineas, by *false pretences*, with intent then and there to cheat and defraud Scofield, the court reversed the judgment, upon error brought, and Buller, J., observed, that

(2) Law Magazine, v. xv. p. 423.

(3) In *R.* v. *Dannelly & Vaughan*, Russ. & Ry. 310, the knowledge on the part of the prosecutor that he was to be plundered on that night, did not lessen the offence, nor make his loss attributable to any other circumstance than the robbery. And in *Norden's* C. East, P. C. 666, the person who went out to meet the robber did not intend to part with his money unless he could help it. But in *Ady's* C. the money was obtained with the knowledge that the pretence was false, and, consequently, could hardly be said to have been given up through the influence of it.

(4) 7 C. & P. 354, *Williams's* C.

(5) 6 C. & P. 657, *Walker's* C.

(6) 3 Stark. 26, *R.* v. *Howarth*.

(7) Id. 27. See also to the same effect, 8 East, 180, *R.* v. *Tomkins*.

(8) East, P. C. 838; S. C. 2 East, 30, where the case is reported at length, and some of the judges were inclined to think, that an allegation of the falsehood of the pretences would suffice without the expressions "falsely," or obtaining by "*false* pretences." See 2 East, 35.

the precedents were quite the other way (9). The court must see what the pretences are, in order to judge whether they come within the statute (1). But, it does not appear necessary to describe them more particularly than they were shewn or described to the party at the time, and in consequence of which he was imposed upon (2). And, although it is usual to allege the pretences to be false, yet it seems, that if the thing or expression, or matter be alleged to be false, it would be sufficient without any further statement of its falsehood (3). Some care must be shewn in setting out the property obtained. "Divers sums of money—that is to say, the sum of two guineas," would probably be deemed too uncertain, and, perhaps, repugnant (4). If the charge be for defrauding a particular individual of goods, the indictment must not only state from whom the goods were obtained, but likewise whose property they were, and the defect has been held fatal, even after verdict (5). And this allegation is deemed to be the more indispensable under the act 7 & 8 Geo. 4, c. 29, because the offence being made larceny by the proviso, the indictment must contain the requisites of a count for larceny, and an acquittal could not be pleaded in bar to a subsequent indictment for larceny, if the statement in question be omitted (6).

It has been said that it was immaterial to affirm the falsely pretending, provided the obtaining by the false pretence was stated, and the truth of the pretence negatived. The latter proposition must not be overlooked. An indictment charged the defendant with obtaining 6*l.* from Eliz. Bullen under the pretext of his having sufficient interest with the Lords of the Admiralty to secure her husband from impressment by means of a protection, and he was convicted, but error was assigned for want of some averment to falsify the matters of the several pretences, or one of them. And the court held, that the judgment must be reversed by reason of this omission. And they likened the prosecution in this respect to a charge of perjury, where it is essentially required that proper averments should be introduced to falsify the matters sworn to. And it was in vain endeavoured by the counsel for the crown to distinguish the case of perjury. The defendant was not apprized sufficiently of the accusation intended to be preferred against

(9) 2 T. R. 581, 586, *R.* v. *Mason*, S. C. Leach. 487, on 30 Geo. 2, c. 24, S. P. by Lord Ellenborough, 1 Campb. In setting forth the pretences, care must be taken to avoid a variance. See 1 Campb. 213, 495, and post, Evidence. So, under 33 Hen. 8, in *R.* v. *Munoz*, Str. 1127, and 7 Mod. 315, the same holding prevailed where the false tokens were not set forth. East, P. C. 837, citing to S. P. *Eddy's* C. 10, Ann. M. S., Tracy, 142.

(1) By Grose, J., in *Fuller's* C. East, P. C. 837. See also 9 C. & P. 227, *R.* v. *Tully*.

(2) East, P. C. 837. Therefore, in a case upon a false wager with a colonel at Bath, it was held unnecessary to specify the name of the colonel. "Perhaps his name was not mentioned." 3 T. R. 98, 100, 102, *Young* v. *The King*. (In error.)

(3) Cro. Car. 564, *Terrey's* C.

(4) See 2 T. R. 581, *R.* v. *Mason*. Id. 586, Buller, J.

(5) 3 Nev. & P. 472, *Martin* v. *Regina*, in error. S. C. 2 Jurist, 515; S. C. 8 Ad. & El. 481; S. P. 8 C. & P. 196, *R.* v. *Norton*.

(6) 8 C. & P. 196, *R.* v. *Norton*.

him, and as the word "falsely" would not impute that the whole of the allegation was untrue, it should have been pointed out what was untrue (7). The indictment should conclude—"against the form of the statute." For want of such a conclusion, it is probable, that the judgment in Mason's case would have been reversed, if the assignment of errors had not succeeded upon another ground (8).

Joinder.] In *Young* v. *The King* in error, (9) it was held that several persons might be joined in the same indictment for the same cheat. If the evidence be complicated, it may be separated for each particular defendant (1). And by Buller, J., "This is not like the case of a conspiracy, where the whole story must be taken up in detached pieces at different times to charge the different actors. If, however," continued the learned judge, "any authority were necessary, a case happened about a year ago, which is stronger than the present. Three persons were indicted on the Black Act for shooting at the prosecutor, they were all charged with the single act, and the indictment was held by all the judges of England to be sufficient" (2). And, in the same case, a joinder of different cheats in the same indictment was likewise held to be proper. And by Grose, J., "It is no objection in the case of felonies, still less is it so in misdemeanors" (3).

Evidence.] The evidence chiefly applicable to an indictment for false pretences is:—1st. Proof that the prisoner made a pretence. 2ndly. That in consequence of such pretence he obtained the property mentioned in the indictment. And, 3rdly. That the pretence so put forth was false.

It is not necessary to establish the whole of the pretences charged, for if part only be proved, such part being the cause of the successful deceit, it will suffice. This point was determined by the judges in a case where several pretences were laid in different counts, and some were satisfactorily brought before the jury, whilst others failed in proof. This alternation took place in a majority of the counts respectively, of which there were six, and there was a general verdict of guilty. The conviction was affirmed (4). The same doctrine has likewise been maintained in a more recent case (5). But although it thus appears unnecessary to shew all the pretences specifically as laid, it is absolutely requisite to be correct in such as are relied upon. Thus the defendant was charged with defrauding M. B. of 106*l.* by means of a pretence, that he, the defendant, had paid a certain sum of money into the Bank of England. The prosecutor, however, when called, proved that the defendant said to him, "the money has been paid at the bank," not that the defendant had paid it. And Lord Ellenborough directed an acquittal upon the ground of the vari-

(7) 2 M. & S. 379, *R.* v. *Perrott.*
(8) 2 T. R. 581, *R.* v. *Mason.* Id. 586, Buller, J.
(9) 3 T. R. 98.
(1) Id. 103, by Lord Kenyon.
(2) Id. 105.
(3) Id. 107.
(4) Russ. & Ry. 190, *Hill's* C.
(5) 7 C. & P. 352, *Dale's* C.

ance (6). So if a statute mention a particular thing, as a basket, and the indictment describe it as a parcel, the variance will be fatal in an indictment upon that statute (7). The defendant was charged with having defrauded the Countess of Ilchester under the pretence of a counterfeit ticket for the carriage and porterage of a certain parcel. The servant of the countess paid the sum said to have been fraudulently obtained, and it was objected, that the servant and not the countess had been cheated, for although the countess had subsequently repaid her servant, yet at the time of the fraud this money was the sole property of the servant. However, the servant swore that he had upwards of 9s. 10*d.*, the sum demanded, at that time in his possession on account of his mistress, and Lord Ellenborough then said, that the averment was sustained. The defendant was convicted (8). The evidence upon an indictment of this kind must also go the full length of negativing the false pretence. The prisoner knowingly tendered a note as a good note belonging to a bank which had stopped payment. He was, accordingly, indicted for a false pretence, but it turned out that the firm of this bank consisted of three persons, and that two only had become bankrupts, upon which Gaselee, J., said, that the prisoner must be acquitted, because the third partner might, perhaps, on application, be in a condition to pay the amount of the note (9). And, generally, if the charge be for offering bad notes, as of a bank which has failed, the proof of the unsound character of the notes must be most amply made out. Evidence that certain notes had been exhibited under a commission of bankrupt against a firm was held insufficient by the judges (1).

Parol evidence may be given of a lost letter which contained the false pretence in question (2).

Trial.] It will be observed, that the act makes the receiving by virtue of the false pretence the substantive crime, and therefore, where the pretence was set on foot in Herefordshire, but the cheat took effect in Monmouthshire, it was held, that the trial ought not to have been in Herefordshire (3).

Judgment.] The judgment for this misdemeanor is, that the party be transported for seven years, or suffer such other punishment by fine and imprisonment (4), or by both, as the court shall award (5).

Restitution.] There was no restitution in the case of a conviction for a fraudulent taking as the law formerly stood. But as we have already seen, the statute 7 & 8 Geo. 4, c. 29, s. 57, permits resti-

(6) 1 Campb. 494, *R.* v. *Plestow.*
(7) Id. 212, *R.* v. *Douglass.*
(8) 1 Campb. 213, *R.* v. *Douglass.*
(9) 3 C. & P. 420, *Spencer's* C.
(1) Russ. & Ry. 460, *Flint's* C.
(2) 6 C. & P. 181, *Chadwick's* C.
(3) 4 B. & A. 179, *R.* v. *Buttery* cited; 2 B. & C. 70.
(4) With or without hard labour and solitary confinement, 7 & 8 G. 4, c. 2, s. 49, provided the latter do not exceed one month at a time, or three months in one year, 1 Vict. c. 90, s. 5. As to a second conviction, see 7 & 8 G. 4, c. 28, s. 11, a second sentence, Id. s. 10, abettors, Id. s. 61, the admiralty jurisdiction, s. 12.
(5) 7 & 8 G. 4, c. 29, s. 53.

tution in cases of any felony or misdemeanor under that act, in stealing, taking, converting, or obtaining any chattel, money, &c. Unless any valuable security shall have been bonâ fide paid or discharged, or being a negociable instrument, shall have been bonâ fide taken or received by transfer or delivery, for a just and valuable consideration, without notice, or reasonable cause to suspect that it had been improperly obtained. In this latter case the court shall not award restitution.

Sect. III.—*Of Forgery.*

Forgery, considered as a misdemeanor, is punishable at common law, and by statute, in respect of various offences.

Forgery at common law consists in the fraudulent design of cheating another. As soon as private advantage begins to operate by means of the forgery, or a prejudice begins to work to the detriment of a third person, the common law deems the defendant to be guilty, and there are cases where a mere erasure was not held to be forgery, because of the absence of any intent to defraud, whether for the sake of private benefit or mischief towards another individual (6).

The act of putting wax to writs, without sealing, has been deemed a high misdemeanor, and next to counterfeiting the seal.

The counterfeiting of matters of record is one of the offences under this head best known to the common law. It is, consequently said, that the public are deeply interested in the integrity of such matters, and that it cannot but be very mischievous that they should be either forged or falsified (7). As if the name of a person, against whom the coroner's jury had not found a verdict, should be inserted in an indictment founded upon the inquest (8). The coroner in such a case was found guilty upon an information for forgery (9). But many other public instruments may be enumerated. Hawkins mentions a privy seal, a licence from the barons of the exchequer to compound a debt, a certificate of holy orders, or a protection from a parliament man (1), and there is a case in Keble for forging patents (2). So where a person who was committed for contempt, counterfeited a discharge as from his creditors to the sheriff and gaoler, it was held by a majority of the judges that he might have been indicted for forgery at common law, but all held it to be a misdemeanor, and the conviction consequently right (3). It is *felony* for a soldier to counterfeit the warrant of his captain (4). In another case of a public nature it was objected, that as the writing (5), if genuine, must have been a nullity, the offence could not be of a higher nature than a

(6) See East, P. C. 854.
(7) 1 Hawk. c. 70, s. 8.
(8) 3 Mod. 66, *R.* v. *Marsh* & others.
(9) 3 Salk. 172, *R.* v. *Marsh*.
(1) Id. s. 9.
(2) 2 Keb. 74, *R.* v. *Winter* & ors.
(3) East, P. C. 872, *Fawcett's* C.; 2 Russ. C. M. 352.
(4) 1 Ro. Rep. 266.
(5) The initials of the name of a clerk to commissioners of appeal.

cheat, but as the sessions had improperly adjudicated upon it as a case of forgery, which was not within their jurisdiction, no opinion was given (1). And, in a recent case where the prisoner forged an order from a magistrate to a gaoler for the discharge of a prisoner, the judges held the conviction right (2). And the better opinion seems to be, that at common law, the alteration of any written instrument is as much a forgery as the making of it (3), provided the alteration were material, and done for the ultimate advantage of the forger (4).

Private Instruments.] Several private writings are also mentioned as the subjects of forgery in like manner. And there was a suspicion at one time that some of these, as wills, making a false order for the payment of rent, and other writings of an inferior nature, were not such forgeries as the common law would recognize (5). But, at length, a defendant forged an order from the Duke of Buckingham, addressed to J. W. the defendant, to charge so much alum to the duke's account, and out of the money arising from the sale to pay J. W. and another, so much per ton. And, upon conviction, it was urged, that this was but a cheat, and no forgery, and the more so as the fraud did not succeed. But it was held to be forgery, and a distinction was made between cheats at common law, and upon the statute 33 Hen. 8, where the party received a prejudice, and a case like the present where it was not necessary that any damage at all should accrue to the person intended to be defrauded (6). So that the rule became settled that the counterfeiting of any writing with a fraudulent intent, whereby another party might be prejudiced, was forgery at common law. Although a distinction had been made between false deeds and other writings, it being necessary to shew in the former case that some person was prejudiced by the forgery (7). Still, if no one can by possibility be prejudiced by the act, it is not a forgery (8). But it was never doubted that making a false deed concerning a private writing was punishable at common law (9). Or antedating a deed with a fraudulent view (10). And although it was held that the omission of matters out of a will was not forgery, as a legacy which the testator had ordered (11), yet if one were directed to give land for life with a remainder in fee, and the estate for life were wilfully omitted, it was said, that this would be forgery (12). And the wilful insertion of a legacy without authority is said to have been forgery (13), al-

(1) 1 East, 173, *Gibbs's* C.; East, P. C. 864.
(2) 1 Moo. C. C. 393, *Harris's* C.; S. C. 6 C. & P. 129.
(3) 1 Hawk. c. 70, s. 2; East, P. C. 855, *Kinder's* C.
(4) 1 Hawk. c. 70, s. 4.
(5) See 1 Hawk. c. 70, s. 11; East, P. C. 859, 860.
(6) 2 Ld. Raym. 1461, *Ward's* C.; S. C. Str. 747; S. P. 1 Sid. 142, *Deakin's* C.
(7) 1 Ld. Raym. 737, *R.* v. *Goate.*
(8) 1 Salk. 375, *R.* v. *Knight*; S. C. 1 Ld. Raym. 527.
(9) 1 Hawk. c. 70, s. 11.
(10) Mo. 655, 1 And. 100; *Puckering* v. *Fisher*. See also 1 Hawk. c. 70, s. 2.
(11) Mo. 759, *Combes's* C.
(12) Noy. 101, *Combes's* C.
(13) East, P. C. 856.

though Sir John Marvin's case seems to militate against this position (1). But the statute law upon the subject of wills has made such an alteration as to render any further inquiry upon these points immaterial.

It was also held, that if the instrument were genuine upon the face of it, it did not matter whether it were of validity or not, if, in truth, it were such as it was counterfeited for. So that the forgery of a protection in the name of A. was deemed as much a crime as if A. had really been a member of parliament (2). And herein consists the difference between cases where the instrument is good in itself, and where it is informal (3).

Other private writings are, a bill of lading (4), a power of attorney (5), letters of credit to gather money (6), an acquittance (7), a marriage register (8), a bill of exchange (9), a promissory note (10), or indorsement, (all these being instruments not under seal), and, as it seems, a county court summons (11).

Indictment.] It may be observed that the indictment should set out the forged record or public instrument, or private writing (12), with the accuracy which would be required upon an indictment for stealing it, but no copy nor fac simile need be placed upon the record (13). And the indictment then goes on to state, that the defendant did falsely (14) make, forge (15), and counterfeit the same, or, in the case of uttering, did, unlawfully and fraudulently, utter it with intent to defraud A. B. (16) But it is not sufficient to state the writing to be a certain instrument partly printed, partly written in the words and figures following, that is to say, &c. The judges in this case were of opinion, that the indictment was bad for want of stating what the instrument was, in respect of which the forgery was alleged to have been committed, and also be-

(1) Dy. 288.

(2) 1 Sid. 142, *Deakin's* C.

(3) See Russ. & Ry. 496, *Burke's* C., where an instrument was described in the indictment as a promissory note, and being produced, turned out not to be payable to bearer on demand, nor payable in money, but only promissory on the part of the maker, that it should be taken in payment in part for a two pound note. And the judges held that the judgment should be arrested, and, independently of the question concerning the promissory note, it was doubted at the trial whether the instrument itself was not a mere nullity, and so not the subject of forgery at common law.

(4) 1 Salk. 342, *R.* v. *Stocker*; S. C. 5 Mod. 137.

(5) T. Raym. 84, *Farr's* C.

(6) Sty. 12, *Savage's* C.

(7) 1 Sid. 278, *R.* v. *Ferrers.*

(8) 2 Sid. 71, *Dudly's* C.; S. C. 3 Leon. 170.

(9) 2 Str. 748, *R.* v. *Sheldon* cited.

(10) Id. ib. *R.* v. *Ward* cited; see also East, P. C. 862 note (g); 2 Str. 1144.

(11) 5 C. & P. 160, *Collier's* C. semble, by Patteson, J.

(12) Before the repeal of 5 Eliz. it had been held, that an indictment for an offence, cognizable by that statute, might be laid equally well at common law. Str. 1144, *R.* v. *O'brian.*

(13) 2 & 3 W. 4, c. 123, s. 3.

(14) The word "counterfeit" implies falsity. Sty. 12, *Savage's* C.

(15) To say "forge or cause to be forged," is bad for uncertainty, 1 Salk. 342, *Stockers's* C.; S. C. 5 Mod. 137; S. P. Ca. Temp. Holt, 345, *Walcot's* C.; Ca. T. H. 370, *R.* v. *Flint*; see also 1 Y. & Jer. 221, *R.* v. *Morley.*

(16) The intent to cheat or defraud must be alleged, Russ. & Ry. 317, *Rushworth's* C.

cause it did not appear that the party signing it had authority for that purpose. The defendant having previously been bound over to appear at the next assizes to receive sentence, the judgment was arrested (1).

Trial.] By 1 W. 4, c. 66, s. 24, The trial may be either in the county where the offence was committed, or where the offender has been apprehended, and is in custody (2). And any accessory, before or after the fact, may be dealt with in the same manner as the principal offender (3).

Judgment.] The judgment is, that the offender be fined and imprisoned, or suffer such corporal punishment as the court shall award (4). The same judgment may be passed upon principals in the second degree, and accessories before the fact, for in forgery *at common law* all are principals (5), and accessories after the fact are also punishable in like manner. The offence itself is said to rest in misdemeanor (6), and in other cases where the act in question is not a cheat it is alleged to be indictable as for a misdemeanor, and the consequences of a judgment are incapacity to be a witness, until competency be restored by the king's pardon under the great seal (7).

Forgeries by Statute—Dutch Bay Hall, Colchester.] By 12 Car. 2. c. 22, s. 4, It is a misdemeanor to counterfeit the seals of the corporation of the Dutch Bay Hall, Colchester, or even to affix their seal, whether counterfeit or not, if the party be not the proper officer.

Sheffield Plate.] By 13 Geo. 3, c. 54, s. 14 (8), To forge or counterfeit stamps used by the Sheffield Plate Company, or any stamp, &c., in imitation thereof, or mark any wrought plate with a forged or transposed mark, or transpose such stamps, or sell or export any such plate with a forged or transposed mark, with a guilty

(1) Russ. & Ry. 50, *Wilcox's* C.

(2) But not at the quarter sessions, either at common law, 1 East, 173, *R.* v. *Gibbs*, or by statute. See 2 Russ. C. M. 371, citing the authorities in Cro. El.

(3) See 3 Campb. 78; Russ. & Ry. 214; Id. 428.

(4) East, P. C. 1003; 1 Hawk. c. 70, s. 1. With respect to the words "with force and arms," which are now usual in an indictment for forgery. See 2 Show, 5, *R.* v. *Marriott*; S. C. 2 Lev. 221; but the report in Levinz seems the more correct. In the same cases the words "a certain writing" were held sufficient to denote a deed. See for other instances of objections to old indictments for forgery, 2 Show, 472; *R.* v. *Neck*, 6 Mod. 87; *The Queen* v. *Brown*, 7 Mod. 379; *R.* v. *O'Brian*, 2 Sess. Ca. 366.

(5) East, P. C. 973; 2 Russ. C. M. 31; Leach, 1096, n. See likewise Mo. 666, *Bothe's* C.

(6) East, P. C. 1003.

(7) Note, that the court of Chancery will direct a forged instrument to be given up where the ends of justice require that proceeding, 1 Russ. 559.

(8) See 5 Geo. 4, c. lii., s. 1. As to the trial of these and other statutable offences, as below, see 1 W. 4, c. 66, s. 24. Pecuniary penalties are imposed upon such as counterfeit stamps upon paper, by various statutes, see 1 Geo. 4, c. 58, s. 13; 2 Russ. C. M. 420; 6 & 7 W. 4, c. 52, s. 8.

knowledge, is made punishable with transportation for fourteen years.

Certificates relating to Naval and Victualling Stores.] By 2 W. 4, c. 40, s. 32, To forge any certificate of the purchase or sale of any naval or victualling stores, or to utter or publish any false or altered certificate of any such purchase or sale, with a guilty knowledge, is made punishable as in cases of wilful and corrupt perjury (1).

Forging Protections.] By 5 & 6 W. 4. c. 24, s. 3, Whosoever with a guilty knowledge, shall forge any certificate of service in the navy, or any instrument purporting to be a protection from such service, or utter or publish, or alter the same: or forge or allow any extract from a baptismal register, or utter such altered extract, or any false affidavit, certificate, or other document, in order to obtain a protection either for himself or another: or being in possession of a protection, shall lend, sell, or dispose thereof to any other, in order to enable that other person make a fraudulent use of the protection, or shall produce, utter, or make use of as a protection for himself, any protection which shall have been made out or issued for any other individual, shall be guilty of a misdemeanor (2), and the protection shall be null and void.

Permits.] By 2 W. 4, c. 16, s. 4, To forge any permit, or part thereof, or counterfeit any stamps directed by the commissioners of excise to be affixed on such permit, or utter or use such forged permit, or permit with such a counterfeited mark, or accept or receive the same, with a guilty knowledge, is made a misdemeanor, and punishable with transportation for seven years, or fine and imprisonment at the discretion of the court (3).

And by sect. 19, The counterpart of such permit is declared to be evidence, without producing or requiring the production of the original, or any order of the commissioners of excise.

Hackney Carriage Plates.] By 1 & 2 W. 4, c. 22, s. 25, It is a misdemeanor to forge the stamp office plate relating to hackney carriages, or wilfully to fix or place a forged plate upon such carriage, or sell, expose to sale, or utter such a forged plate, or have such in the possession of the party without a lawful excuse, (the proof of which is to lie upon the accused,) in all the respective cases aforesaid, with a guilty knowledge. And knowingly to aid, abet, or assist in the commission of these offences, is like-

(1) That is to say, by transportation for seven years, under 2 Geo. 2, c. 25, or fine and imprisonment at the discretion of the court, at common law.

(2) And punishable by fine and imprisonment.

(3) The offence of forging request notes, or fraudulently procuring permits, or misapplying or misusing them is, by s. 13, made punishable by a fine of 500*l*. See also, sect. 19.

wise made a misdemeanor by the same act. The judgment is fine or imprisonment, or both, the imprisonment to be in the common gaol or house of correction, and with or without hard labour, as the court may think fit.

It is also a similar offence, and subject to the like judgment, to use a false name or description of abode, or other false description in the course of applying for or procuring a hackney carriage licence, or to insert such false matters in a requisition for the licence, or in the licence itself, or falsely to insert in such requisition or licence the name of a person as being proprietor, or part proprietor of a hackney carrriage, who shall not be such at the time of the application (4).

Stage Carriages, and Post Horses.] Similar enactments are to be found in the 2 & 3 W. 4, c. 120, s. 10 & 32, respecting stage coaches and post horses, together with the same judgment.

And under sect. 32, Any officer of stamp duties, or constable, or other peace officer, or toll gatekeeper, may take away or seize any such forged plate, in order that the same may be produced in evidence against the offender, or disposed of as the commissioners of stamps may think proper (5).

Metropolis Hackney Carriages Act.] There are likewise the same provisions in the hackney carriages act, 1 & 2 Vict. c. 79, s. 12, as far as the forgery, sale, uttering, and having in possession any licence or ticket warranted by the act, are concerned (6).

Sect. IV.—*Of Misdemeanors relating to the Coin and Bullion.*

Misdemeanors relating to coin, concern the gold, silver, and copper coin of the realm, and likewise foreign coin, and the offences respectively consist in counterfeiting, uttering, having in possession, and exporting the different species of coin above mentioned under different circumstances.

Counterfeiting Foreign Copper Money.] First with respect to counterfeiting copper coin; by 43 Geo. 3, c. 139, s. 3, the offence

(4) 1 & 2 W. 4, c. 22, s. 33.

(5) By sect. 72, of the same act, the forging of tickets authorized by that statute, or aiding or assisting in that offence, is made punishable by a penalty of 50*l.*, to be recovered by action or information, under certain conditions, see sect. 102.

(6) As to the penalty for forging hawker's licences, see 50 Geo. 3, c. 41; and shipping licences, 47 Geo. 3, sess. 2, c. 66. By 3 & 4 W. 4, c. 52, s. 55, (an act for the general regulation of the customs), a penalty of 200*l.* is inflicted upon such as forge any marks or stamps under that act, and aiders and abettors are included; and by s. 129, there is a like penalty for forging or using false entries or other documents. By 6 W. 4, c. 11, concerning the registration of aliens, forging or uttering certificates contrary to that act, is made punishable by a forfeiture not exceeding 100*l.*, or imprisonment for three months. By 4 & 5 W. 4, c. 52, s. 3, Whosoever shall forge, &c., any certificate respecting sick merchant seamen, shall be punished as an incorrigible rogue.

of counterfeiting any coin, resembling foreign copper coin, or coin not ordered by the royal proclamation of his majesty, or coin of a foreign prince, of less value than silver coin, or intended to resemble such coin, shall be deemed to be a misdemeanor, and breach of the peace, and punishable for the first offence, by imprisonment for any time not exceeding one year, and for the second, by transportation for seven years.

By sect. 4, No traverse is to be allowed, and the trial shall proceed at the same assizes or sessions where the indictment is found, unless cause for its postponement shall be shewn to the court.

By sect. 5, The certificate of a former conviction, shall be evidence upon a trial for the second offence.

Uttering.] By 37 Geo. 3, c. 126, s. 4, Any person who shall utter or tender in payment, or give in exchange any false coin designed to resemble the coin of a foreign prince, or to pass as such, shall be guilty of a misdemeanor (7).

The offence of uttering, is not confined to copper coin. By 2 W. 4, c. 34, s. 7, if any person shall tender, utter, or put off any false coin, resembling or intended to resemble the gold or silver coin of the realm, with a guilty knowledge, he shall be guilty of a misdemeanor, and be imprisoned for any term not exceeding one year (8).

By sect. 13, Coin suspected to be diminished or counterfeit, may be cut by the person to whom it is tendered (9).

By sect. 16, No traverse shall be allowed, but the trial shall proceed at the same assizes or sessions where the bill of indictment is found, unless good cause for a postponement is shewn to the court.

By sect. 17, In cases where it becomes necessary to prove the coin in question to be counterfeit, it shall not be necessary to call a moneyer, or other officer of the mint, but the evidence of any credible witness shall be sufficient for the purpose.

Again, by 2 W. 4, c. 34, s. 7, If any person either on the day of the tendering, &c., of such coin, or within ten days next ensuing, shall tender, &c., any more false gold or silver coin, he shall be guilty of a misdemeanor, and be punishable with imprisonment for a term not exceeding two years (1).

(7) And punishable by imprisonment for 6 months; the offender to find securities for his good behaviour for six months more.

(8) With or without hard labour and solitary confinement. 2 W. 4, c. 34, s. 19, provided the latter do not exceed one month at a time, nor more than three months in one year, 1 Vict. c. 90, s. 5. As to the admiralty jurisdiction, see 2 W. 4, c. 34, s. 20. See the interpretation clause, sect. 21. The venue in proceedings against persons acting under the authority of the statute, sect. 22. As to the trial of persons acting in concert in different counties or jurisdictions, see sect. 15. The second offence is felony.

(9) And as to the discovery and seizure of counterfeit coin, see sect. 14. If the false coin be so made as to deceive the unwary, it is an offence to utter it, although a more skilled person might have detected the imposture, Lew. C. C. 43, *Lowe's* C.

(1) With or without hard labour,

An indictment under 15 Geo. 2, c. 28, (now repealed), charged a second uttering to have taken place on the *said 14th day of February*, and as evidence of uttering at any time before the finding of the indictment would support the charge of a single uttering, it was objected, that it should have been expressly alleged that both utterings were *on the same day*. But the judges held, that as it must have been proved that the utterings were on the same day, they must take the fact to have been so, and, consequently, that the 14th day of February was the same day (2). This case might now apply if the utterings within ten days were to take place on the same day, and an indictment were to be drawn similar to that above-mentioned. But the case where it was decided that the facts of uttering twice on the same day should be united in the same count as a single charge, is still of use, and if the second uttering be within ten days, this decision is equally applicable. Owing to the distribution of the charges of uttering into two several counts, the judges held, that the more severe sentence could not take effect (3). Nor can one judgment upon a conviction for two separate utterings in two counts under 2 W. 4, c. 34, be supported. There might be consecutive judgments of one year's imprisonment upon each count (4).

By 2 W. 4, c. 34, s. 12, To tender, utter, or put off, any counterfeit coin, resembling, or intended to resemble the king's copper coin, with a guilty knowledge, is declared to be a misdemeanor, and punishable by imprisonment not exceeding one year (5). This was not an offence at common law, and a conviction for uttering counterfeit half-pence was held wrong upon one occasion, it being admitted at the trial that there was no statute applicable to the fact (6).

The following determinations appear to apply to utterings of gold, silver, and copper coin. The prisoner was charged with the common trick of "ringing the changes," by taking a bad shilling out of his mouth and pretending it was the same which the person he intended to cheat had just given him. The indictment stated an uttering, and it was objected, that it should have said that the defendant uttered the shilling in question as and for a good shilling. But the court held a different opinion, saying that the words of the act 15 Geo. 2, c. 28 (7), were in the disjunctive, utter, *or*

&c. See ante, note (9), at p. 54. As to the traverse and evidence, see supra, p. 55. The second offence is felony.

(2) Leach, 923, *Martin's* C.

(3) Id. 833, *Tandy's* C.; S. C. East, P. C. 182.

(4) 1 Moo. C. C. 413, *Robinson's* C. And note that the words, "common utterer of false money" are now dispensed with. The cases, therefore, which have arisen on indictments, concerning that point may, for the present, be laid aside. See Russ. & Ry. 5, *Smith's* C.; S. C. Leach, 856; S. C. 2 B. & P. 127. Russ. & Ry. 7, *R.* v. *Levy*, cited, Id. ib. *Booth's* C. Id. 29, *Michael's* C.; S. C. Leach, 938. As to procuring base money with intent to utter it, see post tit. "having in possession."

(5) With or without hard labour, &c., see note (9), at p. 54. As to the traverse and evidence, see p. 55, supra.

(6) East, P. C. 182, *Cirwan's* C.; S. C. Leach, 834, n.

(7) And the stat. 2 W. 4, c. 34, is the same.

tender in payment, that the prisoner could not have been properly charged with uttering this bad coin as and for good money, because he evidently uttered it as *bad* money, and, accordingly, that, as he had tendered the shilling in payment, the indictment was right (8). The name of the person to whom the bad coin is uttered, if known, should be mentioned in the indictment. And Holt, C. J., said, that if the uttering were to more than one person, the names ought to be laid severally. The chief justice, nevertheless, tried a woman for putting off ten gilt counterfeit pieces to divers persons unknown, and she was convicted. Sir Edward East observes, that, "this must be governed by the same rule which prevails in the case as stealing the property of persons unknown" (9).

Having in possession False Coin.] By 2 W. 4, c. 34, s. 8, If any person shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling, or intended to resemble the king's gold or silver coin, with a guilty knowledge, and an intent to utter or put off the same, he shall be guilty of a misdemeanor, and punishable with imprisonment for a term not exceeding three years (1).

By sect. 12, If any person shall have in his custody or possession three or more pieces of false copper coin with the like guilty knowledge and intent, he shall be guilty of a misdemeanor, and be imprisoned for a term not exceeding one year (2).

And by sect. 7, If any person shall tender, utter, or put off any false gold or silver coin, with a guilty knowledge, and such person shall at the time of the tendering, &c., have in his possession, besides the false coin so tendered, &c., one or more piece or pieces of such false gold or silver coin, he shall be guilty of a misdemeanor, and be imprisoned for any time not exceeding two years (3).

Great doubts were at one time entertained upon the subject of barely having false money or instruments for making it in possession, and there have been conflicting authorities (4); but, at length it was settled, that the offence was not indictable upon the ground of it's not being an act, and so not a misdemeanor; an intent, without an act, not being a misdemeanor (5). The statute 2 W. 4, c. 34, has, however, provided for this case. But, procuring base money for the purpose of uttering it, was held to be an offence; and the fact of having such false money in possession was

(8) Leach, 644, *Franks's* C. As to association for the purpose of uttering, see Russ. & Ry. 142, *R.* v. *J. and S. Else.*

(9) East, P. C. 180.

(1) With or without hard labour, &c. See note (9), at p. 54. As to the traverse and evidence, see p. 55, supra. The second offence is felony.

(2) With or without hard labour, &c. See the note above.

(3) With or without hard labour, &c. See the note above. The second offence is felony.

(4) See Ca. Temp. Hardw. 370, *R.* v. *Sutton*, for having tools in possession—Judgment for the crown. S. C. 2, Str. 1073. Russ. & Ry. 184, *Heath's* C., where *R.* v. *Sutton* was at first much relied on, but afterwards held untenable. Id. 288, *Stewart's* C.—Judgment arrested. See also Leach, 41, *Parker's* C., and the cases id. 42, n.

(5) Russ. & Ry. 184.

deemed to be evidence of procuring (6). If it be intended to proceed upon the joint charges of uttering and having in possession, the fact of uttering must be distinctly alleged. Reference to another count with respect to the uttering would be clearly insufficient (7).

It has been held in a late case also, that where counterfeit coin to the amount of more than three pieces was found upon one person, but his companion was quite cognizant of the fact, both might be convicted under this section, notwithstanding the interpretation clause, s. 21, which, at first sight, seems to limit the offence to the party having the bad coin in his possession (8).

Exportation of Counterfeit Money.] By 38 Geo. 3, c. 67, s. 1, All copper coin, not being the legal copper coin of this kingdom, and all counterfeit gold or silver coin, made to the similitude or resemblance, or intended to resemble the gold or silver coin of this or any other country, which shall under any pretence, name, or description whatever, be exported or shipped, or laden or put on board any ship, &c., for the purpose of exportation to Martinique, or any of the West Indian islands, or America, shall be forfeited. Section 2 inflicts a penalty of 200*l.*, and double the value of the coin to be recovered by bill, &c., or information in any court of record at Westminster upon any person so exporting, or having the false coin in his custody, in order to be exported.

Bullion.] By 6 & 7 W. 3, c. 17, s. 7, If any broker, not being a trading goldsmith or refiner of silver, shall buy or sell any bullion or molten silver, he shall suffer six month's imprisonment without bail (9). And by sect. 8, the same punishment was ordained against persons having unlawful bullion found in their possession, and not proving the bullion so found to be lawful silver by one credible witness at least upon an indictment for melting the silver coin of the realm, and that the same was not the current coin of the realm, nor the clippings thereof (10).

(6) Id. 308, *R.* v. *Fuller*, & another.

(7) 2 Esp. 28, *R.* v. *Kelly* & others, where there were three counts, and the third count charged the defendants when they so uttered, &c., with having counterfeit money in their possession.

(8) 2 Moo. C. C. 85, *Rogers's* C.; S. P. decided upon the authority of the above case; 2 Moo. & Rob. 85, *R.* v. *Gerrish* and another, prosecuted upon sect. 7.

(9) A regulation probably introduced to prevent gambling speculations, which might enhance the price of the precious metals; East, P. C. 196.

(10) A penalty of 500*l.* is ordained by 6 & 7 W. 3, c. 17, s. 3, against such as make ingots or bars of silver in imitation of Spanish ingots. By sect. 5 the exportation of molten silver is forbidden upon pain of forfeiting the same. And 7 & 8 W. 3, c. 19, s. 6, requires a certificate from the Lord Mayor and Aldermen before bullion or molten silver can be exported, under certain penalties. The treasury likewise may grant licences under 43 Geo. 3, c. 49. See 1 Russ. C. M. 70.

SECT. V.—*Of Perjury and Subornation of Perjury.*

The offence of taking a false oath is *perjury*; that of procuring another to swear falsely is *subornation of perjury* (1). The former consists in a wilful violation of truth in some matter stated on oath, before a person competent to administer it, in a judicial proceeding, and, at common law, whether material to the issue or not. Perjury, by statute, is capable of the same definition with this qualification, that the thing sworn must have been material to the issue (2).

Subornation is the persuading of another to commit perjury, from whence it must be understood that the false oath is actually taken, otherwise there is no subornation of perjury, although the bare endeavour to incite to such a crime was highly penal at common law.

Perjury.] First of Perjury.—It may be punished by the common law, or by statute. But before we treat of the respective modes by which this offence may be thus punished, it will be desirable to consider what shall be said to be perjury. Then, next, what is perjury at common law. Thirdly, What the statutes have enacted with respect to that crime, and, afterwards, we will mention the various courses which are occasionally adopted for the purpose of convicting offenders.

What Perjury shall be said to be.] Perjury must be wilful—absolute—corrupt—positive (3)—an oath which errs through mistake or inadvertency is not perjury (4). On the other hand, if a man swear the truth unwittingly, it is now admitted that he is guilty at common law of taking a corrupt oath, although not under the stat. of Eliz. (5) It is true that the court said upon one occasion, that there was a difference when one swears to a thing which is true in fact, but which the swearer does not know to be so, and when one swears wilfully to a falsehood;—the first is perjury before God, and the other is an offence of which the law takes notice (6). But this was said in an indictment for subornation which was probably brought upon the statute. At common law the ruling has been otherwise. As in the star chamber, where damages having been awarded to the plaintiff *according to the value* of his goods, which the defendant had riotously taken away, he caused two men to swear to the value of these goods, who never saw nor knew them, and this was held to be a false oath, and both the pro-

(1) See 3 Inst. 164; 4 Com. 137; 1 Hawk. c. 69, s. 1.

(2) Both false and material by statute. See 8 Ves. jun. 38.

(3) See 4 Com. 137.

(4) As if one should make two statements at variance with each other, one of which must, of necessity, be incorrect. Lew. C. C. 270, *Jackson's* C.

(5) 2 Russ. C. & M. 518, *R.* v. *Edwards.*

(6) 3 Mod. 122, *R.* v. *Hinton & Brown.*

curer and witnesses were sentenced accordingly (7). So, where one swore how a will had been revoked in his hearing, when, in fact, the words of revocation were spoken to another in the absence of the witness, it was deemed a corrupt oath within the statute (8), and, therefore, *à fortiori*, at common law. Again, where one J. S. had done a certain act which he was to prove, but in lieu thereof, another person procured W. R. to swear to this fact in the room of J. S., it was held perjury at common law in W. R. (9). Again, in former days, cases of inadvertency were sometimes considered by the judges in the light of perjury, although they were wont to pass a lenient sentence; and now, if the court should be satisfied upon affidavit that the falsehood arose from carelessness or inadvertence, they would probably treat the verdict as one against evidence, and grant a new trial. However, it was not always so, since we find, that where one swore that he was servant to J. S., whereas it turned out that he was servant to the servant of J. S. he was convicted of perjury. And moreover, although it was alleged on his behalf that there was no malice in this case, the court fined him 10*l.* Wild had moved for an abatement, because one Tiler had been fined but 5*l.* in such a case (1).

Again, one Bellingham had a process to serve from the Court of Wards. He served it on the 9th of the month, but he swore upon the return that he made it on the 8th. It clearly appeared that this was an inadvertent oath, yet he was convicted of perjury, and fined 10*l.* (2). Then again, the perjury proved and relied on was, that the defendant had sworn concerning J. S. that he was in London to be arrested. This was material, inasmuch as the issue was on the taking of J. S. by the sheriff. J. S., it appeared, was in Southwark, out of the liberties, at that time. In general acceptation Southwark was held to be a part of London, but the sheriff of London could not have any power to arrest there. The court, upon this occasion, fined the defendant 20*l.* *because of inadvertency* (3). At this day a learned judge would direct the jury to acquit the defendant, if they should be of opinion that he had uttered an inadvertent oath, such as that above cited, for the corrupt mind, the gist of perjury, would be absent (4). However, it is said, that falsehood which does not strictly amount to perjury is, nevertheless, a misdemeanor (5).

(7) 3 Inst. 166, *Gurnei's* C.

(8) Hetl. 97, *Styles's* C. cited there, in *Allen* v. *Westley*. But see 1 Hawk. c. 69, s. 22, who takes a distinction between oaths on the statute and at common law in this respect, 3 Inst. 166. acc.

(9) 2 Ro. Rep. 224, *Whicksley's* C.; S. C. Palm. 291. Nom. *Ockley and Whitlesbye's* C., 1 Hawk. c. 69, s. 2. Mr. Tidd observes, that where there have been mutual dealings between parties, the balance is considered as the debt at law, as well as in equity, so that if a plaintiff were to swear to the sum due to him upon the debtor side only, *if it were not a ground for an indictment for perjury*, at least, the defendant would be entitled to sue for a malicious arrest.—Tidd's Practice, 7th ed. p. 195.

(1) Al. 79.

(2) Sty. 136, *R.* v. *Bellingham*.

(3) 1 Sid. 405, *R.* v. *Lewen*.

(4) See 1 Hawk. c. 69, s. 2, and 3 Keb. 345. *R.* v. *Burton*.

(5) 2 Rose, B. L. 257, exparte *Overton*.

Perjury must be direct.] The perjury charged must also be directly fixed upon the point sworn to. A man was examined upon interrogatories in chancery, whether J. S. were of sound mind at the time of his decease. The answer was, that J. S., five days before his death, was not of sane mind. The person examined was indicted for perjury, but it was obvious that J. S. might be insane five days before his death as the answer stated, and yet might be in his right mind when he died. The indictment was quashed, because the oath was not effectually false (6). But, if the evidence be direct, it is sufficient, for an evidence may be very material, and yet not full enough to prove directly the point in question (7).

Not by Implication.] Other cases may be furnished to illustrate this point, namely, that no conviction for perjury can take place upon a supposition. Thus, the defendant was procurator-general of the court of admiralty, and he resigned that office to H., reserving to himself the emoluments of suits then depending. Subsequently, he treated with the prosecutor, and assigned over to him the rights which he had before reserved, giving the prosecutor a power by deed to prosecute all actions then depending in his, the defendant's, name, but to receive the profits on his, the prosecutor's account. Then one U. having become indebted to the prosecutor for business done in the admiralty, the latter sued him in the defendant's name, upon which the defendant made an affidavit to the following effect on a motion to stay proceedings. First, that he had resigned his place to H., and that, from that period, he had not authorized any person to sue in his name; and, then, that the action depending against U. had been brought in his name without his authority. Perjury being assigned upon this affidavit, Lord Kenyon enquired whether the perjury would not depend on the construction of this deed. The counsel for the prosecution replied in the affirmative, on which the learned lord directed an acquittal. Had the defendant acted inconsistently with the obligation entered into by his deed, he might have been liable to a civil action, but an indictment for perjury could not be maintained for an injury arising out of a misconception, or mistake in the construction of a clause in a deed. A question would be made as to what passed under the deed from the defendant to the prosecutor. The defendant was then acquitted (8). And there must not be any uncertainty as to the matter sworn to. And upon this principle it has been said, that perjury cannot be assigned upon evidence relating to the value of land, for that is the most uncertain thing in nature (9). So, again, perjury cannot be assigned upon an answer in chancery, which has denied a promise absolutely void by the statute of frauds (1). Again, a man was indicted for perjury for denying that he had entered into a certain

(6) Palm. 383, citing *Manton's* C. 14 Jac. 1.
(7) 2 Ld. Raym. 889, by Holt, C.J.
(8) 1 Esp. 280, *R.* v. *Crespigny.*
(9) 3 Mod. 134. See 2 Ld. Raym. 1118.
(1) Peake, Add. Ca. 93.

agreement charged by a bill in chancery to have been his. The agreement not having been reduced into writing, the defendant, besides a disavowal of its existence, had relied also upon the statute of frauds. These facts having been admitted by the counsel for the prosecution, it was contended, that the indictment could not be sustained, inasmuch as the agreement could not be enforced at common law, and consequently, the denial of such a matter was irrelevant and immaterial. And Abbott, C. J., was of the same opinion, observing, that the defendants in equity had pleaded the statute of frauds in their answer, and had thus relied upon an apparent ground for relief. Accordingly, the party was acquitted (2).

The attorney-general, in support of the prosecution in this instance, cited a case where a defendant, who denied a trust in his answer to a bill, was convicted subsequently for perjury (3). But the lord chief justice said, that it did not appear from the short statement of that case, and which was not very distinctly reported, whether the statute of frauds had been pleaded and relied on there (4). In the case before the learned judge, the defendant had put the statute upon the record as we have seen.

A. and C. were sworn brokers, and could not accordingly trade in drugs. With B.'s consent they made speculations in his name, B. agreeing to divide the profits and loss with A. and C. A. swore that he did not enter into an agreement with B. and C. jointly, to deal and be a copartner with them in the trade or business of druggists. Abbott, C. J., held that the indictment was not supported, as the above was not the kind of partnership denied by A. upon oath (5). Lastly, if a statute create a penalty in respect of mistakes upon oath which are not *positive affirmations*, an indictment will not lie cumulatively. Thus the 70th section of an insolvent act (6) punishes the omissions of property in the schedule as a misdemeanor; the 71st section inflicts the pains of perjury against false swearers. Lord Tenterden held, in such a case, that the legislature had, in the 70th section, contemplated the particular case of omissions, and directed an acquittal (7).

However, if the courts are jealous, on the one hand, not to permit any intendment or construction against persons accused of this grave offence, they will not connive, on the other, at any stratagems to relieve defendants where the false oath has been distinctly proved to their discredit. The law punishes the offender for his crime, and not for the temporal consequences of his act. Therefore, if it happen that the jury, before whom a person commits perjury, do not give credence to his statement, the individual may be convicted of perjury, although no injury have accrued

(2) Ry. & M. N. P. C. 109, *R.* v. *Dunston.*
(3) *Bartlett* v. *Pickersgill*, cited, 4 Burr. 2255, and 4 East, 577, note.
(4) Ry. & M. 111.
(5) 2 C. & P. 500, *R.* v. *Tucker.*
(6) 7 Geo. 4, c. 57.
(7) 1 Moo. & Rob. 128, *R.* v. *Mudie*; S. C. 5 C. & P. 23.

through his dishonesty. True it is that the party cannot sue him under the statute, because no damage has ensued, but he may be punished at the suit of the king (8).

Neither will equivocation serve a guilty person. A man was said to have rolled up a declaration in ejectment like a piece of tobacco pipe, to have hid it in his box, and then to have delivered it to the tenant in possession. He swore to the delivery of the declaration upon this, but, we are informed, that this could not avail him, for he was set in the pillory (9). The defendant was charged with having sworn falsely as to his charging no more than 6*d.* a quarter as a commission beyond the purchase of certain corn and grain. It was objected, that the defendant's oath might be understood to include collateral expences attending the sale, and, therefore, that the perjury could not be called positive and direct. But the indictment was held sufficient (1). Moreover, a defendant is not allowed to escape who comes to persuade a jury of false facts under colour of a *belief* in that which he ventures to affirm. "Mankind had fallen into a mistake," said Lord C. J. De Grey, "by supposing that a person who *thinks* or *believes* that a fact is true, cannot be convicted of perjury" (2). So again by Lord Mansfield, "It is certainly true, that a man may be indicted for perjury in swearing that he *believes* a fact to be true, which he must know to be false" (3). So again, the point being moved in C. B., by Walker, Serjeant, Lord Loughborough and all the judges there were unanimous, that *belief* was to be considered as an absolute term, and that an indictment might be supported upon it (4).

Another case of evasion would be, if a witness should consent to be sworn upon a book which he might not think sacred or deserving the sanction of an oath, and should then escape unpunished for perjury. This, again, the court will not suffer. A witness, who, in fact, was a Jew, had been sworn upon the Gospels as a Christian, and there was a verdict for the plaintiff. A new trial was moved for upon an affidavit of these facts, the learned counsel observing, that the testimony complained of had come from a witness who could not have considered the oath he had taken as binding upon his conscience. But the court denied the application. The objection had come too late, and great danger and confusion might be apprehended if such affidavits were to be entertained (5). The oath, too, was one upon which perjury might be assigned (6); it imposed on the party taking it both a religious and moral obligation (7). So where the defendant, a Scotch covenanter, had been sworn, first, in the usual way on the testament, and then, at the desire of the counsel, by holding

(8) Said Per. Cur. in *Hamper's* C. 3 Leon. 230; S. C. 2 Leon. 211; 1 Hawk. c. 69, s. 9.

(9) Dict. per Allibone, J., Comb. 62.

(1) 2 Russ. C. M. 542, *R.* v. *Atkinson.*

(2) 2 Sir W. Bl. 881, *Miller's* C., and see 3 Wils. 427; 1 Leach, 327; 1 Hawk. c. 69, s. 7.

(3) 1 Leach, 327, *Pedley's* C.; 2 Russ. C. M. 518.

(4) Suppl. to Vin. Abr. Tit. Perjury, vol. 5. p. 376, A. 2.

(5) 3 B. & B. 232, *Sells* v. *Hoare.*

(6) Id. 232, per Richardson, J.

(7) Id. 232. See Phil. on Ev. 4th ed. vol. 1. p. 24.

up his hand according to the ceremony of his own country, Lord Kenyon held an indictment good charging him with having sworn upon the Holy Gospels of God. For having been sworn in both ways, the learned chief justice said, he should not be suffered to escape punishment by acting the hypocrite (8). So a marksman shall not escape because he has not signed his name to an affidavit, if proof be given of the document having been read over to him, and of his knowledge of the contents (9). Whatever, therefore, be the outward form of the oath, the obligation attaches, and the punishment for a breach of it is consequent. By a very recent statute the last disability which affected two classes of people (1) on the subject of oaths was removed, but the falsehood of their *affirmations* or *declarations* is made punishable by the penalties of perjury.

By 9 Geo. 4, c. 32, s. 1, After the enabling sentence, which substitutes the affirmations and declarations of Quakers and Moravians, both in civil and criminal cases, in the place of an oath which had been indispensable in *criminal* matters before the act, it is added: That if any person making such affirmation or declaration, shall be convicted of having wilfully, corruptly, and falsely affirmed or declared any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures, to which persons convicted of wilful and corrupt perjury are or shall be subject.

Before we quit this general head of our subject, it may be right to advert for a moment to the description of persons who may be convicted of perjury. This might, indeed, be deemed a strange position, were it not that a difference exists between the common law and the statute in respect of persons. For the statute of Eliz. extends to witnesses only in suits between party and party, whereas the common law is universal, and includes every one of competent mind who violates its provisions on this behalf. The statute, in truth, makes nothing perjury which was not so before (2), it pursues the common law, and adds nothing new excepting the penalty (3). Nevertheless, as it confines the description of offenders to perjured witnesses, its provisions have been frequently taken advantage of by parties indicted under it, whose crimes, however punishable at common law, have had no reference to suits between individuals, and, therefore, were not within the statute.

Thus it was that the court held on one occasion, that a man could not be punished under the statute of Eliz. for perjury in his own cause, as in wager of law, but that he ought to be indicted at common law. It was said to have been so adjudged before that

(8) Peake, 155, *R.* v. *M'Carther.*
(9) K. & P. 260, *R.* v. *Spencer.*
(1) Quakers and Moravians. The statutes 8 Geo. 1, c. 6, s. 2, and 22 Geo. 2, c. 46, s. 36, had previously attached the penalties of perjury to the false affirmation of Quakers in civil suits. The Irish act was 19 Geo. 2, c. 18, Quakers affirming falsely under the bankrupt law are punishable for perjury by 6 Geo. 4, c. 116, s. 99, and under the insolvent act by 7 Geo. 4, c. 57, s. 71.
(2) By Holt, C. J., Carth. 422.
(3) By Eyre, J. Ibid.

time (4). So again, where in trespass in an inferior court, the defendant had pleaded his freehold for the purpose of ousting the court of jurisdiction, it was urged, that the defendant might be sworn to the truth of his plea. Twisden, J., denied this, and the court said, that an indictment would not lie for perjury upon such an oath more than upon a wager of law (5).

Witnesses for the Crown.] At common law, witnesses for the crown might always be indicted for perjury, but they were held irresponsible under the stat. 5 Eliz., as far as the usual proceeding by *indictment* could affect them. For it was said, that the king could not punish his own witness who swore for him, and that it had been so adjudged in the star chamber. One Price, accordingly, who had been indicted upon the statute of Eliz. for perjury in an ex officio information in the exchequer, was discharged (6). Nevertheless, an *information* would lie upon the statute (7), as we shall see by-and-by. Again, upon a reference out of the star chamber upon bill and demurrer, it appeared that certain witnesses in an information of *intrusion* for cutting down oaks belonging to the king, had sworn against the defendant, so as to procure his conviction. Upon this, the then defendant brought a bill for perjury, and the defendants in the star chamber pleaded that they were witnesses for the king, and that they had been compelled by process to appear at the trial. The court held, that it was reasonable to take their examinations, for that, although they had sworn for the crown, they were punishable at common law for a false oath, but not on the stat. of Eliz. (8). Such perjury was punishable by the common law, either upon an indictment or an information, or by the act *on an information* (9).

Jurors, &c.] Persons also, who, although under the sanction of an oath, do not take such a one as relates to evidence, are not punishable in general for perjury, although, as we shall see in the second section, there are some exceptions to this rule. Jurors who give a verdict contrary to the plainest testimony, are not guilty of perjury, because they are not sworn *to depose* the truth, but only to give a true judgment upon the depositions of others (1). So also, ministers and officers of justice are, *in general*, dispunishable for a breach of their oaths of office, but there are some occasions upon which they may be convicted, as for specific acts of misconduct at variance with their general oaths.

(4) Noy. Rep. 128; Sir *Robert Miller's* C.; S. C. Yelv. 120.

(5) 1 Ventr. 296, Anon. See 1 Sid. 330.

(6) *Price's* C. Cro. Jac. 120; S. P. Cro. El. 148; *Lane's* C., 3 Salk. 270. See 1 Hawk. c. 69, s. 19.

(7) 3 Inst. 164.

(8) Cro. Jac. 212, *Nannge* v. *Rowland Ap. Ellis* and others; S. C. 3 Inst. 164, nom. case of Rowland Ap. Eliza.; S. C. 12 Rep. 101, nom. *Hugh Manney's* C.

(9) 3 Inst. 164.

(1) Vaugh. 152; Gouldsb. 51; 1 Hawk. c. 69, s. 5. See as to the old writ of attaint, now entirely out of use, 3 Inst. 164. This proceeding fell into disuse by reason of the extreme severity of the punishment awarded against jurors upon conviction. Id. ibid.

Bail.] Bail who prevaricate or swear falsely are open to an indictment for perjury. This was distinctly laid down by Abbott, C. J., in a case where Mr. Justice Best had committed two persons for gross equivocation. They were ultimately discharged, but the lord chief justice intimated, that if any one chose to indict them, they were clearly liable to the charge (2).

So, if one, brought in upon a contempt, deny all upon oath, it is said that he shall be discharged of the contempt, but that he may be prosecuted for perjury (3).

Subornation of Perjury.] Secondly, of subornation of perjury. Although this is a creature of the legislature for the most part, it was, nevertheless, looked upon by the common law with a most unfavourable eye. If, says Fleta, a servant be compelled by his master to swear falsely, both are perjured; but he who incites the other to swear, whom he knows to be a false swearer, or who requires, or receives such an oath, is worse than a murderer. For a murderer only kills the body, but this man destroys both the body and soul of the other. Moreover, continues Fleta, he who wittingly hears another using a false oath, and is silent, is also guilty of a transgression (4). And the statute of Elizabeth makes this distinction between the crimes of two parties, since the suborner is mulcted 40*l.*, the person suborned 20*l.*, or only half (5).

Every subornation is a distinct offence (6).

The particular consideration and statements of the statutes relating to perjury, are reserved for another page; we shall, therefore, content ourselves here by a general notice of the offence of subornation. And it is important to observe in the first place, that, unless there be an oath, there cannot be said to have been a subornation. And this oath must have all the qualities of one which, if violated, would subject the offender to the penalties of perjury.

First, there must be an oath. Thus, by Holt, C. J., a man cannot be guilty of subornation of perjury, unless perjury be actually committed (7). And the nature of the oath must be shewn; as where the defendants were indicted for suborning one to swear that certain persons were at a conventicle; the men were at another place, and the jury convicted the defendants. Error was brought, and although the court seemed to take it for granted that an oath had been administered in this case, they agreed, that the perjury must be shewn, and that subornation could not exist withont an oath. The indictment, however was quashed upon another objection (8). Secondly, the qualities of the oath must have united, in order to ground a prosecution for

(2) I Chit. Rep. 116, *Curtis* v. *Smith*, Tidd's Practice, 7th ed. p. 299; Cro. Car. 146, *Royson's* C.; 1 Hawk. c. 69, s. 4.

(3) 12 Mod. 511, *R.* v. *Sims.*

(4) Flet. lib. 5, cap. 21; cited 3 Inst. 167.

(5) 3 Inst. 167; Sav. 46, in pl. 98. See also 5 Rep. 99; plus peccat author quam actor.

(6) 12 Mod. 154, *R.* v. *Lambert.*

(7) Holt's cases, 536, *Shore* v. *Meddison*; S. C. Comb. 450; 1 Hawk. c. 69, s. 10; S. P. 6 Mod. 202, by Powell, J. See likewise Holt's Ca. 364, *R.* v. *Turvy* and others.

(8) 3 Mod. 122, *Rex* v. *Hinton & Brown.*

subornation of perjury. So that it must have taken place wilfully,—in a judicial proceeding,—and, in respect of the issue. Thus, Holt, C. J., distinctly laid it down, that if a man be indicted for perjury, and it do not appear what he swears, whether or not it were in a cause depending and material to the issue, the indictment must fail. The court is to judge of the materiality, and they cannot do this if the matter sworn to be not set forth. By the same reason, subornation must be of such a thing as would be perjury if sworn, and so must be shewn certainly (9).

Action for imputing Subornation.] To maintain an action for imputing subornation of perjury, it is necessary that the oath proposed to have been suborned, should have been such as that the breach of it must have amounted to perjury, but it is not required that the oath should have been actually taken. In this latter respect, therefore, the action for these imputations differs from an indictment for subornation, where it is indispensable to prove that an oath has been administered to the witness suborned.

An action upon the case was brought for saying, "Thou hast given J. S. 9*l.*, for forswearing himself in chancery, and hast hired him to forge a bond." After verdict, it was moved to arrest the judgment, because there was no allegation of a suit in chancery, or that the plaintiff had forsworn himself in his answer, or as a witness. But the court overruled the objection, for that the words were to be intended according to the usual manner of speaking, and they said, that although the party were never sworn, yet that it was scandalous to impute such subornation, and the plaintiff, accordingly, had judgment (1).

So where the defendant had said, that the plaintiff had procured one S. to come thirty miles to commit perjury before my lord of Winchester, it was moved to arrest the judgment, for want of an allegation that perjury had actually been committed. But by the court, it is a great imputation, and shall be intended in the worst part; and the plaintiff had judgment (2).

An action was brought for these words, "Thou hast procured false witnesses to swear in such an action." It was moved to arrest the judgment, because there was no allegation that the plaintiff had suborned or procured the parties to swear falsely. But the court gave judgment for the plaintiff, because the charge of procuring false witnesses is intended *in malam partem*, that the plaintiff had procured such witnesses as would swear falsely (3).

Yet, in cases of this sort, if the accomplishment of the act propounded to the witnesses would not amount to perjury, there cannot, of course, be any subornation. As if it should appear, that there was no wilfulness in the deed done, that the words sworn, or so imputed to have been, were not in a court, or were immaterial to the issue.

(9) 7 Mod. 101, *The Queen* v. *Darby*.

(1) Cro. Car. 387, Anon.

(2) Cro. Jac. 158, *Harris* v. *Dixon*. It must be confessed, however, that this case is reported in Yelverton, with a decidedly opposite issue, Yelv. 72; 6 Mod. 210.

(3) Cro. El. 93, *Prowse* v. *Cary*.

Some difference of opinion, however, has prevailed amongst learned judges, in cases where words imputing subornation not actionable in themselves, have been used towards *official persons*. Thus, in an action on the case, for these words, " Your master's witnesses, (that is to say, a justice of the peace,) in such a cause were perjured, and your master is the maintainer and upholder of them," it was moved to arrest the judgment, on the ground that the words were not actionable; Rainsford and Turner, barons, were of that opinion, because the words did not relate to the office of justice, but were spoken as of a private person; and also, because it was not said that he upheld their perjury, but only countenanced their persons. But by Hale, C. B., these words, if true, are a scandal to his office, and, upholding, here, can have no other meaning than abetting them in their perjury: the defendant had judgment, there being two to one for him (4). Again, the words were, " There goes your rare chancellor, (innuendo the plaintiff) to suborn witnesses to swear against the parson." The court were divided; Gould and Powys, Js. held, that the action lay; Holt, C. J. and Powell, J. on the contrary, that it did not lie (5).

Endeavouring to suborn, a great offence.] It must not be supposed, from a review of the above authorities, that because an indictment will not lie for subornation where no perjury has been committed, the endeavour to excite to that crime is dispunishable. So far from that, Holt, C. J., was heard to say, that he had known one set in the pillory for an attempt to suborn, that being a great offence (6). Again, upon a consultation as to the amount of a fine in another case, where there was an endeavour to procure the forgery of a certain writing, Jones, J., said, that this was not subornation of perjury, for there had been no perjury committed, nor act executed, and he added, that this was not so great a crime as subornation of perjury. But he, in common with the rest of the court, agreed to fine the defendant for his attempt to commit fraud (7). So again, the inciting of a witness to give evidence as to a particular fact when the inciter is ignorant whether it be true or false, is a high misdemeanor (8). But, it seems, that the false oath should be actually taken, and it is worthy of remark, that this is not subornation, because the inciter is assumed not to have known the falsehood of the evidence he may have been recommending (9).

Perjury at Common Law.] Having now spoken of perjury and subornation in a general view, we come to discusss the nature of that offence, more particularly as it exists at common law and by statute. Thus, we shall shew that it must be done wilfully and

(4) Hardr. 501, *Pugh* v. *Owen*; 6 Mod. 202.

(5) 6 Mod. 200, *Walmsley* v. *Russel*; S. C. 2 Salk. 696.

(6) Comb. 450; Holt's cases, 536. The case, probably, was *R.* v. *Tayler & Vard*, 2 Keb. 399.

(7) 2 Sho. 1, 4, *R.* v. *Johnson*.

(8) 2 Rose B. L. 257, *Overton* exparte.

(9) 2 Russ. C. & M. 518, *R.* v. *Edwards*; cor. Adams, B.

corruptly at common law, that the oath must have been taken before a competent authority, and the courts capable of administering such oaths will be pointed out. We shall then proceed to speak of perjury by affidavit, of the persons individually considered before whom parties may be sworn, and if extrajudicial or idle oaths which do not, even when broken, warrant the penalties of perjury. It will then be shewn that the oath must take place in some judicial proceedings, but that *at common law*, it need not be concerning a matter immediately material to, or bearing upon the issue.

Perjury must be wilful.] One of the clearest requisites to support a prosecution for perjury is, that the act must be *wilful*. Therefore a mistake in swearing is not a false oath as will subject the witness to punishment. As, where a man was asked his name at a conventicle, and, upon his answering that he was A., the defendant swore that A. had been at the conventicle, whereas, in fact, the answer was false, but the defendant was ignorant of the deceit. Here the court set aside a verdict for the crown on an *information*, because there was a "plain mistake" (1). So where one swore that he had seen and read a certain deed, but this turned out to be only the *counterpart*, it was held, that no perjury had been committed, for there was a mere mistake (2).

A competent Authority.] Moreover, perjury cannot be committed unless the oath be administered by a competent authority (3). Therefore, a merely idle oath taken before persons who are not qualified to adjudicate upon the subject of it, or an oath made before individuals in their private capacity, are not such binding assertions as will warrant proceedings for perjury upon the breach of either. Thus it was, that the judges resolved in the star chamber, that a man was not guilty of perjury who swore concerning the title to certain land in the court of *Requests*, because there was a want of jurisdiction in that place over real actions (4). So it was also where the plaintiff presented the defendant at a visitation, which was no part of his duty, and the defendant having slandered him, the plaintiff brought an action. The judges held, that the action did not lie because the plaintiff could not have committed perjury (5).

What Courts.] This case naturally leads us to consider before what courts the offence under discussion may be committed, and we will then shortly mention the description of persons com-

(1) 2 Show. 165, *R.* v. *Smith*; S. C. Sir Tho. Jones, 163, who reports that the verdict was against the direction of the judge, that the grand jury had ignored the *indictment*, and that the court were of opinion that the information ought not to have been retained if all the matter had been discovered.

(2) 10 Mod. 195, per Parker, C. J. in the *Queen* v. *Muscot*.

(3) 3 Inst. 164, 166; 2 Show. 33; 4 Comm. 137.

(4) Yelv. 111; *Paine's* C., 1 Hawk. c. 69, s. 4.

(5) Yelv. 72, *Stile* v. *Heape*.

petent to administer oaths. First, it is allowed universally, that a false oath in any court of *Record* is punishable, both at common law and by the statute of G. 2 (6). And, *at common law*, such a crime if done in a court *not* of record is perjury, and punishable at common law, or by virtue of 2 G. 2, c. 25. A spiritual court, for example, is a court not of record, and yet perjury may happen there. In an action for imputing perjury it was objected, that the consistory court at Exeter was not within 5 Eliz. by reason of its being a spiritual court; but the court observed, that the statute did not alter the liability to punishment, and, consequently, that the common law penalty attached (7). So again, upon a similar objection, the court said, that the action well lay, because the ecclesiastical court is a judicial court, and well known (8); and it is desirable to add here, that the right to sue under these circumstances is only consistent with a legal indictment and acquittal, supposing that the perjury were made the subject of a charge. So that, if the words imputing a false oath relate to a matter upon which perjury is not assignable, no action can be supported on that behalf. But further; subornation of perjury was charged against the plaintiff, for that he had procured S. to come thirty miles to commit that offence before my *Lord of Winchester*, and the plaintiff brought an action for these words. It was said, that the Bishop of Winchester was not a person before whom perjury might be committed, and that no *court* had been mentioned. But the judges said, that it was a great imputation, and should be intended in the worst part, and judgment passed for the plaintiff (9). The same point as to perjury in a court christian was ruled in the reign of Charles the second (1).

However, it must be confessed, that some cases decided about the same time as the former, are contrary to those already cited. Thus, the words, "Thou art perjured, for thou art forsworn in the Bishop of Gloucester's court," was held not to be actionable (2). And so again were these, "Thou art forsworn in Collet court," for it was said, that Collet court could not be presumed to be of record (3).

So again in the Hundred court (4).

Doctors' Commons.] With respect to perjuries in Doctors' Commons, the point does not seem to be fully settled, whether

(6) As *The Leet*, Mo. 404, *Wild* v. v. *Copeman*; S. C. Noy. 34, nom. *Wilde* v. *Cookeman*; Cro. El. 709, *Spencer* v. *Shory*; Godb. 179. The Star Chamber, Cro. El. 609, *Corbet* v. *Hill*.

(7) Cro. El. 185, *Plaice* v. *Howe*, of course before the stat. 2 G. 2; Acc. id. 297, *Lee* v. *Secombe*.

(8) Cro. El. 609, *Shaw* v. *Tompson*. See also 1 Keb. 545, *Dr. Porye's* C.

(9) Cro. Jac. 159, *Harris* v. *Dixon*. Nevertheless this case is reported by Yelverton, with a conclusion entirely different, Yelv. 72; but in 6 Mod. 201, &c. where it was cited by the judges, the report in Croke James was preferred.

(1) 1 Sid. 454. See also 2 Ro. Rep. 410; *Pole* v. *Carrel*, 5 Mod. 348; 1 Lord Raym. 451; 1 Hawk. c. 69, s. 3.

(2) Cro. Jac. 436, *Page* v. *Keble*.

(3) Id. 190, *Skinner* v. *Trobe*. See however 6 Mod. 200, *Walmsley* v. *Russel*, and the observations of Powys, J. upon these cases at p. 201.

(4) Cro. El. 905, *Gore* v. *Moorton*.

proceedings can be taken upon such occasions or not. A negro servant was charged many years since with swearing that a young lady had attained the age of twenty-one, whereas, in fact, she was but sixteen at the time in question. He was married to her by virtue of the false oath, which procured him a licence, and the case was reserved for the opinion of the judges, but the prisoner died in Newgate, and no opinion was publicly delivered (5).

However, in a more recent case the judges held, that perjury could not be charged upon a false oath taken before a surrogate to obtain a marriage licence; and as the indictment in this case neither alleged that the defendant took the oath for the purpose of procuring a licence, nor that he did procure one, the judges thought, that no punishment could be inflicted as for a simple misdemeanor (6).

And a clergyman may be indicted for perjury by taking a false oath at his admission to a living, if he have been convicted of simony. The court refused an information upon one occasion, where affidavits were produced shewing that the presentation had been simoniacal, because there had been no conviction for the simony (7).

House of Commons.] The House of Commons has no power to administer an oath upon the general authority of their constitution; but acts of parliament have been passed from time to time giving power to that House to cause witnesses to be sworn, as in cases of election petitions (8).

Chancery.] Perjury, again, may be committed by giving an answer into chancery (9). And thus, Lord Coke informs us, that a false oath in the chancery, exchequer chamber, &c. was punishable in the star chamber (1), and now by virtue of 2 G. 2, c. 25. For the stat. 5 Eliz. speaks only of the perjury of witnesses in their examinations (2). So may this offence also be complete by swearing falsely upon interrogatories, yet the indictment should here likewise be preferred at common law, and not upon the statute (3). But it cannot be assigned upon the denial of a promise absolutely void by the statute of frauds (4).

King's Bench, &c. and Nisi Prius.] So again, this same offence may be assigned for false oaths taken in any of the courts at

(5) 1 Leach, 34, *Alexander's* C.; S. P. id. 35, note, *Woodman's* C. But the judges in this last case did not communicate their opinion publicly. See 2 Stra. 1160, *R.* v. *Beck*. And as to the spiritual court, see 3 Salk. 269; *Buxton* v. *Gouch*, 1 Sid. 454.

(6) Russ. & Ry. 459, *R.* v. *Foster*.

(7) 1 Str. 70, *R.* v. *Lewis*.

(8) See 4 Comm. Christian's ed. 137, note (5).

(9) Although the fact relate to a thing not charged in the bill, 5 Mod. 348.

(1) 3 Inst. 166; 3 Leon. 201; S. P. per Tanfield, Winch. Rep. 3.

(2) Dy. 288, *Knight's* C. cited in the note. See also 2 Burr. 1189, *R.* v. *Morris*.

(3) Yelv. 120, *Sir Robert Miller's* C.; S. P. Dal. 84.

(4) *Peake's* Add. C. 93, *R.* v. *Beneseech*.

Westminster, or at nisi prius. In the caption of an indictment against a person for perjury both the judges of assize were mentioned, but the false oath was alleged to have been taken before one judge only. Mr. Baron Eyre expressed some doubt upon this, whether one commissioner had authority to administer the oath, and further, as the nisi prius record stated in the usual form, that the trial was had before both the judges, whether the evidence maintained the indictment. But the judges were unanimously in favour of the conviction (5).

So, where at an admiralty session the commission was directed to A. B. & C. and others not named, of whom A. B. & C. were amongst others to be *one*, the court held, upon an indictment for perjury, that the most which could be made of this incorrect phrase would amount merely to making it a clerical error. The obvious meaning of the words was, that if any one of the persons named of the quorum were present, it would be sufficient (6). It may be added here, that it is the practice of the central criminal court not to try an indictment for perjury arising out of a civil suit until that suit be determined, unless the court where the suit is pending should think fit to postpone the decision of the case for the purpose of ascertaining the truth of the criminal charge (7).

Court Baron.] A Court Baron is not a court of record, but yet it is agreed that perjury may be committed there (8). So, by Hobart, C. J. If a man be forsworn in a court baron before the steward, this is perjury (9); and in the principal case, the same doctrine was maintained, although judgment was arrested because the authority of the commissioners of the high commission court was not declared, nor how the party was forsworn (1). But, reverting to the court baron, the perjury, except in the cases of subornation of witnesses, and false oaths by them, must be assigned at common law. For where a bill of perjury *tam quam* was sued, because the defendant, one of the homage, had presented with other homagers, that the plaintiff had cut down certain trees, which he had not so cut, the judges held, that the proceeding was bad, being upon the stat. of Eliz. which had reference to the testimony of witnesses only (2).

Court of Sewers.] So, again, perjury may be committed in a court of sewers, for that is of record. And it is observable, that a false oath, taken before commissioners whose commission is, in strictness, determined by the demise of the crown, is, nevertheless, punishable if the commissioners have not previously any notice

(5) 1 Leach, 150, *Alford's* C.; S. C. 14 East, 218, note.

(6) 5 T. R. 311, *R.* v. *Dowlin.* In fact, according to the 23 G. 2, c. 11, the prosecutor needed not to have set out the commission, but having done so, he was bound to accuracy, 5 T. R. 317, per Lord Kenyon.

(7) 8 C. & P. 50, *R.* v. *Ashburn.*

(8) 1 Sid. 454; 1 Mod. 55; Freem. Rep. 506; 5 Mod. 348.

(9) Winch. 3.

(1) Id. 2, *King* v. *Bowen.*

(2) 3 Leon. 201, *Matthews's* C.

of the demise, for it is said, that it would be of very ill consequence to make their proceedings wholly void (3).

Sheriff's Court.] In an action on the case for words charging the plaintiff with a false oath in the sheriff's court, it was objected, that this was not a court of record, but as judgment was ultimately given for the plaintiff, it was clear that the objection did not prevail (4).

Council of the Marches.] A similar judgment had been previously given for a slander imputing perjury before the *Council of the Marches in Wales*, and the case was relied on by the plaintiff's counsel in *Brumrig* v. *Hanger* (5).

The courts above mentioned are either courts of record, or courts judicially holden by some title, and not by usurpation. In the latter case, perjury could not be committed; and so it was once resolved by all the judges, that this offence could not take place in the lord's court of copyholds, or in any court holden by usurpation, but that it was otherwise in a court baron, or court leet, which were holden by title (6).

Inquest of Office.] Perjury, moreover, may be committed before an inquest of office. And thus it was held, that a false oath taken before commissioners upon such an occasion, was a great offence, and punishable at common law, though not by the statute of Elizabeth (7).

Commissioners of Bankruptcy.] It was said, upon one occasion, that the clause in 5 Geo. 2, c. 30, s. 16, authorizing the commissioners to *examine* the bankrupt, gave them power to administer an oath, and, consequently, that an indictment for perjury might be well founded upon a breach of that oath (8). But the stat. 6 Geo. 4, c. 16, s. 36, gives an express power to examine upon oath. At another time it was made a question whether perjury could be assigned upon an affidavit in support of a petition in bankruptcy before the filing of the petition (9).

Two persons were indicted for perjury committed upon an indictment of barratry, and being convicted, judgment was passed upon them. They, however, brought error, and pointed out objections to the former proceedings as being coram non judice, but

(3) Cro. Car. 99; see 16 Vin. Ab. 309, A. 15; 313, C. 6. It was once incidentally asked by the court whether any one giving his testimony under a commission from a court of equity to examine witnesses in Scotland could be convicted of perjury. 1 B. & P. 210, in *Calliand* v. *Vaughan*.

(4) Hardr. 151, *Brumrig* v. *Hanger & ux.*

(5) Hob. 283, *Adams* v. *Flemming*; S. C. Hutt. 34.

(6) Godb. 179, Mich. 7 Jac. 1, in C. B. See also as to the court of requests, and the old court at Whitehall. 4 Inst. 97, 98; 3 Salk. 269. And the court will exercise a right of committing upon the spot a party apparently guilty of perjury. See 2 Burr. 806, *R.* v. *Parnell.*

(7) Mo. 627, *Agar's* C.; S. C. Noy. 100. See 4 Inst. 278.

(8) Mann. N. P. Digest, 232, *R.* v. *Raphael.*

(9) 2 Glyn & J., 389, *R.* v. *Dudman.*

the court said, that that circumstance made the proceedings only erroneous, and that while the record stood unreversed, perjury might still be assigned (1). Even if reversed, Mr. Serjeant Hawkins makes a quære, whether perjury might not be, nevertheless, assignable (2). And it seems clear, that at all events, the party convicted of perjury cannot himself take advantage of any default in the record of the proceedings at which he took the false oath (3).

Before Arbitrators.] A cause was referred by a judge's order, and it was directed, that the witnesses should be sworn before a judge, or before a commissioner duly authorized. A witness was sworn before a commissioner for taking affidavits, and he was examined vivâ voce before the arbitrator. Gaselee, J., held, that the witness was not indictable for perjury (4).

Perjury by Affidavit.] The subject of perjury by affidavit is very nearly allied to that which has been the last discussed. There was never any doubt but that an indictment might be preferred at common law for an offence of this nature (5). And also, that a party may be punished for using a false affidavit made abroad, though not for perjury, yet, as for a misdemeanor (6). And at common law, it is not necessary in order to maintain the charge, that the affidavit should have been filed of record, or exhibited to the court, although this is requisite in indictments upon the statute of Eliz. (7). Thus, where an indictment at common law neglected to mention these particulars, it was contended, that proof ought to have been given at the trial, that the affidavit upon which perjury was assigned had been read and used against the party, and, consequently, that the judgment should be arrested. But the judges were of opinion, that the guilt or innocence of the defendant could not be said to depend on the circumstance of the *use* of the affidavit, and that the use of the affidavit could not be supplied by intendment (8). So, where it seemed to be agreed, that from certain omissions in the jurat, an affidavit upon which perjury had been assigned, could not have been received in the court of chancery, Littledale, J., said, that the offence was complete at the time of the swearing, notwithstanding the impossibility of making use of the instrument. It appearing, however, that the affidavit was not read over to the defendant, she was acquitted (9). So, again, where the defendant had filed a bill for an injunction, and at the same time had made an affidavit of matters which were material

(1) 1 Ventr. 181, *R.* v. *Sergeant & Annis*; S. C. 2 Keb. 718, 854; S. C. 1 Mod. 81.
(2) 1 Hawk. c. 69, s. 4.
(3) 1 Sid. 148, *R.* v. *Wright.*
(4) 3 C. P. 419, *R.* v. *Hanks.*
(5) 1 Ro. Rep. 79, per Coke, C. J. 5 Mod. 348; 1 Hawk., c. 69, s. 21; 8 East, 364, c. 69, s. 21.
(6) By Lord Ellenborough.
(7) Skin. 403, *R.* v. *Taylor*; S. C. Holt, 534.
(8) 7 T. R. 315, *R.* v. *Crossley*, one, &c., Lawrence, J., cited *R.* v. *Atkinson*, Easter 24, G. 3, K. B., observing, that the objection was not taken there, p. 320.
(9) Ry. & M., N. P. C. 94; *R.* v. *Hailey*; S. C. 1 C. & P. 258.

to the question, it was urged, that he could not be convicted of perjury, because no motion had ever been made for the injunction, but Lord Tenterden refused to stop the case, observing, that the objection was upon the record that the crime was, morally, the same, whether the motion were made or not, and that his opinion was against the necessity of the proof. The defendant was acquitted (1). But it seems, that in indictments upon the statute, the production and use of the affidavits are essential to sustain the charge, because, as Lord Kenyon observed, an action is there given to the party injured by the false oath (2). And several precedents were cited in *R.* v. *Crossley*, from Tremaine's Pleas of the Crown, to this effect (3). So, in a case before Holt, C. J., also upon the statute, the learned chief justice took notice of the necessity of reading and using the affidavit against the party, for that the bare making of it was not sufficient (4). And in *R.* v. *Crossley*, the judges made great research into the precedents, and found, that all which sanctioned the *use* of the affidavit were indictments upon the statute 5 Eliz. (5).

However, an indictment does not lie for perjury in an affidavit in chancery upon the statute of Eliz., although it does lie in respect of depositions in chancery (6). Nor will it lie in respect of a foreign affidavit (7), although it is a very serious misdemeanor to make or use a false affidavit of this kind (8).

Persons.] Secondly, we have already seen, incidentally, that attempts have been made to set aside convictions for perjury, not because the court properly constituted was inefficient, but for want of a sufficient, or a qualified number of commissioners. These efforts were unsuccessful in the cases which we have cited (9). But the fact is not the less true, that there may be a defect in the officer, although there be none in the court; and again, convictions have not unfrequently been quashed by reason of the incompetency of the parties who administered the respective oaths, independently of any court.

A person was indicted for perjury before a surrogate in the ecclesiastical court of the consistory of London, and a difficulty as to evidence of the appointment having been disposed of by Lord Ellenborough, it was proposed for the defendant to shew that the appointment had not been *duly* made. The surrogate should have been appointed in the presence of the registrar, or his deputy, or

(1) M. & M. 271, *R.* v. *White*; *R.* v. *Crossley* was not referred to either in this or the preceding case.

(2) 7 T. R. 319.

(3) Trem. P. C. 136, *R.* v. *Cross*; Id. 138, *R.* v. *Jole*; Id. 151, 155, *R.* v. *Brooks*. See also Id. 148, *R.* v. *Stone*; Id. 167, *R.* v. *Hawkins*.

(4) *Holt's* cases, 534, *R. & Reg.* v. *Taylor*; S. C. Skin. 403.

(5) In this case of *R.* v. *Crossley*, it became necessary to prove the defendant to have been an attorney, and, for this purpose, the book from the master's office, wherein the names of the attorneys of the court are entered, was held sufficient, without producing the roll, 2 Esp. 526.

(6) 3 Keb. 345, *R.* v. *Burton*.

(7) 19 Ves. jun., 502, *Musgrave* v. *Medex*.

(8) 8 East, 364, *O'Mealy* v. *Newell*.

(9) Ante, p. 72; *Alford's* C., and *R.* v. *Dowlin*.

a notary public, but the counsel for the crown urged, that it was too late to press the objection after proof that the office had been executed for twenty years by the surrogate. Lord Ellenborough, however, refused to shut out this evidence, and being of opinion, thereupon, that the appointment had taken place contrary to the canon, he directed an acquittal (1). So, again, a master in chancery, merely as such, has no power to administer an oath, for he is but a clerk of the court to make writs. But when the allegation is made, that the oath in question was taken in the court of chancery, by which it appears to have occurred in a judicial proceeding, the case is altered, and the authority sufficiently appears (2). So, in an answer to interrogatories, if one be forsworn in a matter not materially charged in the interrogatories, it is not an offence punishable even at common law, because the officer has no power to administer an oath concerning any things except such as are charged in the interrogatories (3).

Justices.] Justices of the peace have no *acknowledged* right at common law to administer an oath (4), but various acts of parliament have expressly authorized them to do so, and they have exercised the power in question from very early times. Without entering here upon the disputed question, whether this jurisdiction belongs originally to them independently of the legislature (5), it is certain that no voluntary oath sworn before them extra-judicially, could have subjected the party breaking it to an indictment for perjury. It was, indeed, said once by Jeffreys, C. J., that such a charge might be preferred (6); but this dictum is at variance with the received law of modern times. In an indictment of perjury, however, for swearing before a justice, that J. S. was present at a conventicle, the chief justice before mentioned, and all the court, refused to quash it for a want of power in the magistrate to administer the oath, leaving the party to plead that matter, if he chose. And the Lord C. J. said that the conventicles were unlawful by the common law, and that justices might punish unlawful assemblies (7).

So also, it is said, that if one take a false oath before a magistrate, in order to induce him to compel another to find sureties for the peace, he will be guilty of perjury (8).

Extrajudicial Oaths, &c.] If the oath alleged to be false, take place either before an incompetent court, or one become so by incidental circumstances, or before a person not authorized to administer it, the obligation is not binding in law, so as to subject

(1) 3 Campb. 432, *R.* v. *Verelst.*
(2) See 16 Vin. Ab. 308, A. 6.
(3) 1 Sid. 274, per Cur.
(4) 2 Hawk. c. 8, s. 64.
(5) See Burn's Justice, Tit. Oaths, upon this subject.
(6) 1 Ventr. 370.
(7) 1 Ventr. 369, Anon. The justice was, probably, as much authorized to give the oath in this as in many other cases where the power of doing so would never have been questioned. See Cro. El. 168, *Kimersly* v. *Cooper.* Burn's Justice, Tit. Oaths, on this subject, and post.
(8) 16 Vin. Ab. 309, A. 15. See Id. 314, D. 1.

the violator of it to the penalties of perjury. Therefore, an extrajudicial oath, though false, cannot be thus dealt with (9). And Mr. Serjeant Hawkins lays it down, that no oath whatsoever in a mere private matter, however wilful and malicious, is punishable as a perjury in a criminal prosecution, for private injuries are to be redressed by private actions. So that, although some magistrates have felt it right occasionally to permit affidavits to be made before them, which concerned individual transactions, perjury could not be assigned for a breach of truth in those instruments. This leave, however, was far from being universal, the majority of applications for the purpose being unsuccessful. And, indeed, not without reason, for, "by such idle oaths," says Mr. Justice Blackstone, "a man may frequently *in foro conscientiæ* incur the guilt, and at the same time evade the temporal penalties of perjury" (1). And Lord Kenyon was heard to say, that "he did not know but that a magistrate subjects himself to a criminal information for taking a voluntary extrajudicial affidavit" (2).

So again, there may be an extrajudicial oath in a court of record, the court having lost its jurisdiction by reason of the non-compliance of parties with the enactments of the legislature. As where there had been co-plaintiffs in a suit, and one of them died, but without entering any suggestion on the record under 8 & 9 W. 3, c. 11, s. 6, the trial was brought on, and evidence given. The defendant was indicted for perjury upon this trial, but his counsel urged, that the trial had been extrajudicial because the statute of William had not been complied with. There was no suggestion upon the record. Lord Ellenborough observed, that the oath had been taken in an unauthorized cause, and held, that the suit had abated at the time of the trial. The defendant was of course acquitted (3). But where a writ of inquiry was returnable into the common pleas instead of the king's bench, and perjury was assigned upon evidence during such an inquisition, the court held that an indictment would lie (4).

The Perjury must be committed in Judicial Proceedings.] It has been shewn, that the perjury, which is a fit subject for prosecution, must be wilful, and that the oath must have been taken before persons possessing a competent jurisdiction to administer it.

There is still another requisite, namely, that the offence should have been committed in some *judicial proceeding*. Therefore, a breach of the oath of fealty and allegiance, or of oaths taken by officers and ministers of justice, is not punishable as a perjury (5). If an officer, however, commit extortion, the breach of his oath, it is said, may serve for aggravation (6). But if there be a violation of the oath in any specific instance, the law will attach upon

(9) 16 Vin. Ab. 307, A. 3.

(1) 4 Comm. 137.

(2) In *Bramah* v. *The* —— *Fire Insurance Company*, 3 Burn's Justice, ed. Chetwynd, p. 532. And see now 5 & 6 Wm. 4, c. 62, s. 13. forbidding the use of such oaths before magistrates, unless warranted by statute.

(3) 1 Stark. 511, *R.* v. *Cohen.*

(4) 5 B. & Ald. 634, *Pippett* v. *Hearn*; S. C. 1 D. & Ry. 266.

(5) 3 Inst. 166.

(6) Ibid. 11 Rep. 98; Palm. 144.

the transgressor. So that, if a mayor make a false return, he may be indicted for perjury upon his general oath (7). And there is an instance of a proceeding against a sheriff, by information, for perjury, in making a false return, where however it turned out that the sheriff had never been sworn, upon which the court ordered that he should be punished for that omission (8).

So, again, a wager of law falsely made, was held not to subject the transgressor to the penalties of perjury (9). And if it be suggested, that an affidavit is necessary upon any particular occasion, that fact must, upon an indictment for perjury, be shewn to the satisfaction of the court. Where such a practice was alleged as being necessary in the insolvent debtor's court, the production of a printed paper by a witness, purporting to be a copy of the rules of that court, and requiring an affidavit, was held insufficient evidence of the practice (1).

A solicitor complained to the lord chancellor, *ore tenus*, that he had been arrested on his return home after the hearing of a cause. He was examined before that judge concerning the injury which he had sustained, and perjury was assigned upon his answer. It was objected, that the oath alleged as false, had not been made in a judicial proceeding, but the court were quite clear upon the point, and discharged the rule for arresting the judgment (2).

At Common Law, need not be material to the Issue.] With respect to the materiality of the point sworn to, as it regards the issue, although the books were formerly not very clear upon the subject, it may, nevertheless, be fairly collected from the various dicta and decisions, that, at common law, a man may be convicted, although he be only perjured in circumstance (3); but that upon the statute of Eliz. the oath must be immediately relevant to the thing in question. But with this qualification, that even at common law, the swearing to any impertinent or minute circumstance, is not deemed worthy of notice so as to create a punishable offence. And this explains the meaning of a passage, in Freeman, where it is said, that perjury cannot be in respect of a thing which is altogether foreign, for that if a witness were to swear what clothes he had, or when he saw such a fact done, it would not be perjury at common law (4).

In illustration of the first point, it is laid down, that any false oath is perjury, which tends to mislead the court in any of their proceedings relating to a matter judicially before them, though it do not in any way affect the principal judgment to be given, as where

(7) Noy. 92; Latch. 232.
(8) Dy. 168, *Bronker's* C. See 3 Keb. 389.
(9) Gouldsb, 51.
(1) 1 Nev. & P. 828, *R.* v. *Koops*; S. C. 6 Ad. & El. 198.
(2) 1 Term Rep. 63, *R.* v. *Aylett*.
(3) See 1 Ld. R. 258, per Holt, C. J,; 2 Show. 20; admitted arguendo by the attorney-general, Sir Wm. Jones.
(4) Freem. 506; Parch. 1693; *R.* v. ———, one of the Lord Mountague's witnesses; 1 Ld. Raym. 258; S. P. Gouldsb. 191, per Popham. But Holt, C. J., denied the authority of this last case, in *R.* v. *Greep*, Carth. 422; 12 Mod. 139; Comb. 461: and held that such a swearing would be perjury. See, however, the observations of Mr. Serjeant Hawkins, post.

a person offers himself as bail for another, knowingly and wilfully swearing at the same time that his substance is greater than it is (5). So, where the witness swore that he had seen thirty or forty of T. S.'s sheep in Mr. Sotherton's close, that he knew them to be such, because they were marked with an (a 5) on the shoulder, and all his sheep were so marked, whereas the sheep were not marked with (a 5); it was objected, that the perjury here assigned was immaterial to the issue. For it was said that the issue was, whether T. S.'s sheep were in the close or not, but that the sheep might have been in the close in this case, although not marked with an (a 5). Lea, C. J. and Houghton, J. were of opinion, however, that the perjury had been well assigned (6). Nevertheless, it does not appear that any judgment was given, and some years afterwards, two persons were charged with having sworn falsely to the same facts as above, when there arose a difference of opinion upon the bench. Hyde, C. J. and Whitlock, J. held, that the perjury had been sufficiently made out, but Doderidge, J. thought on the contrary, that the swearing was only to the particularity. But Hyde observed, that the indictment was bad, because it had been drawn jointly against two, since the perjury of one was not that of the other; and the attorney-general had a day given him to maintain the indictment (7).

So perjury may be committed by giving a false answer in chancery, although in a matter not material, or charged in the bill (8). As where one exhibited a bill to discover the knowledge of the defendant as to a devise, and whether he did not solicit to prove the will in chancery. He answered that he did not solicit. But upon the trial for perjury, it was proved, that he did solicit, *although he did not pay* the fees, and it was moved to stay the judgment, for want of material reference to the point at issue. But the court was clear, that this was perjury, for at common law it might be in a thing not material (9). So, if the credit of a witness be in question, and one come forward and swear falsely for the purpose of supporting the testimony, this has been said to be perjury (1). So, a man may be indicted at common law for a false affidavit taken before a master in chancery, but not upon the statute, because in the latter case, the oath must be in a matter relating to the proof of what was in issue (2). So, in illustration of this point it must be further added, that in the nature of the thing an evidence may be very material, and yet not full enough to prove the point in question (3).

It was held by Lord Kenyon, also, that if in answer to a bill

(5) See 16 Vin. Ab. 309, A. 14.

(6) Palm. 382; S. C. 2 Ro. Rep. 368.

(7) Palm. 535, *Jary* and *King*; Nels. Ab. 975, pl. 21; and see 16 Vin. Ab. 316, E. 3. The case does not seem to have been ultimately decided, 1 Hawk. P. C. c. 69, s. 8.

(8) 5 Mod. 348; 1 Sid. 274.

(9) 1 Sid. 274, *R.* v. *Drue*; S. C. 1 Keb. 935.

(1) By Holt, C. J., Carth. 422; 1 Ld. Raym. 258; 2 Salk. 514; Com. Rep. 43 n.; 12 Mod. 142.

(2) 3 Salk. 220, *Buxton* v. *Gouch*.

(3) By Holt, C. J., 2 Ld. Baym. 889. See also upon this subject, Cro. El. 500, *Brown* v. *Michel*; S. C. Noy. 36; 2 Ro. Rep. 42, 145; Hob. 53; 1 Hawk. c. 69, s. 8.

filed by A. for the redemption of lands, the equity of which was assigned to him by B., the defendant should swear that he had no notice of the assignment, insisting at the same time on tacking another bond debt due from B. to his mortgage, it would be a material fact upon which perjury might be assigned (4). However, under the statute of Eliz. an indictment which does not allege a perjury immediately material and relevant to to issue, cannot be sustained.

We intimated too, that, even at common law, matters which are idle, impertinent, or trifling, although falsely sworn, will not amount to perjuries. Some examples of these shall follow. A party was charged with perjury, for swearing that J. S. drew his dagger, and beat and wounded another. This act was found to have been done with a staff. This was agreed not to be perjury, inasmuch as the beating only was material (5). So, where one was asked by the judge whether A. brought such a number of sheep from B. to C. all together, and the answer was, yes; whereas he brought part at one time and part at another. This was held not to be perjury, because the manner of bringing the sheep was merely circumstantial (6); and so it was again in the case of the blue coat already cited (7). So again, where a witness was asked, whether such a sum of money had been paid for two things then in dispute, to which he answered, yes, though in truth, it was paid but for one by agreement; no perjury was deemed to have been committed, because it was not material whether the money were paid for one or both (8). So if a witness take an oath that, in coming to town to give evidence, he lay at one inn, whereas, in fact, he lay at another, this is an immaterial matter, and is not perjury (9). A question was made about sealing a deed at D., and whether one J. S. was a witness to it, and the defendant swore, that J. S. was one hundred miles distant from D. at the time, and, consequently, that he could not witness it. Eyre, J. said, that this was not perjury, because not material to the issue; but Holt, C. J., entertained a different opinion. The judgment, however, was arrested upon another point, with leave to the informer to exhibit a new information, the court being of opinion that the defendant had been guilty of wilful and corrupt perjury. But the case being removed into the House of Lords, by writ of error, the peers, in their turn, reversed the judgment of K. B. without assigning any reason (1). Parker, C. J., upon a subsequent occasion, made the following observations upon this case of *R.* v. *Griepe*: "I have heard a case mentioned in King William's time, where the question being put

(4) Peake, Rep. 138, *R.* v. *Pepys.*

(5) *Style's* C., cited Hetl. 97, by Richardson, C. J., in *Allen* v. *Westley.*

(6) 2 Ro. Rep. 41, *Laiston's* C.

(7) Ante, p. 78, note (5); but Holt, C. J., denied the authority of this case in *R.* v. *Greep*, See ante, p. 78, note (5).

(8) 2 Ro. Rep. 42, per Houghton, J., cited.

(9) By Holt, C. J., Comb. 461; and see 12 Mod. 142; 2 Salk. 514.

(1) 1 Ld. Raym. 256, *R.* v. *Griepe*; S. C. 12 Mod. 139; Comb. 459; Carth. 421.

about the sealing of a deed, it was sworn, that the party was at such a time in such a place, and, consequently, could not seal the deed; and upon this oath, he was convicted of perjury. But now, though the matter of this oath was but a circumstance, considered in relation to the point in question, upon the trial in which the oath was given, yet it was *all his oath, his entire evidence.* But if perjury may be committed in matter of circumstance, it must be a material circumstance, a circumstance of that weight, that without it he could not hope to find credit with the jury" (2).

The same learned judge, when lord chancellor, observed also, that he did not think it would be perjury at law, if the depositions of a witness taken *de bene esse* were quite contradictory to his depositions in chief, there being *no issue joined,* as there must be before the taking of the depositions in chief (3). It has also been held, that the reversal of a judgment against B. for perjury upon a writ of error, is no ground of defence for A. upon a trial for perjury alleged to have been committed by him upon B's. trial, as shewing that A's. evidence could not have been material, and it was also the opinion of the judge, that the allegation of B.'s conviction was not negatived by the subsequent successful appeal (4).

Error was brought upon a judgment against the defendants for perjury. The indictment stated, that it had become a material question, whether on the occasion of a certain alleged arrest, one J. K. had been touched by J. L. The defendant was charged with having sworn that J. L. put his arms round him, and embraced him: innuendo, that on the occasion to which the evidence applied, J. L. had touched the person of J. K. The court reversed the judgment, being of opinion that the evidence was not in any way connected with the material subject of inquiry. And, moreover, there was no averment of materiality in that part of the indictment which set out the evidence (5).

Nothing, therefore, however trifling in itself, can be safely tampered with upon oath, if it either conduce to the issue in any way, or be so sworn as to evince a desire to mislead the jury. This seems to be the rule at common law, and the only distinction between the common and statute law is, that, in the latter case, the assignments of perjury must be upon something material between the parties, and at issue in the cause.

It should be remarked here, in concluding this subject, that an action for the imputation of perjury is by no means co-extensive with the various instances of perjury at common law. Every suit of this nature must, indeed, be founded upon the competency of preferring a legal indictment, for the false oath insinuated, but the converse will not hold. Every perjury imputed at common law will not sustain an action for words. And for this reason; the party grieved by the slander sues for the damage done him; if, therefore, the false oath be in a matter immaterial, the plaintiff has sustained no injury, although the act may, nevertheless, be a

(2) 10 Mod. 195.
(3) 1 P. Wms. 569, Trin. 1719.
(4) 9 C. & P. 513, *R.* v. *Meek.*
(5) 1 B. & Ad. 21, *R.* v. *Nicholl.*

perjury at common law. So it is if the slander be, that the plaintiff was forsworn in a judicial court; this, again, would be a perjury at common law, if true, but unless it charged further a swearing to some material point, the action, it is conceived, would fail (6). And this differs from a case where the defendant has said, "thou art forsworn," or words to that effect, without more, because the courts will intend the worst in this last matter, namely, that the false oath imputed had been material to the issue.

Of Perjury by Statute.] In discussing the subject of perjury by statute, it is not intended to limit the inquiry as heretofore to the requisites which are necessary by law to constitute that offence. All the legislative provisions upon the subject will, on the contrary, be embraced in the present section.

We will begin, however, by giving a succinct account of the proofs necessary to support an indictment for perjury under the statutes. There must, as at common law, be a corrupt and wilful breach of the oath; the offence also must have happened in some judicial proceeding and before a competent court, or authority. But there are these two remarkable distinctions between the crime at common law and upon the statutes, namely, that the latter include perjuries by witnesses and upon depositions only (the former having respect to all regular and legitimate oaths); and, secondly, that according to the statutes, the thing sworn must have been immediately material to the issue. There is, moreover, another difference, namely, that the thing sworn must be false in fact as well as in law; so that if one swear the truth without knowing it, however guilty he may be at common law, he cannot be convicted upon the 5 Eliz. (7).

The old statutes (8) which gave a jurisdiction to the star chamber over perjuries having either expired or become useless upon the dissolution of that court, we proceed at once to the consideration of 32 Hen. 8, c. 9, and 5 Eliz. c. 9, the chief enactments upon the subject.

By the third section of the former act it is provided, that no person whatever do suborn any witness, by letters, rewards, promises, or any other sinister labour or means to the procurement or occasion of any manner of perjury by false verdict or otherwise in the chancery, the star chamber, Whitehall, or elsewhere within the king's dominions, or the marches of the same, upon pain of forfeiting 10*l.* one moiety to be the king's, the other his who may sue for the same by action of debt, bill, plaint, or information, in any of the king's courts, in which action no essoin, protection, wager of law, nor injunction shall be allowed.

This interference on the part of the legislature was followed up by 5 Eliz. c. 9, s. 3 (9),—whoever shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises,

(6) 2 Bulst. 150. *Croford* v. *Blisse.*
(7) Vide ante.
(8) 3 Hen. 7, c. 1; 11 Hen. 7, c. 25; Dy. 243.
(9) S. 1 recites the statute of Hen. 8, and s. 2 declares that the crime of perjury has augmented, by reason of the smallness of the penalty.

&c. by any other sinister or unlawful labour or means whatsoever, to commit any wilful or corrupt perjury in any matter or any cause whatsoever, now or hereafter depending, by any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts before mentioned (1), or in any of the queen's majesty's courts of record, or in any leet, view of frank-pledge or law-day, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in Devonshire and Cornwall; or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses sworn to testify *in perpetuam rei memoriam;* every such offender shall forfeit forty pounds (2).

By sect. 4, if the offender had not goods or lands to the amount of 40*l.* he was to be imprisoned for half a year, without bail or mainprise, and to stand for an hour in the pillory in some market town next adjoining the place where the offence was committed, in open market, or in the market town itself if the crime happened there.

The 5th section prescribes the incompetency arising from the infamy of the crime (3).

Next follow the punishment of such as fall into the temptation of subornation. By sect. 6, the party thus offending is to forfeit 20*l.* and to be imprisoned for six months, without bail or mainprise (4). And by sect. 7, in default of payment, the offender was liable to be pilloried, and to have his ears nailed to the pillory. The 8th sect. gives a moiety of these respective forfeitures to the crown, and the other half to the party grieved, and who will sue for the same in the manner pointed out by the statute of Hen. 8. The 9th sect. points out the judges who should have authority to hear and determine these matters (5). By sect. 10, proclamation of the statute was directed to be made at the assizes twice in the year, to prevent ignorance of the same. Sect. 11 declares, that ecclesiastical and spiritual courts shall not be in any wise affected by the act, but that offenders may be punished therein as before (6). The 12th sect. related to the serving process upon witnesses, giving a penalty of 10*l.* to be recovered against witnesses neglecting the process, and also such further recompense as the party grieved might have sustained. The action to be brought by the injured party, and the further payment to be at the discretion of the judge of the court (7). The 13th and last section saved the provisions of 11 Hen. 7, but as the court of star chamber was abolished soon after the passing of the 21 Jac. 1, which made this statute of Eliz. perpetual (8), it is not necessary to consider that subject further (9).

(1) The courts mentioned above in 32 Hen. 8.

(2) See, as to the increase of punishment, 2 Geo. 2, c. 25, post.

(3) See sect. 6.

(4) See 2 Geo. 2, c. 25, for a further punishment.

(5) See sec. 4.

(6) See Dy. 302; 3 Inst. 164.

(7) See 1 Leon. 122; March 18, Cro. El. 131.

(8) A similar provision was made to perpetuate it by 29 Eliz. c. 5. 21 Jac. 1, c. 28, s. 8.

(9) See Dy. 288.

This act does not alter the nature of the offence of perjury, but only enlarges the punishment (1). In considering it, it cannot fail to strike the reader that it divides itself into two branches, the one concerning subornation, the other against perjury itself. And it is equally obvious on a careful perusal of it, that it respects only such false oaths as are procured or taken in civil suits. This restriction was always conceded by the learned judges. As where one Fiower was indicted on the statute for giving false evidence at the Wisbeach sessions on an *indictment* for a riot: the indictment against him was removed into the king's bench, and there quashed. For both parts of the act ought so to be expounded as to agree with each other; and, therefore, notwithstanding that the clause against perjury is more general than the other, yet, when properly construed, it has reference to the first. Otherwise, the suborner would escape with impunity, by reason of detaching the two clauses from each other, which would be against reason, and also against the meaning of the legislature (2).

Again, it is observable, that the statute speaks only of *witnesses*. Therefore, if a person be examined in any other manner than as a witness, he is not punishable under the statute. As, where an action was brought upon the statute against one for committing wilful perjury in his testimony. The defendant in his defence before the star chamber alleged, that he had been examined as a party, and not as a witness. And by Weston, J. If he had been sworn upon his answer, it would not be within the statute, but if examined *on the part of the Queen* upon interrogatories it is otherwise (3). So, where a man was indicted for perjury in his answer in the star chamber upon his examination to interrogatories there, he was discharged, because there was no examination as a witness, nor *in perpetuam rei memoriam* (4). So, upon another occasion, it was said by counsel arguendo, that the case was not within 5 Eliz., for such an offence ought to have been before a jury in giving evidence, or upon some articles (5). The court, however, were against him, probably because they thought that the facts did not bear out the argument of the counsel, the defendant having been convicted of taking a false oath at a court leet (6).

Then again, as at common law, the oath must been taken in some judicial proceeding. Therefore, where a man was examined upon certain articles in the star chamber, and being convicted of perjury, the judgment was, that he had falsely and wilfully deposed, it was holden bad for want of stating the matter in

(1) 3 Salk. 269.

(2) 5 Rep. 99. S. P. *Flower's* C. S. P. *Munday's* C. there cited, as in K. B. Mich. 36 & 37 Eliz. And again, Trin. 39 Eliz.; 3 Inst. 164.

(3) Dal. 84. S. P., As to the old wager of law, now abolished, Noy. 128, *Sir Robert Miller's* C.; S. C. Yelv. 120; 1 Hawk. c. 69, s. 20.

(4) Cro. El. 148, *Richer's* C.; 2 Leon. 201.

(5) Godb. 71.

(6) Godb. 71; S. C. 4 Leon. 105; see 3 Leon. 201, *Matthews's* C. to the same effect; Dy. 288 (*a*), S. P. By Wray and other justices.

which the false oath had been taken, as well as the action, and the defendant was discharged (7). So also, an indictment was holden bad which charged a perjury before commissioners out of chancery, because it was not alleged that the commission was under the great seal, or that the officers had power to administer an oath under their commission (8).

There must appear in proceedings upon the statute to have been a suit depending, for otherwise no party could be prejudiced (9).

Lastly, (and herein the statute differs from the common law,) the matter sworn must be in some court of record, or court especially mentioned in the act, and must be material to the issue. Thus, by Popham, C. J., if a man do not depose upon some matter depending in suit in some court of record, he cannot be touched for a perjury upon 5 Eliz. Also, if he be perjured in circumstances, and not in the point in question, it is not material nor punishable by virtue of that statute (1).

So, where a man was indicted for perjury, he was discharged, because there was no statement how the issue was, nor how the deposition trenched to the point of the issue (2).

So again, in an indictment upon the statute it was agreed, that the charge should strictly pursue the requisites of the act. For, by Richardson, C. J., and G. Croke, J., there can be no indictment upon this statute but where it is shown, that the deposition is upon the matter in question, and conducing to the issue, and that the party has been prejudiced by the false oath. The court, however, would not quash the indictment, but directed that the defendant should plead not guilty, upon which it would appear by the evidence, whether the matter he had sworn to were pertinent to the issue or not (3). The same point was mentioned as law by Lord Mansfield in the *King* v. *Aylett* (4).

Perjury by Affidavit.] There is also a distinction between the proceedings at common law and on the statute 5 Eliz. concerning perjury by affidavit, which the reader will remember to have been noticed in a former page (5). It was in substance, that in the proceedings under the statute, it must be made appear that the affidavit in question was used in some way or other; whereas, at the common law, the bare making of a false affidavit in a competent court is sufficient to bring on the criminal the punishment of perjury (6).

(7) Cro. El. 137, *Stedman's* C.; S. P. id. ibid. *Thomas's* C.
(8) 2 Ro. Rep. 417, *Mandy's* C.
(9) See 2 Russ. C. & M. 518.
(1) Gouldsb. 191, S. P. 11 Rep. 13; S. P. 2 Ro. Rep. 427, *Mandy's* C.; S. P. Sty. 337, *Custodes* v. *Howel Gwin*; S. P. 2 Show. 20. By the att.-gen. arg. 3 Inst. 166.
(2) Cro. El. 148, *Lane's* C.
(3) Cro. Car. 352, *Sharp's* C.
(4) 1 Term Rep. 69.
(5) Ante, p. 74.
(6) 7 Term Rep. 315, *R.* v. *Crossley*. To swear falsely in an affidavit in order to procure the readmission of an attorney, seems to be punishable as a perjury; 2 Dowl. P. C. 607.

The statutes which ordain the penalties of perjury, under various circumstances against false swearers, are very numerous. We cannot undertake to mention the whole, but the more important may be briefly referred to in this place (7).

Affidavits.] By 29 Car. 2, c. 5, an act for taking affidavits in the country, to be made use of in the courts of king's bench, common pleas, and exchequer, the penalties of perjury are awarded under s. 2 against all persons forswearing themselves in such affidavits.

Witnesses for Prisoners.] By 1 Ann. st. 2, c. 9, s. 3, It was enacted, that all persons who should be produced as witnesses for prisoners upon any trial for treason or felony, should be sworn in like manner as the witnesses for the crown, and if convicted of wilful perjury, that they should suffer all the penalties prescribed by the law against perjury.

Freeholders' Oath.] By 18 Geo. 2, c. 18, s. 1, If any person, taking the freeholders' oath and affirmation, shall thereby commit wilful perjury, and be convicted, or if any person should suborn any freeholder to take such a false oath, and be convicted, each offender shall respectively be subject to the punishments prescribed against perjury, by 5 Eliz. c. 9, and 2 Geo. 2, c. 25, and in the last section, when we come to treat of the verdict and judgment, we shall find that these punishments are cumulative.

The same law is provided by 11 Geo. 1, c. 18, s. 3, with reference to elections in London, and with respect to elections generally by 2 Geo. 2, c. 24, s. 5.

Courts Martial.] The stat. 22 Geo. 2, c. 33, s. 17, prescribes the punishments of 5 Eliz., and 2 Geo. 2, against all persons who are found guilty of perjury, or subornation of perjury at courts martial.

Municipal Corporations.] By 5 & 6 Will. 4, c. 76, s. 21, False swearing under that act, "for the Regulation of Municipal Corporations in England and Wales," and false affirmations, as declared to be perjuries, and punishable accordingly.

General Inclosure Act.] By 41 Geo. 3, c. 109, s. 43, If any person shall wilfully swear or affirm falsely before any justice or commissioner in any examination, &c. taken or made under the act, he shall be deemed guilty of perjury, and suffer pains and penalties accordingly.

Bankrupts and Insolvents.] By 6 Geo. 4, c. 16, s. 99, The false

(7) "Where an oath is required by an act of parliament, but not in a judicial proceeding, the breach of that oath does not seem to amount to perjury, unless the statute enacts that such oath, when false, shall be perjury, or shall subject the offender to the penalties of perjury." 4 Comm. 137, note (5), Christian's ed.

oath of a bankrupt under examination, is made punishable with the penalties of perjury, and by 7 Geo. 4, c. 57, s. 71, the like punishment is awarded against persons swearing falsely under the provisions of that act (1). But it is not a perjury to swear to the truth of a schedule, in which certain items have been omitted, as debts due to the insolvent (2). Although the defendant may be indicted under 1 & 2 Vict. c. 110, s. 99, for a misdemeanor in making such an omission (3). And by the same statute, s. 100, any person swearing falsely under that act (4), or making a false affirmation is made liable to the penalties of perjury.

Excise and Customs.] Several oaths having been imposed by statutes concerning the customs and excise, it is a perjury for a party to forswear himself in these respects. The reader is referred to several acts of parliament in the note (5), but he will be careful to remember that the oaths abolition act (which we shall set out presently), has interfered with several of these oaths by substituting a declaration in lieu of them.

Naval and Military Departments.] There are oaths likewise in the various departments of the naval and military services, the breach of which is punishable (6).

West Indian Colonies.] So under the bill for giving relief to certain colonies in the West Indies (7).

Privy Council.] So with reference to oaths or affirmations before the judicial committee of the privy council (8).

Slavery.] And again, under the act for the abolition of slavery throughout the British colonies (9). The Spanish slave treaty act in the case of persons wilfully and corruptly giving false evidence (10).

(1) See as to Quakers and Moravians, ante, in this section.

(2) 1 M. & Rob. 128, *R.* v. *Mudie*; S. C. 5 C. & P. 23, nom. *R.* v. *Moody*.

(3) The form of oath at the end of an insolvent's schedule is an affidavit in writing, and it may be so stated.

(4) For abolishing arrest on mesne process, except on certain occasions, &c.

(5) See, amongst others, 52 Geo. 3, c. 139, s. 30; 7 & 8 Geo. 4, c. 53, s. 31; c. 85, s. 38; 3 & 4 Will. 4, c. 51, s. 29; 3 & 4 Vict. c. 80, s. 18; Id. c. 87, s. 71; and compare 5 & 6 Will. 4, c. 62, sects. 2, 5, with these acts.

(6) See 11 Geo. 4, and 1 Will. 4, c. 20, s. 89, 90; 2 Will. 4, c. 40, s. 32, Naval civil department. 2 Will. 4, c. 40, s. 45; army prize money; perjury or subornation of perjury. In this latter case, by s. 46, if the offence be committed out of the realm, it may, nevertheless, be tried in any county in England, as if it had been committed in that county. 2 Will. 4, c. 106, s. 4; half pay receipt [perjury.] See, however, 5 & 6 Will. 4, c. 62, s. 2, which substitutes a declaration in several cases, and also see sect. 21.

(7) 2 & 3 W. 4, c. 125, s. 16.

(8) 3 & 4 W. 4, c. 41, s. 9.

(9) 3 & 4 W. 4, c. 73, s. 42; and to make or subscribe any false declaration under 6 W. 4, c. 5, s. 8, see Slaves compensation acts, is a misdemeanor.

(10) 6 W. 4, c. 6, s. 8, Not saying whether by oath or affirmation, o otherwise.

Poor Laws.] So under the poor laws' statute, in the case likewise, of giving false evidence wilfully and corruptly (1). But the commissioners are authorized to administer oaths as well as declarations, if they see fit (2).

Charities.] Again, to give false evidence before the charity commissioners, either upon oath or affirmation, is an act of perjury (3).

Sale of Bread.] So to take any false oath, or make a false affirmation under the sale of bread bill, is punishable as a perjury, either by indictment or information, according to the due course of law (4).

Tithe Commutation.] So under the tithe commutation act, whosoever shall wilfully give false evidence, shall be deemed guilty of perjury; and if any person shall make or subscribe a false affidavit or declaration for the purposes of the act, he shall suffer the penalties of perjury (5).

Marriage Act.] So under the marriage act, knowingly and wilfully to make any false *declaration*, or sign any false notice or certificate, required by the act, for the purpose of procuring any marriage. And any person who shall forbid the issue of any superintendent registrar's certificate by falsely representing himself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury (6).

Births—Registration.] Every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of birth, death, or marriage, any false *statement*, touching any of the particulars required by the act to be known and registered, shall be subject to the same pains and penalties as if he was guilty of perjury (7).

Election Petitions.] By 2 & 3 Vict. c. 38, s. 72, Every person who shall wilfully give any false evidence before any committee or examiner of recognizances under the act, or who shall wilfully swear falsely in any affivavit authorized under the act, shall be liable, on conviction, to the penalties of perjury.

Affirmation instead of Oath.] Certain dissenters from the church of England have been, from time to time relieved from the obligation of taking an oath to which they have entertained religious scruples, but the wilful violation of their affirmation, which was substituted for the oath, has been so far declared to be an

(1) 4 & 5 W. 4, c. 76, s. 13.
(2) Sect. 2. See also sect. 109.
(3) 5 & 6 W. 4, c, 71, s. 10.
(4) 6 & 7 W. 4, c. 37, s. 22.
(5) 6 & 7 W. 4, c. 71, s. 93. These expressions, "guilty of perjury," and "suffer the penalties of perjury," must be considered as synonymous.
(6) 6 & 7 W. 4, c. 85, s. 38.
(7) 6 & 7 W. 4, c. 86, s. 41.

offence of the same nature as perjury, as to subject the defendant to the same penalties and forfeitures which are enacted against that crime (8).

By a late statute this relief has been afforded to Quakers and Moravians on *criminal* as well as civil cases (1); the quaker having been expressly excluded by statute from giving his testimony upon criminal trials. But under the same section, which ordains the relief, the pains, penalties, and forfeitures of wilful and corrupt perjury are enacted against the quaker who makes a wilfully false affirmation, or the moravian who falsely declares by virtue of his privilege. However, it having been found, that certain persons who had seceded from the sects of quakers and moravians, were yet still embarassed by scruples respecting oaths, it was provided that these separatists might make their solemn affirmation and declaration as fully as if they had continued to belong to those denominations of Christians. And the like penalties, as in cases of perjury, were, by the same law denounced against such persons if they should violate their affirmation or declaration (2).

Declaration instead of Oath or Affirmation.] An act was passed in the year 1835, which very considerably lessened the number of oaths in general (3). A subsequent statute of the same year (4) repealed the former, (it being found necessary to make some amendments) and consolidated the old and new provisions int one law.

By sect. 2 of this last mentioned act, in any case where, by any act or acts, made or to be made relating to the revenues of customs or excise, the post office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war office, the army pay office, the office of the treasurer of the navy, the accountant general of the navy or the ordnance, his majesty's treasury, Chelsea hospital, Greenwich hospital, the board of trade, or any of the offices of his majesty's principal secretary of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendence of the lords commissioners of his majesty's treasury, or by any official regulation in

(8) 7 & 8 W. 3, c. 34, s. 3: 8 G. 1, c. 6, s. 2; 22 G. 2, c. 46, s. 36. See also 12 G. 2, c. 13, s. 8.

(1) 9 G. 4, c. 32, s. 1.

(2) There are other statutes as, for instance, those concerning—Committees of the House of Commons, 10 G. 3, c. 16; East Indian Prize Money, 1 & 2 G. 4, c. 61, s. 6; Life Annuities, 48 G. 3, c. 142, s. 26; 52 G. 3, c. 129, s. 7; Irish Courts, 55 G. 3, c. 157; Mutiny Act, False Oaths or Declarations, Perjury, 4 Vict. c. 2, s. 79: Marine Mutiny, 4 Vict. c. 2, s. 59; Naval Stores, 39 & 40 G. 3, c. 89, s. 36; Passengers to foreign Settlements, 43 G. 3, c. 56, s. 20; Pilotage, 48 G. 3, c. 104, s. 70; Registry Acts, 2 & 3 Ann. c. 4, s. 29; 5 & 6 Ann. c. 18; 7 Ann. c. 20, s. 15; 8 G. 2, c. 6, s. 33; Registry of Vessels, 6 G. 4, c. 110; Quarantine, 6 G. 4, c. 78, s. 29; Stamp Duties, 54 G. 3, c. 133, s. 13; 55 G. 3, c. 184, s. 53; Woods and Forests, 50 G. 3, c. 65. See also 2 Russ. C. M. 526—533.

(3) 5 W. 4, c. 8.

(4) 5 & 6 W. 4, c. 62.

any department, any oath, solemn affirmation, or affidavit, might, but for the passing of this act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the lords commissioners of his majesty's treasury, or any three of them, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit, which might, but for the passing of this act, be required to be taken or made; and the person who might under the act or acts imposing the same, be required to take or make such oath, solemn affirmation, or affidavit, shall, in presence of the commissioners, collector, other officer, or person empowered by such act or acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, other officer or person, is hereby empowered and required to administer the same accordingly.

By sect. 3, this declaration is to be published in the Gazette, and after the lapse of 21 days from the publication, the provisions of the act are to apply.

And by sect. 4, no oath nor affirmation can after such 21 days be administered in respect of the subject-matters in question.

By sect. 8, the Universities of Oxford and Cambridge, and all other bodies corporate and politic, and all bodies now authorized to administer any oath, &c., may make statutes, by laws, or orders, authorizing the substitution of a declaration for an oath, affirmation, or affidavit, provided that such statute be passed according to the rules of the particular body.

Sect. 9 abolishes oaths of the churchwarden and sidesman, both upon entering and quitting office, and substitutes a declaration upon the commencement of the duties of such office.

Sect. 10 substitutes a declaration for oaths, affirmations, or affidavits taken or used under any highway or turnpike acts.

Sect. 11 has the same provisions where oaths, &c. were previously required upon the taking out of a patent.

Sect. 12 has reference to the pawnbrokers' acts, and likewise substitutes a declaration.

By sect. 14, in lieu of affidavits on oath, to prove the death of any proprietor of any stock or funds transferable at the bank of England, or to prove the identity of the person of any such proprietor, or to remove any other impediment to a transfer, or relating to the loss, mutilation, or defacement of any bank note, bank post bill, a declaration is substituted.

Sect. 15 has the like provision with regard to oaths hereupon required under 6 Geo. 2, c. 7, "An act for the more easy recovery of debts in his majesty's colonies and plantations in America," and also under 54 Geo. 3, c. 15, "An act for the more easy recovery of debts in his majesty's colonies of New South Wales."

By sect 16, it shall and may be lawful to and for any attesting witness to the execution of any will or codicil, deed, or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer, shall be and is hereby authorized and empowered to administer or receive such declaration.

By sect. 17, in all suits now depending, or hereafter to be brought in any court of law or equity, by or in behalf of his majesty, his heirs and successors, in any of his said majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account; his majesty, his heirs and successors shall and may prove his and their debts and accounts, and examine his or their witness or witnesses by declaration, in like manner as any subject or subjects is or are empowered or may do by this present act.

By sect. 18, Whereas it may be necessary and proper in many cases not herein specified, to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters; it is further enacted, that it shall and may be lawful for any justice of the peace, notary public, or other officer, now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor.

Sect. 20 ordains that all declarations, unless otherwise directed by the powers given under the act, should be in the form prescribed by the annexed schedule.

In the following case oaths are entirely abolished—

By sect. 13, Whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken, and made in matters not the subject of any judicial inquiry, nor in any wise pending or at issue before the justice of the peace, or other person by whom such oaths or affidavits have been administered or received; and whereas doubts have arisen whether or not such proceeding is illegal, for the more effectual suppression of such practice and removing such doubts it is enacted, that from and after the commencement of this act, it shall not be lawful for any justice of the peace, or other person, to administer, or cause, or allow to be administered, or to receive or cause or allow to be received any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being, provided always that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation, before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parlia-

ment or any committee thereof respectively, nor to any oath, affidavit or affirmation, which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively. There are some saving clauses: Sect. 6 saves the oath of allegiance in the case of persons appointed to any office. Sect. 7 preserves all oaths, solemn affirmations, and affidavits in any judicial proceeding in any court of justice, or upon any proceeding by way of summary conviction before a magistrate. And sect. 19 declares that the same fees should be paid upon the taking of declarations, as in the case of oaths, affirmations, or affidavits.

Penalties.] The offence of breaking the new obligations just mentioned, is not regarded in so strong a light as the breach of an oath, nor is it subject to such severe penalties.

By sect. 5, If any person shall make and subscribe any such declaration as herein-before-mentioned in lieu of any oath, solemn affirmation, or affidavit, by any act or acts relating to the revenues of customs or excise, stamps and taxes, or post office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statement as to any material particular, the person making the same shall be deemed guilty of a misdemeanor (5).

And by sect. 21, *In any case* where a declaration is substituted for an oath under the authority of this act, or by virtue of any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor (6).

Of the Proceedings against perjured Persons.] There are two modes of proceeding against perjured persons at common law, namely, by indictment and information. Three, however, are given by the statute 5 Eliz., that is to say, indictment, information (7), and action. At common law either of the courses above mentioned may be pursued. Under the statute also, the better opinion is, that an indictment will lie in all cases, although it has been questioned (as we have seen already) whether the king's witnesses could be punished in this form. It was never doubted but that an information might be preferred, even admitting that

(5) And so punishable accordingly, by fine and imprisonment at the discretion of the court.

(6) And punishable by fine and imprisonment at the discretion of the court. By sect. 22 the act was to take effect on the 1st of October, 1835.

(7) It was ruled upon one occasion, that the attorney-general might have an information upon perjury supposed to be in advantage of the crown, and that any other person might assign such perjury if he were grieved by it, but that the attorney might though the queen were benefited by it, Mo. 627, *Agar's* case. The course of information by a memorandum, quod recordatur, &c., was since 5 Eliz. and begun by Twisden.—1 Keb. 213.

an indictment could not be adopted under those circumstances, and as action is expressly given to all persons who may be injured by the false testimony.

This section will be devoted to the following considerations :— 1. Where the proceedings by indictment or information may be had, or where they are *usually* taken, together with the practice sanctioned thereupon. 2. When an action will lie, and what action may be brought; and, 3. We will submit to the reader some other collateral measures which have been resorted to occasionally for the purpose of animadverting upon this offence.

Before what Courts.] First, it may be observed that the most common and most advisable course for a prosecutor is to prefer his indictment at common law, and take that proceeding either at the assizes or the court of king's bench at Westminster (8). Because notwithstanding that the statute 5 Eliz. was introduced for the better prevention of the crime, it is much more difficult to procure a conviction upon it than in the old way of proceeding, and with regard to the punishment which formed so chief a merit of that statute, the act 2 Geo. 2, c. 25, has amply supplied its place on that behalf. But, it should be added here, that the justices of the peace at sessions had no jurisdiction over this offence at common law, and it is rarely, if ever, that they are called on to hear and determine an indictment of this nature at present. Although the stat. 5 Eliz. gives them an express authority to this effect, thus conceding to them a power which they did not possess before (9). For, by stat. 5 Eliz. c. 9, s. 9, it is enacted, that as well the judges of the said courts (1) where such perjury shall be committed, as also the justices of assize and gaol delivery, and the justices of peace at their quarter sessions shall have power to inquire of all offences contrary to this act, by inquisition, presentment, bill, or information, or otherwise lawfully to hear and determine the same. It is also provided by s. 13, that the statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof, but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in this act. The following case happened upon this section :—A bill of perjury was sued in chancery for a perjury committed there against the form of the statute,

(8) See 2 Russ. C. & M. 533.

(9) 2 Str. 1088, *Rex* v. *Bainton*, *Rex* v. *Westiness*, S. P., cited there, where indictments at the quarter sessions for perjury at common law were quashed for want of jurisdiction. S. P. Say, 278, *Rex* v. *Beaumont*, and in the rule for quashing the indictment the reason was ordered to be especially inserted—namely, the want of jurisdiction. 2 Hawk. P. C,. c. 8, s. 38. It was once thought that they had jurisdiction. 11 Mod. 67. *The Queen* v. *Gunn*.

(1) Any of the queen's courts of record, any leet, antient demesne court, hundred court, court baron, or courts of the stannary in Devon or Cornwall.

and a doubt arose, whether if the defendant would plead not guilty, he should be sworn to his plea, and also answer interrogatories as was usual in the star chamber. It was resolved in the negative by Catlyn, Saunders, Dyer, and Whyddon, unless it had previously an absolute authority, and had been used to examine perjuries in that court before that statute (2). The words "might have done and used to do," were expounded strictly; for, being copulative, an anterior usage could not give authority to a court, unless a *right* existed as well before the statute, and it was so held in the 7 & 8 Eliz. very shortly after the passing of the act (3). The proviso operated expressly to save the authority of the star chamber, but that court having been abolished by an act (16 Car. 1) which remitted all powers in the trial of perjuries to the common law, the court of king's bench regained an original jurisdiction which it had never entirely lost, and which it maintains in full force at the present day.

By section 11 of the statute above referred to, it is also provided that the act shall not extend to any ecclesiastical court, but that the offenders may be punished by such laws as heretofore in the ecclesiastical courts.

However, notwithstanding this apparent saving, the spiritual courts have no jurisdiction in cases of perjury. "For perjury, concerning any temporal act," says Lord Coke, "the ecclesiastical court has no jurisdiction, and if it be concerning a spiritual matter the party grieved may sue for the same in the star chamber" (4).

We have seen, however, that although these are not courts of record, the offence of perjury committed in them is nevertheless punishable at the common law.

Information.] The courts will not always grant an information. As where a wife came forward and swore that she had no manner of cause for swearing the peace against her husband, the court refused an information for perjury upon her oath (5). So where a witness was asked whether he had received 800*l.* for passing his his accounts. Per Holt, C. J.—This was not a fair question.—It could not have been expected that the witness would have owned himself guilty of bribery; you may indict him, but we will not grant an information (6). And the court will not permit a right, as of voting, to be tried by an information for perjury. A man was indicted for perjury in an affidavit and pleaded guilty. He was then charged with the same offence by one L. upon an information, and the court doubted at first whether they should proceed upon the latter charge. But as his affidavit had charged L. and others with having suborned him to commit perjury, it was thought that he might be tried upon that as another distinct perjury, and he was convicted (7).

Further proceedings.] The legislature has interposed in the

(2) Dy. 288, 3 Inst. 167.
(3) Dy. 242, In *Onslow's* case.
(4) 3 Inst. 164.
(5) 1 Barnard. 52, *R.* v. *Porter* & others.
(6) 1 Salk. 374, *Rex* v. *Dummer*.
(7) 1 Barnard. 56, *R.* v. *Weston*.
(8) 1 Vent. 182, *Maynard's* C.

strongest manner possible to facilitate the proceedings against persons guilty of this crime. Thus, it having been doubted whether a witness could be committed by the judge for a perjury *in facie curiæ* (9); the 23 G. 2, c. 11, s. 3, enacted, that the judge of assize, sitting the court, or within twenty-four hours afterwards, may direct any witness to be prosecuted for perjury, if there shall appear to him to be a reasonable cause, and he may assign the party injured or other person undertaking such prosecution, counsel, who are to do their duty *gratis*. And every such prosecution, so directed as aforesaid, shall be carried on without any payment of any tax or duty, and without payment of any fees in court or to any officer of the court. And the clerk of assize or other proper officer of the court who shall be attending when such prosecution is directed, shall give to the party injured, or to the prosecutor, a certificate *gratis*, together with the names of the counsel assigned, which certificate shall be sufficient proof of such prosecution having been directed; provided that no such direction or certificate shall be given in evidence at the trial.

Chancery.] In the court of chancery the course seems to have been always, that the chancellor might punish according to his discretion. And thus it was said, that either upon perjury by affidavit, or in an answer, the learned equity judge might direct the offender to be punished (1). Thus, also, Egerton, C. J., adjudged a person who was palpably perjured, to pay a fine of 20*l.*, to be imprisoned, and to pay 10*l.* costs (2). And his lordship cited some cases in support of his right to do this. As where a perjured witness in chancery was adjudged to the pillory and to pay costs (3). So again, where a witness was ordered to stand in the pillory under such circumstances (4). His lordship cited another case, in which a juror swore that he had not 40*s.* in freehold, whereas it appeared that the value of his property of that description was of 4*l.* annually, and the justices committed him to the Fleet (5). The lord keeper added, that every court might punish perjury appearing before themselves (6).

Practice.] The courts are very tender of interposing any difficulties between the finding of a grand jury and the trial for perjury. Thus they will not, in general, quash an indictment, although de-

(9) "It was said, a perjury in *facie curiæ* is punishable by the judge, and such is it if jurors go against their evidence; perhaps a witness may be punished for perjury in *facie curiæ* (which I will not maintain to be law). But a jury can never be so punished, because the evidence in court is not binding evidence to a jury, as hath been shewed."—By Vaughan, C. J., in *Bushell's* case. Vaugh. 152. And in *Rex* v. *Thorogood*, the defendant having made an affidavit in the court of common pleas, and then subsequently appearing and confessing its falsehood, the court recorded the confession, and ordered him to be set in the pillory, 8 Mod. 179.

(1) 1 Ch. Rep. 14, Mich. 13 Jac. 1, in *The Earl of Oxford's* case.

(2) Mo. 656, *Bullen* v. *Bullen & Clerke.*

(3) Id. 657, *Baskerville* v. *Gulliam*, cited there.

(4) Id. ibid. *Pomeroy* v. *Ford.*

(5) Id. ibid. *Sir Geo. Calveley* v. *Rishley.*

(6) Id. ibid.

fective, but will compel the defendant to plead, or, at all events, to demur (7). And they exercise the same caution and reluctance in granting a writ of certiorari to remove an indictment for this offence.

Application was made to the court of chancery for leave to amend an answer in a case where it did not appear that the party had any interest in the issue, and, therefore, could not be supposed to have sworn falsely with intention. But the court refused the motion, it being intimated that a prosecution for perjury had been threatened. It was the province of the grand jury to judge of the intention (8).

No certiorari.] In general, the court will not grant a certiorari at the instance of the defendant to remove an indictment for perjury, nor will they quash it upon motion, but will put the party to plead (9). But, under some extraordinary circumstances, this indulgence has been permitted. As where the defendant made an affidavit that he had twice paid costs for not going on to trial, the judges having gone away. This was allowed to be a special reason (1). So also where the defendant made an affidavit, that the prosecutor's attorney was under-sheriff of Middlesex, and that he attended the grand jury on finding the bill (2).

The effect of a certiorari is not to discharge the defendant out of custody, although it will vacate a recognizance of bail. As where the prosecutor removed an indictment for perjury into the king's bench by certiorari. Here Buller, J., said, upon an application to deliver the prisoner out of custody on the ground of there being no record before the court, that he must find sureties. Had he been admitted to bail, indeed, the removal of the indictment would have discharged his recognizance (3).

Action.] We now proceed, secondly, to shew in what cases an action may be brought under the statute by the party grieved, and what action it is which is prescribed. And the plain meaning of the statute obviously was, that if any one be aggrieved by the false oath of another, he might recover damages for the mischief thereby occasioned. But it seems that some doubt once prevailed as to the power of suing for injuries caused by false affidavits. Thus, Coke, C. J., said that an action would not lie upon the statute for a false affidavit; the party offending might certainly be indicted at common law (4). However, Mr. Serjeant Hawkins questions this opinion, observing, that it must, at all events, be confined to such affidavits as are in no way material to the issue before the court. For if the parties be grieved in any way by reason of the perjury, as if a trial were put off, or a judgment or execution set aside in consequence of a false affidavit, the offence,

(7) 2 Hawk. P. C., c. 25, s. 146.
(8) 1 Bro. Parl. Ca. 419.
(9) 1 Sid. 54; S. P. 2 Str. 717; 2 Hawk., c. 9, s. 28, *Rex* v. *Pusey*.
(1) 2 Str. 1049, *Rex* v. *Morgan*.
(2) Id. 1068, *Rex* v. *Webb*.
(3) 2 Leach, 560, *Rex* v. *Richardson*.
(4) 1 Ro. Rep. 79; see 5 Mod. 348; S. P. as to an indictment.

says the learned serjeant, appears not only to be within the meaning, but within the very letter also of the statute. Unless, indeed, he adds, the words witnesses and depositions be confined to so strict a signification as to bear no kind of application to any other persons or oaths, excepting those which are made use of upon the trial of the issue in question (5).

But upon the same grounds which have determined the courts to hold that the statute of Eliz., being confined to witnesses and depositions, would not warrant an indictment in any other respect, an action will not lie upon that statute. And thus, where a bill of perjury was sued for a false presentment by a homager, all the judges held that it could not be maintained (6). Mr. Serjeant Hawkins questions the authority of the next case which we are about to cite to the same effect. A man deposed, upon a commission to examine witnesses issued out of chancery, certain matters inimical to the plaintiff in the action of debt for perjury. The plaintiff, accordingly, brought the action which we have just alluded to, and the defendant demurred. By Gawdy and Yelverton, Js., the action does not lie, because the words of the statute only respect a deposition in a suit between party and party, and here L., in support of whom the defendant had given his testimony, was not originally a party to the suit, but came in, *a latere*, by an order, no bill then depending against him, or brought by him. The judges said, that, being a penal statute, the 5 Eliz. must be construed strictly (7). Perhaps, however, says Serjeant Hawkins, the authority of this opinion may justly be questioned, not only because the words of the statute whereon it is grounded are mistaken (8), but also because the offence seems, in truth, to be both within the meaning and letter of the law, since thereby a person is grieved in respect of a cause depending in suit in a court mentioned in the statute (9).

Although the oath do not trench much unto the proof or disproof of the issue, yet if by reason of such an oath the jury have awarded large damages against the plaintiff, the court will support the action in his behalf (1).

What action.] Next, what is the form of action prescribed by the statute, or sanctioned by the law? The usual course of proceeding upon statutes being by actions of debt, it may appear at first rather strange that any difficulties could have arisen on the subject. But, nevertheless, other actions were adventured, though,

(5) 1 Hawk. P. C. 180.

(6) 3 Leon, 201, *Matthews's* case.

(7) Yelv. 22, *Brode* v. *Owen*; S. C. 1 Brownl. 82, nom. *Broad* v. *Owen*. The reporters add the following query:—If upon an aid prayer he in reversion join, and be grieved and prejudiced by an oath and deposition, whether he can maintain an action upon this statute. For clearly by the common law he may have attaint. Id. Ibid.

(8) The words, "between party and party."

(9) 1 Hawk. P. C. 181. However, if the action in question were *an action on the cause*, the judgment would be right, because such an action will not lie upon the statute.

(1) 2 Leon. 198, *Courtney & Kelloway's* case.

at first, with but moderate success; and, secondly, the statute 18 El. c. 5, which provided that no suit should be had upon a penal statute, except by information or original action, give rise to some temporary objections. As to the first point, an action on the case was brought against the defendant, because he had sworn, on a trial concerning the value of a fountain of silver, that it's worth was not more than 180*l*., whereas, in truth, 500*l*. would have been the proper value to have set upon it. The jury, consequently, gave but 200*l*., and the damages in the present action, the defendant being found guilty, were assessed at 300*l*., altogether making 500*l*. But it was moved to arrest the judgment, for there was not any power at common law to sue in this manner, and by 3 H. 7, the punishment for perjury was referred to the star chamber. Then followed the stat. of Eliz., which gave an action of debt, and, consequently, if this new mode of proceeding were allowed, the defendant might be twice punished. Anderson, C.J., thought that the action was sustainable, but Walmsley, Beaumond, and Owen, Js., were of the opposite opinion, both for want of precedents to support such an action, and also because the intent of the jurors would be called into question by it, namely, whether they would, but for this oath, have given greater damages. Judgment for the defendant (2). So, again, an action upon the case was brought against a party for swearing in chancery that the plaintiff had acted in contempt of the king's process, and judgment was arrested (3). And Doderidge, J., took a distinction between a voluntary and a compulsory oath, observing, that in the former case an action would lie, because the party giving testimony was not compelled there to speak to the injury of another, as a subpœnaed witness might be (4).

The latter case, which can hardly be sustained at the present day, differs very widely from the first. For a man could hardly be proceeded against with safety for undervaluing a commodity by reason of the extreme difficulty of detecting the corruption (if any) of a secret oath; whereas, on the last occasion, the defendant had sworn to a fact, namely, that the plaintiff had assisted in rescuing a person who had been committed, and had thus acted contemptuously towards the court, which was a plain matter of fact. And since the utility of the action on the case has been universally acknowledged, it has not only been introduced upon occasions where it could not formerly have been adopted without an arrest of judgment, but it has also superseded many other modes of proceeding, and amongst the rest, for the most part, this action of debt upon the 5 Eliz. Thus an action on the case was brought for not producing a paper under a *subpœna duces tecum*. On a former trial, the defendant had appeared as a witness, but would

(2) Cro. El. 250, *Damport* v. *Sympson*; S. C. Ow. 158; S. C. 2 And. 47; S. C. cited Cro. Jac. 469; 2 Ro. Rep. 198.

(3) Palm. 142, *Ayres* v. *Sedgwick*; S. C. 2 Ro. Rep. 195, 197, nom. *Aire* v. *Sedgwicke*; S. P. Palm. 143, *Scullam* v. *Harrison*, 44 Eliz. cited there; 2 Ro. Rep. 197.

(4) Palm. 143, by Doderidge, J., citing *Jerom* and *Mason's* case.

not produce a warrant, which was the subject of the present action, but, on the contrary, swore positively that he neither had it in his possession, nor knew any thing of it. The plaintiff was, consequently, nonsuited, and compelled to pay the costs of the action. The attorney-general objected, for the defendant, that the only remedy was an indictment against him for perjury, and that the proper mode of trying his veracity could not be the present. As well might an action be brought against a witness for withholding certain oral testimony, which, it might be imagined, he could have disclosed. But Lord Ellenborough answered, that if a man commit a misdemeanor, the party injured by such offence is not in every case to be driven to proceed against him criminally, but may maintain a civil action for damages. There were various actions well known in the law (as for maliciously holding to bail, &c.) wherein perjury was imputed to the defendant, for which he was liable to be indicted. A verdict was ultimately found for the plaintiff (5).

We have said, that another difficulty presented itself occasionally in actions upon 5 Eliz. in consequence of the subsequent act, 18 Eliz. c. 5. The argument was, that, as the 18 Eliz. mentioned only informations or original actions, the plaintiff could not proceed by *bill* on 5 Eliz. It was unsuccessful, but the reason for repelling it proceeded on other grounds at first than those assigned on the same behalf in later times. A bill of debt being brought upon the statute, this objection was made, but it was answered, that there was a proviso in the same act where the action is given to the party grieved specially, and not merely to him who might sue generally, that he might sue as before. And judgment was given for the plaintiff (6). This reason, however, appears to be insufficient, because the statute of 18 El. c. 5, might be well said, according to the reasoning above adopted, to be inconsistent with that of 5 Eliz., inasmuch as a subsequent general statute must control one, whether general or local, which has preceded it. But the true ground in support of that decision, and consequently of the action of debt under the act of 5 Eliz. is, that the proceeding by *bill* is of itself an original action within 18 Eliz. And for this reason: the word, *original*, there does not mean *original writ*, but *original action*, as contradistinguished from proceedings in inferior courts and the star chamber, where the proceedings were had in a summary way, by libel or complaint (7).

Thirdly, we proceed to mention a few instances in which it has been endeavoured to proceed in a collateral manner, not indeed as a punishment of the parties said to be perjured, but obviously so as to affect them with the crime. It was moved to set aside the allowance of bail upon the ground of an entirely false description of property, but the court refused the rule. The court said, they could and would punish the defendant, or his attorney, if it were possible to connect them with the transaction, but independently

(5) 1 Camp. 14, 16, *Amey* v. *Long*; 9 East. 473.

(6) Cro. El. 434, *Johnson* v. *Pays*.

(7) 3 Term Rep. 365, note (*a*).

of that fact, the plaintiff had no other remedy than an indictment for perjury (8). On a subsequent application to set aside the *allocatur* of bail by reason of perjury, Park, J., said, that the rule, if granted, would operate on the defendant whose conduct had not been called in question, and that he would be affected without even hearing an answer from the bail. The learned judge added, that he did not clearly see on what ground a case in the king's bench, which was cited (and to which we shall presently advert) proceeded. The only remedy for the plaintiff was by indictment (9).

The practice, however, of the court of king's bench seems to be different in this respect, although even there the application met at first with no encouragement from the judges. It was moved to set aside the justification of bail on an affidavit charging perjury, when Best, J., said, he never knew an instance of such an application. Ultimately, however, upon a statement by the master, that one of the bail had been rejected in another cause, the rule was granted nisi, and, subsequently, made absolute (1). The same course was pursued in the same court upon another occasion (2).

However, the courts have unanimously refused to stay execution, on the ground of a bill of indictment having been found against the plaintiff's principal witnesses. For, by Lord Ellenborough, this would be a receipt to every person, after verdict and judgment against him, how to delay the fruit of such judgment by indicting some of the plaintiff's witnesses for perjury (3).

Strong affidavits, imputing perjury, will afford good grounds for a *new trial*, but cannot prevail in any other way (4). But merely finding an indictment will not be sufficient before conviction (5).

Pleadings.] The labour, difficulty and hazard of setting out the crime of perjury on the record was formerly most considerable (6). Thus, an information under the statute first set forth the statute itself, then the pleadings in an ejectment, the issue, the proceedings upon the trial, the evidence both before the perjury as well as that on which the perjury was assigned, and, lastly, the assignments themselves (7).

(8) 5 Taunt. 776, *A'Becket* v. ——.

(9) 1 Bingh. 365, *Stockham* v. *French*; S. P. 2 B. & B. 619, *Shee* v. *Abbott*. See, however, 6 Bingh. 423, *Barling* v. *Waters*.

(1) 1 Chit. Rep. 143, *Gould* v. *Berry*.

(2) Id. 372, *Brown* v. *Gillies*. It should seem, however, that upon the same principle which requires the oaths of two persons to convict a man of perjury, there ought to be at least *two affidavits* on these occasions. It may be added, that the bail may be punished if they prevaricate, or commit perjury *in facie curiæ*. See ante; 1 Str. 184, *Anon.* where both the bail and the attorney were set in the pillory.

(3) 4 M. & S. 140, *Warwick* v. *Bruce*; S. P. 2 Price, 3, *Att.-Gen.* v. *Woodhead*; S. P. 1 Bingh. 340, *Thurtell* v. *Beaumont*; see also 4 East, 577, n. *Bartlett* v. *Pickersgill*.

(4) 1 Bingh. 340; 1 B. & P. 429, *Lister* v. *Mundell*; 3 Burr. 1771, *Fabrilius* v. *Cock*. And there are many other cases to the like effect.

(5) 4 Bingh. 461, *Seeley* v. *Mayhew*.

(6) See Stark. Cr. Pl. vol. i. 112.

(7) Ibid. Citing Co. Ent. Inform. 367; Co. Ent. 165, 166; see 1 Hawk. c. 69, s. 23; 1 Keb. 935, *R.* v. *Drew*.

A statute was passed in the reign of George the second for the purpose of remedying the inconvenience (8). And by s. 1 it was declared, that prosecutions for perjury were so difficult that the crime had frequently been committed with impunity, for which reason it was enacted, That in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it should be sufficient to set forth *the substance of the offence charged* upon the defendant, and *by what court*, or, before whom the oath was taken, (averring such court, *or* person or persons, to have a competent authority to administer the same,) together with the *proper averment or averments to falsify the matter* or matters wherein the perjury or perjuries might be assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or other proceeding, either in law or equity, other than as aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, any law, &c. notwithstanding. And by s. 2, On every information or indictment for subornation of perjury or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, &c. as in section 1.

In proceeding on this statute, it was formerly necessary to set the act itself forth almost literally. Where the statute was recited as speaking of *any court of record*, the defendant was discharged because all the courts enumerated in the statute should have been specified (9). So where the word admitteret was put for *amitteret* (1).

Yet, notwithstanding the manifest advantages derivable from this act of the legislature, it was not followed so frequently as might have been expected, so that Lord Kenyon felt himself compelled to say upon one occasion, that the court had reason to lament, in almost all the trials for perjury, that the prosecutor would not avail himself of the act in question, passed to obviate difficulties in drawing indictments for the offence (2). The consequence of these neglects was, as, indeed, it still is at the present day, that, if the party who draws the indictment thinks fit to state more on the record than is necessary, that is to say, more than the substance of the charge, he incurs an imminent risk of defeat at the trial or in arrest of judgment. As, where an indictment stated, that an affidavit had been made to the intent that 250*l.* might be indorsed upon a certain precept, called a bill of Middlesex, *issuing out of the office of the chief clerk assigned to inrol pleas, &c.:* it appeared that no bills of Middlesex ever issued out of this office, and an objection was taken on the score of variance. The other side contended, that the superfluous matter might be rejected as surplusage. But Lord Kenyon said, that the

(8) 23 Geo. 2, c. 11.
(9) Cro. El. 137, *Thomas's* C.
(1) Cro. Jac. 133, *Parker's* C.; see 2 Leon. 211, 214; 1 Hawk. c. 69, s. 17.
(2) 5 T. R. 317.

prosecutor having undertaken to tell out of what office the bill of Middlesex issued, was bound to be accurate; he need not have done this, but having done it wrong, he had furnished a fatal difficulty. The counsel for the prosecution then abandoned the case, although the learned lord said he would not stop it upon that objection (3).

Indeed, the court has taken notice publicly of lengthy indictments for perjury, and, on one occasion, where an indictment, stating all the continuances on the former prosecution, &c. had been removed into K. B. by certiorari, it was referred to the master to see what part of the record was unnecessary, and ordered, that the clerk of the peace should pay the expence incurred by the unnecessary part (4). And his lordship desired that the bar would, for the sake of publicity, take a note of this (5).

Amendments of Informations and Indictments.] The court, upon application, will allow informations to be amended in some particulars, if they see fit. Thus, the court declared upon such a motion that amendments might be made, but the defendant must have notice of the matters in question (6).

So, in the case of an indictment where the defendant was called Edward throughout the charge till the end, when it was said, "And to the said *John*," &c. The court said: Indictments removed out of London have been amended by the original, for they do not certify that, but only a transcript, and a jury have been resummoned to amend an indictment found in this court, and in this case, if by examination of the clerk of the peace [Middlesex] it appeared, that the indictment certified varied from the original, it might be amended. But cur. adv. vult (7).

By 9 Geo. 4, c. 15, certain variances between written and printed evidence and the record may be amended, if the court should see fit.

Where perjury was assigned on an affidavit made to set aside a judgment signed since the rules of Hil. Term, 4 W. 4, and the allegation was, that the judgment had been entered up "in or as of Trinity Term," 5 W. 4, the judge refused to amend (8).

Joinder of Parties.] It is worthy of attention, that two persons cannot be joined together in the same indictment for perjury. And thus, after several objections the court fastened upon this, saying, that the perjury of the one could not be that of the other (9). It was indeed said, in *R.* v. *Chedwick*, that an indict-

(3) Peake, 112, *R.* v. *Schoole*; and see 5 T. R. 311, *R.* v. *Dowlin*.

(4) Dougl. 194, *R.* v. *May*; 8. C. Leach, 192.

(5) Dougl. 194, note 26.

(6) 1 Lev. 189, *R.* v. *Goffe*.

(7) 1 Ventr. 13, *Anon.* said to be *R.* v. *Bromley*; 16 Vin. Ab. 325, J. 21.

(8) 7 C. & P. 559, *R.* v. *Cooke*. In this case of *R.* v. *Cooke* it was likewise held, that the allegation of the defendant having made his warrant of attorney directed to contain persons, "then and still being attornies," &c. was proved by putting in the warrant of attorney.

(9) Palm. 535, *Jary & King*; 2 Burr. 985; acc. S. P. 1 sess. ca. 424, *R.* v. *Harvey* and others.

ment against husband and wife was good, although preferred against both (1); but this case stands alone amongst contradictory decisions. As, where six had been included in an indictment for perjury, and four were convicted, the court arrested the judgment, saying, that there might be great inconvenience if the practice were allowed. One might be desirous to have a certiorari, the others not; the jury on the trial of all might apply evidence to all, which, in fact, might be against one only. Perjury is a separate act in all (2).

Two Oaths.] Where the defendant has sworn on a second examination matter directly opposite to his first evidence, the contradictory testimony should be specifically pointed out in an indictment of this sort.

A defendant was convicted of having sworn in the House of Lords diametrically opposite to his previous oath before a committee of the House of Commons, but the indictment omitted to specify in what particulars the perjury consisted, or in which evidence, and the court arrested the judgment. It was admitted, that precedents were to be found of such indictments (3), but there being no judicial decision in their favour, Abbott, C. J., would not allow them to prevail as authority. A defendant might be twice put in peril of the punishment of perjury, and perhaps twice convicted and punished on the same subject-matter, if such an indictment as this could be sustained; for he could not plead the acquittal or conviction as a bar to an indictment charging perjury in the usual way on either of the depositions (4).

Venue.] It has been said, that in indictments the venue in this case is local, but that it is otherwise in informations. Thus, where the perjury was alleged to have happened in Middlesex, but it turned out to have occurred in the Inner Temple, the court mentioned the distinction above laid down. The reporter adds, that the court offered to have the matter found specially; but there being no connsel for the defendant in the information, and the question being raised only per amicum curiæ, the matter went off (5).

It has been said that perjury committed at the Old Bailey, although before a Middlesex jury, must be tried by a London jury (6). So perjury committed at a trial at bar in Westminsterhall from Yorkshire must be tried by a Middlesex jury, although the cause be tried by a Yorkshire jury (7). But the judges held, that perjury committed in Gloucester, which is a county of itself, before a jury of the county at large, might be tried by a jury of

(1) 1 Keb. 585.
(2) 2 Str. 921, *R.* v. *Philips & others*; 2 Burr. 985; see also 1 Barnard. 314, *R.* v. *Longbotom & others*; 2 Barnard. 24, *R.* v. *Macajah*.
(3) 5 B. & A. 937, note (*a*).
(4) 5 B. & A. 926, *R.* v. *Harris*; S. C. 1 Dow. & Ry. 578.
(5) 1 Ventr. 182, *Maynard's* C.
(6) Dougl. 794, *Eliz. Canning's* C. cited, see Dougl. 797.
(7) Id. Ibid.

the county (8). And so again, perjury committed at the Worcester quarter sessions, which are held in the county of the city of Worcester, was held rightly tried in the city (9).

Time and Place.] "There must," said Lord Mansfield, in *Rex* v. *Aylett*, 1 T. R. 69, "be an allegation of time and place, which are sometimes material and necessary, and sometimes not." Where it was stated that A. was arrested by L. after hearing a cause in chancery, *to wit, on the 4th of August*, Lord Mansfield held the indictment good; because, supposing the time material, it must have been proved at the hearing, and if not, it might be rejected, being laid under a videlicet (1). If time be material, it may be proved though laid under a videlicet, and if immaterial, its being laid under a videlicet will not render it material (2). If the indictment be founded upon perjury committed at the assizes or sittings, the offence may be laid on the first day of the assizes or sittings, or upon the day when the trial really took place (3). An indictment for perjury stated, that heretofore, to wit, on Monday, the 3rd day of December, in the 28th year, &c. a certain cause came on to be tried. By the nisi prius record it appeared, that the jury were respited until, &c. unless the justices, &c. should first come on Thursday, the 29th day of November, &c. It was objected, that here was a variance, for the cause must be taken to have been tried on the day mentioned in the nisi prius record. But Lord Kenyon overruled the objection, for the day being stated under a videlicet need not be proved exactly as laid (4). Where the indictment is preferred in London, some parish or ward must be laid. To state the offence as having been committed "at the Guildhall of the city of London," is insufficient, and judgment was arrested under such circumstances (5).

Court.] The statute 23 Geo. 2, c. 11, requires, that the name of the court where the proceedings took place should be mentioned, in order that a competent authority may appear upon the record, but the commission need not be set forth. It was objected to an indictment, that it was said to have been taken *plenâ sessione pacis*, but that it did not appear to have been at the quarter sessions, as by law it ought, and Roll, J. acceded to this. But the indictment was quashed for want of saying that any of the justices before whom it had been taken were of the quorum (6).

The defendant was indicted for perjury, and the charge was, that a trial was had before the chief baron, *associato sibi* J. S. by nisi prius in Middlesex, and that the defendant being sworn before the chief baron, deposed so and so, and thus, that the defendant committed perjury before the said chief baron, &c. And it was moved to arrest the judgment, on the ground that this

(8) Dougl. 791, *R.* v. *Gough*.
(9) 6 C. & P. 237, *R.* v. *Jones*.
(1) 1 T. R. 63, *Rex* v. *Aylett*.
(2) *Johnson* v. *Pickett*, E. 25 Geo. 3, B. R. cited, 1 T. R. 68, in the above case.
(3) Stark. C. Pl. 122. Per Abbott, C. J., 1819.
(4) 9 East, 158, *R.* v. *Payne*, cited there.
(5) Leach. C. C. 800, *Harris's* C.
(6) Sty. 123, *Rex* v. *Burton*.

oath could not have been at the trial set forth in the indictment, since the trial was before the chief baron and the associate, but the oath before the chief baron without the associate. But the court overruled the objection, because the associate need not be mentioned in every part of the indictment with the chief baron; and by Powell, J. it shall be intended that the associate did continue with the chief baron during the whole of the trial, he having been mentioned to have been there at the beginning. And judgment was given, that the defendant should be set in the pillory (7). But where the indictment set out the nisi prius roll thus—"that a cause came on to be tried before Lloyd Lord Kenyon chief justice, &c. *William Jones* being associated, &c. whereas in the judgment roll of that cause it appeared that *Roger Kenyon* was associated," &c., Lord Kenyon held it a fatal variance, and the defendant was acquitted (8).

So where the indictment stated that a trial was had before certain judges *assigned to take the assizes*, &c. and the caption of the record was "before, &c. *assigned to hear and determine all pleas of the crown*, the variance was holden fatal, for the sitting under a commission of oyer and terminer and gaol delivery was not synonymous with the commission alleged in the indictment (9).

It has been said, that the commission under which the judge acts need not be set forth. But it is well worthy of observation, that if more be set out in the indictment than is necessary, the ancient accuracy attaches, and the statute will not operate in aid of a want of due care (1). This was distinctly laid down by Lord Kenyon in a case where, although the commission was held to have been sufficiently stated, the learned judge expressed his regret that the excellent provisions of the statute had not been adopted. It was an indictment for perjury committed at an admiralty session, where the commission was set out as directed to A. B. & C. and others not named, of whom A. B. & C. were, amongst others, to be *one*, and it was said, that this error rendered it nugatory, and, consequently, that the oath had been administered before an incomplete jurisdiction. But the court said, that this, at most, was but a clerical error, and that they would take the expression in its ordinary sense,—namely, that if any one of the persons named of the quorum were present, it would be sufficient (2).

Oath of Jury.] The allegation of the oath of the jury before whom the proceedings were heard is indispensable in cases of trial by jury. For want of this statement an indictment has been quashed (3).

Proceedings.] Since the passing of the statute 23 Geo. 2, c. 11,

(7) 2 Lord Raym. 1221, *Reg.* v. *Deman.*
(8) 1 Esp. 98, *Rex* v. *Eden.* As to a court leet, see Godb. 71.
(9) Russ. & Ry. 421, *Rex* v. *Lincoln.*
(1) 5 T. R. 317. By Lord Kenyon.
(2) 5 T. R. 311, *Rex* v. *Dowlin.*
(3) 3 Mod. 122, *Rex* v. *Hinton and Brown.*

the mode of stating the judicial proceedings in the indictment has ceased to be a work of such painful accuracy as before. The subtance of the proceedings only need be disclosed upon the record, and even in that case, the court will not lean in favour of variances (4).

Thus, where an indictment alleged, amongst other things, that F. C. A. and others exhibited their bill in the exchequer against the defendant, it appeared upon the production of the bill itself, that J. C. A., &c., exhibited this bill, and it was submitted, that here was a variance. But Lord Ellenborough said, that the question then before them, namely, whether F. C. A. did in reality exhibit his bill might be proved by other evidence than the production of the bill, although that certainly was the usual mode of proceeding. Had the indictment professed to set out the tenor of the bill, there would have been clearly a variance. The indictment further stated, that afterwards, to wit, on, &c., comes the said defendant in his own proper person, and exhibits and produces his answer to the aforesaid bill of complaint. This answer, upon producing it, appeared to be entitled, "The answer of R. R. to the bill of complaint of J. C. A.," &c. Upon this, the defendant's counsel again contended for an acquittal, because here was no proof of the allegation of an answer by the defendant to a bill of complaint by F. C. A. But Lord Ellenborough held, that there was nothing in this objection after the former decision. The defendant being found guilty, his counsel moved for a new trial. 1st. Because the evidence had been improperly admitted, there being no *averment* that F. C. A. had exhibited his bill by the name of J. C. A. Secondly, because, after all, there was a variance, inasmuch as the words "as appears by the record," had been introduced into the indictment, whereas, in fact, extrinsic evidence had been given to shew that F. C. A. exhibited his bill, the *record* proving the direct contrary. But the court were against the motion, holding, that the evidence was admissible, and that the words, *as appears by the record*, referred to the last antecedent, and could not be incorporated with the prefatory allegation that F. C. A. exhibited his bill (5). However, the court granted a rule to shew cause on the ground that the answer, being improperly entitled, was a nullity, but this ultimately failed, the judges, on consideration, being of opinion, that the answer could not be so treated (6).

Again, an indictment alleged, that a bill of discovery was filed on the 1st day of December, 1807, but, on the production of the bill, it appeared to have been entitled generally of the preceding Michaelmas Term. The point was taken immediately as a variance, but Lord Ellenborough said, that as the day was not alleged as part of the record, it was sufficient to prove the bill filed on any other day (7).

So, where the indictment alleged a trial to have taken place

(4) Indictments for perjury are the only instances in which a legal authority is usually set forth. Dougl. 156.

(5) 1 Stark. 518, *R.* v. *Roper*.

(6) 6 M. & S. 327.

(7) 1 Stark. 521, *R.* v. *Hucks*.

before Sir J. Littledale, &c., but on producing the record, it was silent as to the name of the judge, and the postea stated the trial to have been before Sir C. Abbott, &c.; it was objected, that here was a variance. Sir J. Littledale, in fact, did try the cause. It was answered, that there was no reference to the record, and, therefore, that the name of the judge might be proved dehors. Lord Tenterden refused to stop the case upon this objection, but gave leave to move the point. The defendant, however, had a verdict (8). And a difference between the nisi prius record, and the indictment as to the day of the trial was also held immaterial.

So, where perjury was assigned in answer to a bill alleged to have been filed in a particular term, but the copy produced was of a bill amended in a subsequent term by order of the court, it was held to be no variance, the amended bill being part of the original bill (9)

So, where the record of a trial had the words "of Westminster," instead of "at Westminster," it was held to be no variance, for the cause was, in fact, so tried, and no county was mentioned in the record (1).

An indictment stated that an action was depending wherein H. K. was the plaintiff, and B. F. the defendant. The judgment when produced began thus—"B. F. *sued by the name of L. F.*, was attached to answer H. K.," &c. Lord Ellenborough held that this was no variance, because, although the indictment did not, as in the judgment, give F. his full description, it gave him his true one (2).

So, the description of a suit as pending between P. and M. instead of P. and M. the elder, was held not to be a variance (3).

So, where the indictment, in setting out a petition, stated, that at several meetings before the *commission* (of bankrupt) the petitioner declared certain things, but upon the production of the petition it appeared that he had done so before the *commissioners*, it was considered to be no variance, for the word "commission" may be read as signifying either a trust, or persons invested with a trust (4). And by Abbott, C. J., "If the word *commission*, as there used, was intended to denote the commission itself, it would follow that the several meetings took place before any commission issued; but that is impossible, because in that case the petitioner could not have made his declaration in the hearing of the said assignee" (5).

So, where the indictment charged the defendant with having sworn to certain facts, but the deposition being produced, turned out to be joint, his wife having sworn first to the matters in question, it was held, that there was no variance, because it was sufficient for the indictment to state the substance of the defendant's oath (6).

(8) M. & M. 118, *R.* v. *Coppard*; S. C., 3 C. & P. 59.
(9) 2 Russ. C. M. 537, *R.* v. *Waller*, citing 3 Stark. Ev. 1138.
(1) 3 Dow. & Ry. 239, *R.* v. *Israel*.
(2) 1 Campb. 405, n., *R.* v. *Windus*.
(3) 7 C. & P. 264, *R.* v. *Bailey*.
(4) 4 B. & C. 850, *R.* v. *Dudman*; S. C. 7 D. & Ry. 326.
(5) Id. 854.
(6) 2 C. & P. 563, *R.* v. *Grindall*.

The indictment stated that the defendant had sworn she had been in A's. company from two till half-past four. The evidence was, that she said she had been in his company from eleven till half-past four. Parke, J., doubted at first whether the allegation was supported, but upon conferring with Bolland, B., he thought it was (7).

But where the indictment undertook to recite the record of a trial upon a feigned issue, a variance was committed in substance by alleging the affirmation to have been made by three, whereas it appeared on the record to have been made by four. But Holt, C. J., directed that the defendant should be indicted *de novo* (8).

So, where the indictment stated that the defendant gave information that A. being a brewer, &c., did neglect, &c., but the information did not contain the words "being a brewer," the variance was held fatal (9).

So, where an issue was set out in an indictment as having been touching the forfeiture of certain goods, whereas in fact, it only related to the possession and knowledge that such goods were run goods, it was held to be a fatal variance (1).

If the perjury have arisen in a reply to the evidence of a defendant who was acquitted at the trial, that acquittal need not be stated in the indictment, but second evidence of it may be given (2).

A certain Issue.] An indictment reciting an information, stated that a certain issue came on to be tried. The evidence was, that the information contained two counts, and that the defendant had pleaded the general issue to each separately. Lord Kenyon held, that there was no variance. Had the indictment, indeed, said that the perjury was committed on the trial of two issues, when there was but one, it would have been fatal (3).

County.] It is necessary to allege some county where the false oath was taken. For want of this statement an indictment has been held insufficient (4). Error was brought to reverse an outlawry upon the 5 Eliz. for perjury. The defendant had been indicted by the name of N. L. in the parish of Aldgate, but the record did not shew in what county Aldgate was. And it was allowed (5). Although it was urged, that as the word "Middlesex," was in the margin, the parish should refer thereto (6).

County aforesaid.] Care must be taken not to refer to the wrong county. In indictments the word "aforesaid" is held to refer to

(7) Lew. C. C., 271, Anon.
(8) 6 Mod. 167, the *Queen* v. *Carter*; S. C. Holt, 347; S. P. 9 East, 441, *R.* v. *Gardner*, cited by Abbott, arg. and see 4 Burr. 2269.
(9) 2 Man. & Ry. 119, *R.* v. *Leech*.
(1) Peake, N. P. C. 8, *R.* v. *Hawkins*.
(2) M. & M. 315, *R.* v. *Browne*; S. C. 3, C. & P. 572.
(3) Peake, 37, *R.* v. *Jones*.
(4) Cro. Eliz. 137, *Thomas's* C.
(5) Cro. Jac. 167, *Leach's* C.
(6) Cro. Jac. 167.

the last antecedent, unless the sense hinders; in actions to the county in the margin where the action is said to be laid (7).

An information in Middlesex for subornation of perjury, stated that A., late of ———, in the county of Surrey, impleaded B. for that, whereas, he was indebted to him in the parish of St. Clement Danes, *in the county aforesaid*, and that the cause was *duly* tried at the sittings in Middlesex. The defendant having been convicted, it was moved to arrest the judgment, because, according to the record, the cause had not been tried before a competent authority. And the objection was held good, inasmuch as the county aforesaid related to Surrey, whereas the parish of St. Clement Danes was in Middlesex, and the judgment was arrested (8).

So, where an indictment for perjury found at the sessions in Norfolk, stated, that a fine was levied in the court of common pleas at Westminster, in the county of Middlesex, and that the defendant perjured himself at *Theed*, in the county aforesaid, it it was the opinion of the court, (although, in fact, they adjourned the case), that it could not be supported (9).

Sworn.] The averment that the defendant was sworn is material. An indictment was discharged for want of a distinct and full statement that the party had been *sworn* (1).

Judge having competent authority.] "Indictments for perjury are the only instances in which a legal authority is usually set forth. But that has only been the practice since the statute of 23 Geo. 2. The precedents before that period do not contain such an averment. Co. Ent. 363-368. Trem. 136, 144-147, 157" (2). But although this be so, sufficient must have appeared on the record anterior to the passing of 23 Geo. 2, c. 11, to have shewn that the judge had authority, although an express averment was not required. As where it was alleged that the defendant had made a false oath before Master Page, one of the masters of the chancery. It was objected, that there was no mention of judicial proceedings, nor even that any such had been filed of record, and then as the master, *merely as such*, could not take an oath, that the charge was not sustained. And the court assented to the objection (3).

So, again, upon an indictment for perjury, assigned in an affidavit made before Sir Robert Rich, it was objected, amongst other things, that it was not laid that Sir Robert Rich was a master in chancery, and the court allowed of the difficulty, and quashed the indictment (4).

So, under the beer act, 1 Will. 4, c. 64, s. 15, it was held necessary to aver that the justices were acting in and for the division or

(7) 2 Ld. R. 888; 11 Mod. 67; 3 Wils. 339.
(8) 2 Ld. Raym. 886, the *Queen* v. *Rhodes* and *Cole*.
(9) 11 Mod. 66, the *Queen* v. *Gunn*.
(1) Cro. Eliz. 105, *Dinslow's* C.; 2 Hawk. c. 25, s. 111.
(2) Dougl. 156.
(3) 16 Vin. Ab. 308, A. 6. *R.* v. *Ruddy* and *Howel Gwinn*.
(4) 3 Bulstr. 322, *R.* v. *Bell*.

place where the house was situated, but not that the said justices were acting in petty sessions, inasmuch as every meeting of two justices for business is a petty sessions (5). And it seems that in such a case a written information would not be necessary.

Again, where a perjury was charged against the defendant for swearing that one A. B. had sworn several oaths before a justice, judgment was arrested for want of an allegation that the oath was sworn in the county for which the justice acted. The jurisdiction of the magistrate to administer the oath did not appear upon the record (6).

Material to the issue.] It is usual and prudent to allege, where there is any colour at all for such a statement, that certain questions became, and were material, &c. Although (as we have seen) a conviction may be had at common law upon a collateral perjury, in which case it is better to say, that "certain matters then and there arose between the parties," &c.

But, if the proceeding be on the statute 5 Eliz., an allegation as to the materiality of the questions becomes indispensable. As, where in a suit in chancery concerning a manor, the defendant swore that the deed of feoffment of the manor was delivered as an escrow. It was said, that the pleading was insufficient, without shewing that this oath had reference to the manor in question. It was endeavoured to be answered to this, that the words "*manerium prædictum innuendo*" would cure the omission. But by the court: A man shall not be punished as a perjurer by an innuendo (7).

So, moreover, even at common law, if the materiality of the question be of the substance of the offence, such parts of the original proceedings must be set forth as will demonstrate that fact. Upon an indictment for perjury, it was attempted to be answered to an objection for want of an allegation of this sort, that the defendant could not have been found guilty unless the materiality had been established in evidence. But the judges declared, that they could not take that by intendment or inference—it ought to have been expressly alleged (8)

A statement that J. K. was in due form of law tried upon a certain indictment then and there depending against him for murder, and that, at and upon the said trial it then and there became and was made a material question, whether, &c., was deemed sufficient, with the aid of the 23 Geo. 2, to shew that the perjury was committed on the trial of J. K., for murder, and that the question on which the perjury was assigned was material on that trial (9). The means by which a murder has been committed need not be set out in an indictment for perjury (1).

(5) 8 C. & P. 439, *R.* v. *Rawling*.
(6) 2 Russ. C. & M. 541, *R.* v. *Wood*.
(7) Cro. Eliz. 428, the *Queen* v. *Bowles*; S. C. cited 1 Lord Raym. 260; 12 Mod. 141; S. P. Cro. Car. 352, *Sharp's* C. See also, Cro. Eliz. 148, *Lane's* C; 1 Keb. 452, *R.* v. *Wallenger*; S. C. 1 Sid. 106.
(8) 5 T. R. 316, *R.* v. *M'Keron*, Lancaster Lent assizes, 1792; S. P. 2 Russ. C. & M. 541, *R.* v. *Bignold*. Cor. Buller, J., cited there.
(9) 5 T. R. 311, 318, *R.* v. *Dowlin*.
(1) Russ. & Ry. 421, *R.* v. *Lincoln*.

Further, if there be an omission to aver that the matters sworn to were material, and it cannot be collected from the indictment that they were so, the judge at nisi prius is fully authorized in discharging the jury (7). Should the materiality, however, appear on the record without an averment to that effect it seems to be sufficient, according to an intimation which once fell from Abbott, C. J., in a case where the defendant was convicted (8). The materiality must appear in some way upon the record, either from the facts stated, or by a special averment illustrating and applying the matters alleged.

It is observable, however, that the judges themselves interfere upon these occasions, and that counsel ought not to insist upon the invalidity of an indictment in so summary a manner, unless, indeed, it may be to suggest a point upon which there can be no doubt (9). In the case just referred to, Lord Tenterden thought the indictment good, notwithstanding the interference of counsel before the trial, and there was a verdict for the crown. It was stated, that issue was joined in a cause of *Jacob* v. *Abraham*, and the cause set down for trial, and appointed for a particular day; and that the defendant in that cause, before that day made an affidavit before Lord Tenterden, C. J., in which he stated that he had a good defence to the action, which he would be able to prove at the trial, and that some of the bills on which it was brought were void for usury, and perjury was then assigned on these allegations. Lord Tenterden thought that the occasion on which the affidavit was intended to be used might be sufficiently collected from the indictment (1).

The matter; whether,&c.] The main facts of the indictment now begin. First, the question between the parties. This must be accurately stated. To omit it altogether after stating that a question had arisen would make the indictment *felo de se*. As where upon a charge of a false oath in the star chamber, there was a neglect to shew in what matter the defendant had sworn falsely. He was discharged (2).

So, again, in a more recent case, a count alleged that at the trial of the said indictment, the said J. H. by means of the false and material testimony of the said J. P. in the said first count of this inquisition mentioned, was unlawfully and untruly found guilty, that a rule nisi for a new trial was granted, &c., and that, thereupon, J. S. made an affidavit in writing that what he had sworn at the trial was true; whereas, &c., it was false *in the particulars in the said first count of this inquisition assigned and set forth, &c.* The defendant having been found guilty, and the judges having intimated that the first count was bad for want of the words, wilfully or corruptly, it was argued, that the count above alluded to was

(7) Ry. & M., N. P. C. 147, *R.* v. *Tremearne*; S. P. 1 D. & Ry. 10, *R.* v. *Dunn*.
(8) 2 Stark. 423, *R.* v. *Souter*.
(9) 1 Moo. & Rob. 7. *R.* v. *Abraham*.
(1) Id. Ibid.
(2) Cro. Eliz. 137, *Stedman's* C.; S. P. Id. 148, *Lane's* C.; S. P. Id. 907, *Poultney* v. *Wilkinson*; S. P. 3 Mod. 122.

also ineffective, because it contained no assignment of perjury, nor any particular evidence given by the defendant, nor even *directly* stated, that he gave any evidence on the trial with reference to which the affidavit is stated to have been afterwards made. The court concurred in the objection and arrested the judgment (2). And by Abbott, C. J., "In the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But the fact of his having been sworn must be taken by intendment" (3).

So where an indictment accused the defendant of having sworn to a false schedule of his effects in the insolvent debtor's court, whereas the said schedule did not contain a full, true, and particular account, &c., the lord chief justice ordered the case to be struck out of the list before all the jury had been sworn, for here were allegations absolutely vague and indefinite; no debt was specified as having been omitted, and therefore, no information was afforded to the defendant of the particular charges against him (4).

So, upon a charge of perjury, committed before justices, the indictment stated that the defendant, with a view to injure A. by accusing him of felony, did depose and swear, that A. had put his hand into the defendant's pocket, and had taken out a 5*l.* note; it was held that the assignment of perjury upon this could not be sustained. No charge of felony appeared to have been previously made, nor that the defendant then made any charge of felony, nor that any judicial proceeding was pending before the magistrate. (5). Whereas an assignment of perjury, which stated the false oath to have been made upon an *information* and examination, clearly shewed that a charge was pending, and upon such an occasion, Patteson J. distinguished *R.* v. *Pearson* upon this ground. The judges likewise held the conviction correct (6).

Wilfully and corruptly.] No prudent practitioner would hesitate to adopt the words "falsely, wilfully, corruptly, and maliciously." But indictments without those most material words "falsely and corruptly," have occasionally been placed on the record. As in an information upon the statute, where the defendant was charged with having committed *voluntarium perjurium*. Per Shute, J. "This is not enough; it should be corrupté et voluntarié." (7). On the other hand, *falsé et corruptivé* were held insufficient, without *voluntarié* (8). Both expressions must be used (9): at all events,

(2) 5 B. & C. 246, *R.* v. *Stevens*; S. C. 7 D. & Ry. 655.
(3) Id. 250.
(4) Ry. & M., N. P. C. 210, *R.* v. *Hepper*. S. C. 1 C. & P. 608. See also 3 Inst. 167.
(5) 8 C. & P. 119, *R.* v. *Pearson*.
(6) 2 Moo. C. C. 95, *Gardiner's* C.; S. C. 8 C. & P. 737.
(7) Sav. 43.
(8) Cro. El. 147; *Lembro & Hamper's* Case; S. C. 2 Leon. 211; 3 Leon. 230; S. P. Hetl. 12, *Kitton* v. *Walters*.
(9) Cro. Jac. 508; 2 Hawk. c. 25, s. 110.

in an indictment upon the *statute;* and it would not be safe, perhaps, at this day, to omit them in an indictment at common law, notwithstanding the authority of *Cox's* case. Upon this last occasion, the words "falsely, maliciously, wickedly, and corruptly" were used, and the charge was at common law. It was moved to arrest the judgment for want of the word "wilfully;" but ten judges met, and were of opinion, that the record was sufficient at common law, because the expressions used implied *wilful* perjury (1). It follows from the foregoing decisions, that should both "wilfully and corruptly" be omitted, the count must necessarily be bad. And in a modern case, the judgment was arrested upon that ground (2). "Whether the word 'maliciously,'" said Abbott, C. J., "might supply the place of either wilfully or corruptly, it is not necessary to determine, for neither of those words are found in the counts in question, and *Cox's* case, which has been referred to, proves, at all events, that such counts are insufficient" (3).

It is observable here, that these expressions are twice used, once in this place and again at the conclusion. It is indispensable to employ them in both places (4). And the clause, "so the defendant committed," &c. at the end, will not help a former omission (5).

By his proper Act.] For want of these words, an indictment upon the statute has been holden bad, because both perjury and subornation being mentioned in 5 Eliz., it is necessary that the nature of the perjury should be specified (6).

Assignments—Substance and Effect, &c.] Very considerable accuracy is required in setting forth the assignments of perjury. The matters deposed to must be stated in the first instance, in doing which much care must be employed, and the truth of all of these matters must then with equal care be negatived. The expression, "in substance and to the effect following" is better than "according to the tenor and effect," because it does not bind the prosecutor to such a verbal minuteness, and it is, therefore, to be preferred on all occasions. In either case, however, the courts will not suffer a defendant to escape under colour of a mere clerical error. As where the word "understood" in an affidavit was spelt "undertood" in the assignment of perjury (7). So where the indictment had the abbreviations "Mr. and Mrs.," instead of "Mister and Mistress," which words the defendant used (8). Or, the words "in manner and form following," may be used. These

(1) 1 Leach, 71, *Cox's* Case.

(2) 5 B. & C. 246, *R.* v. *Stevens;* S. C. 7 D. & R. 665, nom. *R.* v. *Richards.*

(3) Id. 250.

(4) Cro. El. 137, *Thomas's* C.

(5) 3 Inst. 167; Mich. 29 & 30 Eliz.; S. P. 27, El., *Meller's* C. ibid.; S. P. Cro. El. 201, Anon., said to be *Somerland's* C.; 16 Vin. Ab. 321, I. 3, in the notes. See also 1 Show. 190, *R.* v. *Tayler;* S. C. Skin. 403; Holt, 534.

(6) 3 Inst. 167; but see 3 Bulst. 147, *Cockeril* v. *Apthorp,* 1 Hawk. P. C., c. 69, s. 18.

(7) Cowp. 229, *R.* v. *Beach;* S. C. Leach, 133; Dougl. 194.

(8) 3 C. & P. 59, *R.* v. *Coppard.*

do not bind the prosecutor to recite instruments verbatim, and, consequently, are not affected by mere omissions and mistakes. The defendant was indicted for perjury in giving his evidence upon an indictment for an assault. This indictment had the words, "*whereby his life was greatly despaired of.*" The indictment for perjury, speaking of the former charge, had these expressions:—"*which indictment was presented in manner and form following, that is to say,*" but it omitted the word "despaired." It was objected hereupon, that the prosecution must fail. True it was, that the prosecutor had professed to recite the indictment *unnecessarily*, but having undertaken to do so, it was urged that he was bound to the strictest accuracy. Buller, J., however, overruled the objection, observing that this mistake was a mere matter of form, and that a substantial recital only was requisite. A rule to shew cause why there should not be a new trial was afterwards granted, but it was dropped (9).

The rule, nevertheless, it should be observed, extends no further than to these formal omissions or clerical errors. If matters of substance be neglected, however few or apparently unimportant, the case is entirely altered. An indictment for perjury before a select committee of the House of Commons concluded the assignments of perjury, which were numerous, thus: "whereas, in truth and in fact, the said E. L. did not tell the said J. L. that his lordship had given his assurance *that it should be so*, or that the said expenses should be secured; and so," &c. The short-hand writer swore that his note upon this matter was, that "his lordship had given his assurance," without more. It was immediately contended, that there was a material variance, for that the representation of the defendant before the committee was substantially different from that attributed to him in the indictment, and Lord Ellenborough entertained the same view of the case. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different; and if a man swear falsely to several material questions, these may be included in distinct counts. The learned lord was decidedly in favour of the defendant (1).

In the last case, the sense was materially affected by the omission. It is no objection that intervening expressions have been left out *which do not concern the point*. As where an indictment charged the defendant with having sworn to an assault, and with denying that he had said, "Give it him, give it him—it will go in one account." Upon the evidence, these words were proved; but it appeared that other matter had intervened between the statement of the assault and the words in question, and it was objected that here was a variance. But by Abbott, C. J., "it is immaterial; what intervenes does not vary the effect of what is stated" (2). It was alleged in an assignment of perjury, that the

(9) Dougl. 193, *R.* v. *May*; S. C. Leach, 192.

(1) 2 Campb. 134, *R.* v. *Leefe*, Gent. one, &c.

(2) Ry. & M., N. P. C. 252, *R.* v. *Solomon*. And see 6 B. & C. 102, *R.* v. *Callanan*; S. C. 9 D. & R. 97.

defendant, at the time of effecting the said policy, that is to say, a certain policy of insurance, purporting to have been underwritten by —— Kite, by his agent, Meyer, on the 13*th* of August, 1807, &c. (and by other underwriters specified in the indictment), well knew, &c. It appeared, however, that the policy had been underwritten by Meyer for Kite on the 15*th* of August, and Lord Ellenborough held the variance fatal (3). So where it was alleged, that the defendant swore to a particular fact on the day of the date of a particular memorandum, and of making a certain bill of exchange, without averring that these days were the same days. The assignment of perjury was, that this fact did not happen on the day of the date of the memorandum, and the indictment was held bad for uncertainty (4). Perjury was assigned on a fact sworn to have been committed at Norwich, and it was averred that the fact was not committed at the said *city* of Norwich. This was holden to be a variance (5). These will serve as examples to shew the nature of variances upon assignments of perjury.

Innuendo.] We have already said that no innuendo shall be allowed to operate against defendants by attempting to explain facts which are obscurely alleged. It was charged that the defendant had deposed this:—Master G. S., about the middle of July, 1681, was at Newnam, and the information then went on to shew where Newnam was, but only in the innuendo. And judgment was arrested for this cause, after several arguments (6). The use of the innuendo is to explain mistakes or ambiguities. An indictment, after assigning perjury concerning an assault, added, "and at the same *time* threatened to shoot her with a pistol." The information, however, when produced from the Bow Street Office, had the words "and at the same threatened to shoot her," &c. It was contended that the word *time* being left out, here was a fatal variance, and Lord Ellenborough acceded to the objection. There should have heen an innuendo, for the information might have meant at the same place. The defendant was acquitted (7).

If there be no occasion for an innuendo, it may be rejected (8).

Lastly, it may be added, that if there be but one good assignment, it is sufficient to warrant a judgment for the crown. This was laid down positively by Holt, C. J., in a case where a general verdict had passed for the crown (9). And the usual ending, that so the defendant has committed perjury, must be preserved (1). Of course, care must be taken not to say, "against the form, &c." if the thing charged be only a perjury at common law (2).

(3) 1 Stark. 521, *R.* v. *Hucks.*
(4) 4 Jur. 697, *R.* v. *Burraston.*
(5) 1 Show. 335, *R.* v. *Stone.*
(6) Com. 43, *R.* v. *Gripe;* S. C. 1 Lord Raym. 256; S. C. 5 Mod. 343; S. C. 12 Mod. 139; S. C. 2 Salk. 513; S. C. Carth. 421; S. C. Holt. 535; S. C. Comb. 459; S. P. 1 Keb. 612, 635, *R.* v. *Chedwicke;* Say. 281.
(7) 1 Campb. 404, *R.* v. *Taylor.*
(8) 1 T. R. 70, in *R.* v. *Aylett;* 9 East. 93, in *Roberts* v. *Camden.*
(9) 2 Lord Raym. 886, *the Queen* v. *Rhodes and Cole.*
(1) Tho. Raym. 34, *R.* v. *Read;* S. C. 1 Sid. 66; S. C. 1 Keb. 138; S. C. 163, nom. *Dawson* v. *Dunn.*
(2) 3 Bulstr. 322, *R.* v. *Bell.* As to the effect of the word "know-

Indictment for Perjury upon the Trial of an Information.] An information at common law is said not to require so much certainty as an indictment, whether the latter be at common law or on the statute. Thus, where the information was for perjury upon interrogatories administered in chancery, it was objected, that it had not been shewn in what particular one the defendant had been perjured. But the court overruled the objection, saying, that each perjury was punishable by the common law, although they admitted that greater certainty was requisite under the statute (3). And an *indictment* at common law demands the same certainty as the statute of Eliz. (4). It is observable, that the judge at the trial is to notice a variance between the information and the record, and that it is not by any means the province of the jury to do so. As where a matter of this sort had been permitted to be found specially, the court said, that the jury could not have any conusance on the subject. The judge at the trial ought to have determined it. A venire de novo was accordingly awarded (5).

Indictment for Perjury committed in an Answer in Chancery.] Bill:—With regard to the bill, it may be observed in the first place, that an objection that the indictment had stated the bill to have been directed to Robert Lord Henley, &c., whereas in fact, it was directed to Sir Robert Henley, Knight, &c., was overruled in *R.* v. *Lookup* (6).

The statute of G. 2. operates to prevent a variance in consequence of a misdescription of the parties to a bill. An indictment stated, that a bill was filed in chancery by one T. against the defendant *and another*. The bill appeared to have been filed against these persons and the attorney general. The matters which were material lay between the defendant and T. It was objected, that the omission of the attorney had created a fatal variance, but Lord Ellenborough said, that it would have been sufficient if the indictment had even omitted the mention of any other than the defendant. The statute would be entirely defeated should such subtleties prevail (7). But in a case where the indictment purported to set out the *substance and effect* of the bill, and stated an agreement concerning houses, Abbott, C. J. held, that the word "house" which appeared in the original bill, disclosed a fatal variance, being a difference in substance from houses, and the defendant was acquitted (8).

ing," as knowing the matters sworn to be false, see 1 Barnard. 263, 274, 287, 293, 459, Re Lady *Lawley*.

(3) 1 Sid. 106, *R.* v. *Wallengen*; S. C. 1 Keb. 452; S. P. per Cur. 5 Mod. 348; 1 Keb. 191.

(4) Carth. 422, per Holt, C. J.

(5) Tho. Raym. 202, *Rex* v. *Sykes*. That a party shall not take advantage of errors in the first record, when perjury is assigned upon matters sworn at a trial. See Tho. Raym. 74; *R.* v. *Wright*, S. C. 1 Sid. 148; 1 Keb. 531.

(6) Cited 1 T. R. 240.

(7) 2 Campb. 509, *Rex* v. *Benson*; S. P. Ry. & M., N. P. C. 101, *Rex* v. *Powell*, cor. Abbott, C. J.

(8) Ry. & M., N. P. C. 98, *Rex* v. *Spencer*.

If an answer be imperfectly entitled, it cannot be treated as a mere nullity. An answer was alleged in the indictment as an answer to the bill of J. C. Aberdeen, whereas the person's name was *F.* C. Aberdeen. The court having decided that the variance between J. C. A. and *F.* C. A. was not fatal, held also, that the answer above entitled could not be deemed void (9).

Indictment for Perjury in an Affidavit to hold to Bail.] Here, as to the venue, if an affidavit be assigned as the perjury in answer to an original application in any court, there is no need to shew where that court was, there being a venue as to the false oath (1).

Bill of Middlesex.] A bill of Middlesex was described wrongly on one occasion, as issuing out of the office of the chief clerk assigned to inrol pleas, &c., and the court refused to consider these words as surplusage, upon which the prosecution was abandoned (2).

Before the party authorized to take the Affidavit.] If the affidavit be sworn in the country, the expression usually is, "Before E. F., gentleman, then being a commissioner duly authorized and empowered to take and receive affidavits touching and concerning matters and proceedings of or in the court of our said lord the king, before the king himself, to wit, on &c. at &c." An indictment charged, that the affidavit was sworn before A. without naming him as a commissioner otherwise than saying at some distance *as such commissioner as aforesaid*, when the word, commissioner, had not been before used, and Scarlett moved to arrest the judgment. But the court held that it was not necessary to set out the nature of the authority. It had been alleged that A. had power to administer the oath, and that, together with his name, was sufficient (3).

Prout patet.] It is usual to add these words, and in indictments upon the statute of Eliz. they are necessary, but it has been solemnly decided, that the omission of the *prout patet* at common law will not vitiate the indictment (4).

Assignments.] On the production of an affidavit charged to be false in the indictment, it appeared, that the parts set forth were not continuous, but that they were separated by the introduction of other matter. This was pointed out as a variance; but Abbott, C. J. overruled the objection, and the court refused a rule for a new trial (5).

Plea of Auterfois Acquit.] The defendant was indicted in Middlesex for perjury committed in an affidavit, and the indictment concluded with a prout patet by the affidavit, as filed at Westminster. He was acquitted, but was again indicted for the same offence, with this difference, that the affidavit was here stated to have been sworn in *London*, and there was an averment traversing

(9) 1 Stark. 532, *Rex* v. *Roper*.
(1) 7 T. R. 315, *R.* v. *Crossley*.
(2) Peake, 112, *Rex* v. *Schoole*.
(3) 6 B. & C. 102, *Rex* v. *Callanan*.
(4) 7 T. R. 315, *R.* v. *Crossley*.
(5) 6 B. & C. 102, *R.* v. *Callanan*; and see Ry. & M., N. P. C. 252, *R.* v. *Solomon*; S. C. 9 D. & R. 97.

the jurat, and alleging that the defendant was, in fact, sworn in Middlesex. To this charge the defendant pleaded auterfois acquit, and the court gave judgment in his favour, because the jurat was not conclusive evidence of the place of swearing the affidavit, and the whole crime might, consequently, have been tried upon the first indictment (6).

Indictment for Subornation of Perjury.] Where the words were, "by sinister means," caused, &c., the court held the allegation sufficient, although the means were not specified (7). The words "solicit, persuade," &c., imply that the oath was actually taken, and this is necessary, because there cannot be a subornation without a perjury (8). But the attempt to suborn is a heinous offence, and will be severely punished by the court (9).

Where the indictment charged the defendants *and each of them*, with a suborning of four witnesses, *and each of them*, it was objected, that here were several charges joined in one indictment, and likewise, that it was too general to swear that one H. *and* his brother had committed perjury. The court made a rule to shew cause (1).

Indictment for Perjury before a Committee of the House of Commons.] In an indictment for perjury before a committee appointed to try a petition concerning the borough of New Malton, a count stated, that an election took place, "*by virtue of a certain precept of the high sheriff of the county aforesaid, duly issued to the bailiff of the said borough of New Malton*," &c. (2). The precept of the sheriff being produced at the trial, it appeared to be directed, "To the bailiff of the borough of *Malton*." Upon this it was objected, that the precept in the indictment being concerning *New* Malton, there was a variance. But Lord Ellenborough held, that it was not matter of description, and that if the precept was actually issued to the bailiff of the borough of New Malton, it was sufficient, whatever might be the tenor of the direction (3). But the *return to the crown office* stated, that the members, naming them, were returned for the borough of *Malton*, and the objection was renewed with effect. It was insisted for the prosecution, that the indictment did not profess to set out the tenor of the return, or the manner in which the members were returned, and that the words Malton and New Malton, were used indiscriminately in the journals of the house of commons. But Lord Ellenborough said, that this averment must be understood as a description of

(6) 9 East, 437, *R.* v. *Emden.*

(7) 2 Ld. Raym. 886; *The Queen* v. *Rhodes & Cole.*

(8) 2 Ld. Raym. 886, ut supra; 3 Mod. 122, *R.* v. *Hinton & Brown*; 7 Mod. 101, *The Queen* v. *Darby.*

(9) 2 Show. 2, *R.* v. *Johnson*; 2 Keb. 399, *R.* v. *Tayler* & another.

(1) 1 Barnard. 314, *R.* v. *Longbotom* & another, and *Giles* v. *Gwyn* was cited, and it was said that the indictment there was held bad for the first exception.

(2) But it is better to say, that an election "came on," &c., without mentioning the precept.

(3) 2 Camp. 139, *R.* v. *Leefe.*

something, and the defendant was accordingly acquitted for this variance (4).

Indictment for perjury before a magistrate.] The indictment for perjury before a magistrate should state, that the offence was committed upon an information and examination. The words "say, depose, swear, charge," and "*give the said justice to be informed,*" were deemed applicable (5). On the contrary, where it did not appear that a charge was made or pending, the indictment was held insufficient (6). If a perjury be committed at quarter sessions, the chairman is not a competent witness (7).

Of Evidence in Perjury generally.] Having now considered some of the general rules relative to indictments and informations upon this subject, we proceed to do the same with regard to the evidence. And the chief portion of our observations upon this head will apply to the competency of witnesses. For there does not seem to be any difference in general between the mode of proving perjury and any other offence; the transaction is disclosed *vivâ voce* by the mouths of admissible witnesses, and the guilt or innocence of the accused is ascertained in the same way as upon other occasions. Nevertheless, one or two things are still worthy of our attention. As that a party may be punished instanter by the court on the evidence, as it were, of his own confession, *in facie curiæ*. Thus, where a party having sworn to an affidavit in the court of common pleas, appeared in the king's bench upon a summons, and confessed the falsity of his oath, the court ordered, that he should be set in the pillory (8). So, bail who prevaricate, may be committed and punished, if the court see fit (9).

Oath, deliberate.] It is important to observe, that throughout all the proceedings for different perjuries, the oath charged against the defendant must be proved to have been deliberately false to the satisfaction of the jury. Mistake, error, inadvertence, are not sufficient grounds for preferring so grave a complaint as perjury (1). We have seen, that a party may be convicted for a wilfully false oath to the best of his belief or thought (2). If a defendant have uttered two contradictory statements upon oath, the course is to point out specifically in the indictment which of the oaths was corrupt, and then to give evidence of the testimony thus given in two ways. This proof will be sufficient without the form of two witnesses, as on other occasions of perjury, and also without showing a corrupt motive, or negativing the probability of any mistake. Because, in fact, in such

(4) 2 Camp. 141, *R.* v. *Leefe.* See also 5 B. & A. 926, *R.* v. *Harris.*
(5) 2 Moo. C. C. 95, *Gardiner's* C.; S. C. 8, C. & P. 737.
(6) 8 C. & P. 119, *R.* v. *Pearson.*
(7) 8 C. & P. 595, *R.* v. *Gazard.*
(8) 8 Mod. 179, *R.* v. *Thorogood.*
(9) 1 Chit. Rep. 116.
(1) See 2 Hawk. P. C. c. 69, s. 2, citing authorities; and see also sect. 7.
(2) Ante.

a case the contradiction actually arises on the side of the defendant himself (3).

Witnesses.] The principal observations, however, which we have to make on the general head of evidence apply to witnesses. These persons may be considered here in reference, 1st, to their number, 2ndly, to their competency.

First, it is established as a general principle, that two witnesses are necessary to convict a defendant of perjury, and for this simple reason, that there must be a majority of oaths against the accused. Thus, by Parker, C. J., "Presumption is ever to be made in favour of innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath against oath" (4). And the court at the Old Bailey laid down this point still more decidedly on one occasion, observing that this must be so upon each assignment of perjury. The law, they said, will not leave it to the jury to determine which oath they will believe, because the person indicted for perjury has already sworn one way (5). So, that if there be but oath against oath, the defendant must be acquitted (6). There is an exception, however, to this rule, and it is where the defendant has created evidence against himself. A person, named Knill, was convicted of having sworn contradictory oaths, the one before the house of lords, the other before a committee of the house of commons. One witness only deposed to the contradictions, yet the court denied a rule *nisi* for a new trial, because the contradiction had happened through the party's own agency (7). So, where there was one *vivâ voce* witness against the defendant, and a document written by himself contradicting his own statement upon oath (8). Moreover, two witnesses are not essentially necessary to disprove the fact which has been sworn to, for if a material circumstance be proved by another witness, it may turn the scale, and warrant a conviction (9). And, upon one occasion, the defendant was allowed to

(3) 5 B. & A. 929, n. *R.* v. *Knill.*

(4) 10 Mod. 194; S. P. 2 Str. 1230, *R.* v. *Broughton;* S. P. Suppl. to Vin. Ab. vol. 5, 379. K. 3, *Naylock's* Case, O. B. 1786; S. P. M. & M. 318, *R.* v. *Browne;* S. C. 3 C. & P. 572.

(5) Suppl. to Vin. ut supra, p. 380, *Ledwick's* C. O. B. 1788.

(6) Skin. 327. *Farrlaw's* C.

(7) 5 B. & A. 929, note, *R.* v. *Knill.*

(8) 6 C. & P. 315, *R.* v. *Mayhew.*

(9) 2 Russ. C. & M. 545, *R.* v. *Lee;* see also 1 Moo. & Rob. 128, *R.* v. *Mudie.* The defendant's account book, given in by him to the insolvent debtors' court, was put in, and several persons whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and "paid" was marked to their accounts in the defendant's writing. These persons were called, and stated that they did not pay until after the petition and schedule. It was objected, that here was merely oath against oath, and Lord Tenterden, though he would not stop the case, thought the point worthy of discussion. The defendant, however, was acquitted upon another ground.

convict himself without any further proof. As where the question was concerning the presence of certain women at a riot at his mill. He gave information upon oath before a justice that they were so present, and then, having been tampered with, he swore at the trial that they were not at the riot: and Yates, J. deemed this evidence of itself sufficient, and the defendant was convicted upon it alone, and transported (1). However, this case does not seem to have been presented to the notice of a learned judge upon a much more modern inquiry. A witness at sessions contradicted the entire of his deposition before the magistrate, and perjury was assigned accordingly. Gurney, B. held this proof insufficient. In order to convict the defendant, the jury ought to have been satisfied either that the testimony given at the sessions was false according to the charge, or that the deposition was true (2).

Witness—Interest to Disqualify.] Secondly, we go on to examine the competency of witnesses in perjury. Formerly, perjury was not (as it continued to be until the late statute 9 G. 4,) the only crime which the prosecutor was in general disqualified from proving in his own person. It was also incompetent for parties who indicted defendants upon the statute of Eliz., to appear against them because of the supposed interest of such witnesses in the forfeiture. Because, it was said, that should the defendant be convicted upon the information, the party grieved, if admitted thus to give his testimony, would be entitled to an action upon the statute (3).

So where an action had been brought by B. against C. it was held, that C. could not be examined as a witness upon an indictment for perjury against A. who had given evidence at the trial (4). And Mr. Nolan in a note to Strange, expresses the same opinion, taking a distinction between cases at common law, (to which we are coming directly,) and those upon the statute(5). But, on the other hand, Mr. Phillipps observes, that the party injured may be a witness, according to the sense of modern decisions, whether the prosecution be at common law or upon the statute, since as in an action to recover his moiety he would be precluded from giving the conviction in evidence, the objection to his competency would seem to be removed (6). However, at common law, it was considered, that the party injured might be a witness (7), and so it continued to be held, until a notion prevailed that the witness would reap some advantage from the conviction, for instance, that the court of chancery would relieve against the consequences of a judgment obtained by perjury. Thus it was said, that, in perjury, a person should not be received

(1) 2 Russ. C & M. 545. *Anon.*; and in this opinion Lord Mansfield, Wilmot and Aston, Js., concurred. Id. note (a); one oath being said to disprove the other. Id. 545.

(2) 8 C. & P. 238, *R.* v. *Wheatland.*

(3) 1 Sid. 237, *R.* v. *Povey, Lambert* & others.

(4) 2 Ro. Ab. 697, *Bacon's* C.; S. C. 21 Vin. Abr. 363, Gilb. Ev. 111; S. C., see Bull. N. P. 288, et seq.

(5) 2. Str. 1104, note (1); S. P. by Sir W. D. Evans, 1 Salk. 283, note (a).

(6) Phil. on Ev. 4th ed. p. 120.

(7) Bull. N. P. 289.

to give evidence as prosecutor, because he might reap a benefit in case of a verdict for the king (8). The same law was afterwards laid down where certain defendants in an ejectment were refused as witnesses by the lord chief justice, in an indictment for perjury committed upon the previous trial (9).

So a party who had been compelled to pay a sum of money through the evidence of the defendant, the only witness examined, and who had filed a bill for relief, was rejected, for the court of chancery, said Lord Kenyon, upon having this new matter stated in a new or supplemental bill would direct that the money should be refunded (1).

So where a verdict had passed against the prosecutor in consequence of the testimony of the defendant in perjury, Lord Kenyon would not suffer the prosecutor to be sworn, he having admitted that he had not paid the debt and costs. It was said, that the bail had been fixed, and would, therefore, be liable at all events, but Lord Kenyon said, that the prosecutor might be relieved in a court of equity against a judgment obtained on the sole evidence of the defendant, in case of conviction, and the proposed witness was, consequently, rejected (2).

These decisions, however, were at length doubted, and afterwards overturned after considerable discussion. Lord Hardwicke first threw out a hint that *R.* v. ***Whiting***, upon which the other cases followed, was a case in which the credit, rather than the competency of the witness, was at stake (3), and in a few years afterwards, a decision was made the other way. There was an indictment against a defendant for a fraudulent oath supposed to have been taken in chancery, and the prosecutor tendered himself for the purpose of being examined. The chief justice (Sir William Lee) received his testimony, saying, that as no bill of exceptions lay, the prosecutor would otherwise be without remedy, whereas the defendant, if convicted, might move for a new trial. Lee, C. J., said further, that in Nunez's case, the suit in the exchequer was then still pending, whereas here the suit in equity seemed at an end. The defendant, however, was acquitted, because there was only one witness against him (4). The next case was mentioned by Lord Mansfield in giving judgment upon a question, whether the borrower was competent to prove usury (5). The defendant had bought an estate for the plaintiff; he articled in his own name, and refused to convey, and by his answer denied any trust. The bill was dismissed, and the defendant was indicted for

(9) Hardr. 331, 332; S. P. 1 Salk. 283 in *R.* v. ***Whiting***; for a cheat, 1 Ld. Raym. 396.

(9) 2 Str. 1104, *R.* v. *Ellis*; S. P. *R.* v. *Newens*, 4 Geo. 1, cited there. S. P. 2 Str. 1043, *R.* v. *Nunez*; S. C. Cas. T. H. 265.

(1) Peake, 12, *R.* v. *Dalby*.

(2) 1 Esp. 97, *R.* v. *Eden*.

(3) Ca. Temp. Hardw. 359, and see Bull. N. P. 289, note (a).

(4) 2 Str. 1229, *R.* v. *Broughton*.

(5) 2 Burr. 2251, *Abrahams q. t.* v. *Bunn*, and held that he was. This case confirms the overturning of the decisions above enumerated. See Peake, 12, *R.* v. *Menetonè* cited; Id. 104, *R.* v. *D'Faria*, id. 138, *R.* v. *Pepys*, 4 East, 577, 581; 2 Russ. C. & M. 546.

perjury, and convicted on the evidence of the plaintiff in equity confirmed by circumstances, and by the declaration of the defendant. The plaintiff then petitioned for a supplemental bill in nature of a bill of review, stating the conviction, but the petition was dismissed because the conviction was not evidence (6). However, the point was finally decided in a solemn manner soon afterwards. The defendant, in an indictment for perjury, had brought an action against the prosecutor, who filed a bill against him in equity for a discovery and an account, and obtained an injunction. The defendant then denied the allegations of the prosecutor, and obtained a dissolution of the injunction, upon which he was indicted for perjury. The cause and the indictment came on to be tried at the same assizes, the indictment standing first, and the court held, that the testimony of the prosecutor should be received, because he could not avail himself of the conviction, either at law or in equity. The court added, that they could not accede to this objection on the part of the defendant without breaking in upon the authority of *Smith* v. *Prager* (7), and *Bent* v. *Baker* (8), where it was decided that where a party is not immediately interested in the cause, nor has any interest in the event in support of which the verdict in that cause may be given in evidence by him in any other proceeding instituted by or against him, he is a competent witness. The rule, therefore, which had been obtained for setting aside the verdict and granting a new trial was, accordingly discharged (9). However, in a later case where it was clearly admitted that a person who had not paid the debt and costs of a prior action, was not rendered incompetent as a witness for the prosecution, he was, nevertheless, held to be disqualified upon the disclosure of the additional circumstance that he expected the defendant to be a witness against his interest in a similar action coming on for trial after the indictment. This was such an immediate interest as rendered him incompetent (1). And, in chancery pending a suit, the complainant's testimony has been rejected (2).

It is no objection to a witness that he has sworn to the fact which he is about to depose to in an indictment for perjury. As where the defendant had filed a cross bill against a witness who in her answer had sworn to the very fact, she was brought forward to prove upon an indictment. Because her answer would not help her in the court of chancery, since other evidence must be adduced there before she could prove her case, and so she could not be said to have an immediate interest in the event of the suit (3).

Evidence to prove a General Indictment for Perjury.] The chief points of evidence which tend towards the proof of an indictment

(6) 2 Burr. 2255, *Bartlett* v. *Pickersgill*, Nov. 22, 1762, cited there.
(7) 7 T.R. 60, *Smith q. t.* v. *Prager*.
(8) 3 T. R. 27.
(9) 4 East, 572, *R.* v. *Boston*; S. C. 1 Smith, 202; and see 2 Vern. 464, *Needham* v. *Smith*; 1 Camph. 10; 1 Phil. on Ev. 120; 2 Russ. C. & M. 546.
(1) 7 C. & P. 8, *R.* v. *Hulme*.
(2) Skin. 327, *Fanshaw's* C.
(3) Peake, N. P. C. 138, *R.* v. *Pepys*, esq.

for perjury are:—1. The proceedings in which the offence was committed. 2. The oath of the defendant. 3. The matter sworn to. And 4, the assignment of perjury. Having proved that the defendant took the oath in question before the jurisdiction mentioned in the indictment, having shewn the matters which he swore, and in what he swore falsely, the case for the prosecution will be made out.

First, as to the proceedings (1). To shew the nature of the cause in which the perjury took place as alleged in the indictment, it is usual to produce the record of the court (2). If the trial be for a perjury committed at the assizes or sittings, produce an office copy of the record, or the nisi prius record (3). The production of the postea, though no evidence of the verdict, is enough to shew that a trial took place, so as to introduce an account of what a witness swore at the trial (4). So that where an objection was made that a copy of the final judgment ought to have been produced, it was overruled (5).

So also, though no postea be indorsed, but only a minute of a verdict, the nisi prius record is evidence for this purpose, and the examination of one defendant after his acquittal may be proved by parol evidence (6). But if no record is made up, so that it does not appear whether any trial has happened or not, the minutes will not be received, for the main link is wanting in such a case (7).

It is not competent to travel out of the record, nor to introduce new matter into the proceedings. Therefore, where the defendant was charged with perjury before a magistrate, it was held, that parol evidence could not be brought forward to aid the written deposition by shewing other matters sworn to by the defendant upon the same occasion (8). But where a document failed to shew the presence of certain justices at sessions, by reason of it's being faulty as a record, it was held, that parol evidence might be adduced to shew the presence of those justices according to the statement made in the indictment (9).

We must next shew that the defendant took an oath. The particular mode of swearing, however, need not be testified, and proof that the party was sworn and examined will satisfy the allegation in the indictment that he was duly sworn, &c. (10).

Thirdly, The matters sworn to must be given in evidence.

(1) Note that all formal proofs must be admitted at the trial, or the judge will direct an acquittal, 8 C. & P. 376, *R.* v. *Thornhill.*

(2) The chancellor will take care that all proper documents in his court shall be produced. See Mont. Bank. C. 214. And so will the lord chief baron, security being given for the safe return of the record, 2 Y. & Jer. 512.

(3) Arch. Crim. Pl. p. 366.

(4) Per Pratt, C. J. Str. 162.

(5) *R.* v. *Minus*, *R.* v. *Iles*, cited Bull, N. P. 243.

(6) M. & M. 315, *R.* v. *Browne*, and see 1 Phil. Ev. 389, 4th ed.; S.C. 3 C. & P. 572. This case shakes the authority of a decision made by Lord Kenyon upon a trial for perjury, where it appeared that the postea had not been indorsed, 6 Esp. 83, *R.* v. *Page*; S. C. in the note, 2 Esp. 649.

(7) 6 Mod. 167, *The Queen* v. *Carter.*

(8) 6 C. & P. 380, *R.* v. *Wylde.*

(9) Ry. & Moo. N. P. C. 171, *R.* v. *Bellamy.* See also 6 C. & P. 367, *R.* v. *Ward.*

(10) Ry. & M., N. P. C., 302, *R.* v. *Rowley.*

Should the count allege that the defendant swore certain matters in *substance and effect*, (which is not a desirable or prudent allegation) it must be proved, that the defendant swore the *whole in substance and effect* of that which is set forth in the count as his evidence. For want of being able to do this the count will fail(1). And this rule holds, although there be distinct assignments of perjury in that count (2). It is moreover necessary to give the whole of the evidence sworn by the defendant referrible to the fact on which the perjury is assigned. For the defendant may have explained an apparent falsity in a subsequent part of his examination. Therefore, if there be two answers in chancery relative to the same matter, it would be competent for the defendant to prove that the second answer contained a satisfactory explanation of the first, in which case he would be entitled to an acquittal (3). And Lord Kenyon directed an acquittal where the witness who had taken down the defendant's evidence proved the words on which the perjury was assigned, but could not speak to any other part of his evidence, and his lordship mentioned Carr's case (4).

But where the witness stated, that he took no note of the evidence, but that from his duty as attorney's clerk he had paid particular attention, that he would not undertake to say that he had given the whole of the defendant's testimony, but that he would swear that nothing else was said which qualified what he had stated, and that to the best of his recollection he had given all that was material to this inquiry and relating to the transaction in question, Littledale, J., received the evidence, and the prisoner was convicted, and the judges subsequently expressed their approbation of the decision (5).

So where three witnesses stated, that the defendant swore certain matters, but admitted that they did not take down the evidence as it was given, nor did they even profess to relate the whole of the evidence so sworn, the proof was allowed (6).

So where an answer on a cross-examination was quite foreign to the general merits of the case, upon an indictment for perjury in this particular, it was held sufficient to prove all the cross-examination, only because that was entirely unconnected with the original examination (7).

It also lies upon the prosecutor to shew that the matters sworn to were material (8), or, at all events, bore in some way upon the question at issue; and this proof lies upon the prosecutor, for it will not be taken by intendment (9).

The statement of a deceased witness being tendered in evidence

(1) 2 Campb. 134, *R.* v. *Leefe.*
(2) Ibid.
(3) 1 Sid. 418, *R.* v. *Carr*; 2 Ves. & B. 258.
(4) Peake, 38, *R.* v. *Jones.*
(5) Ry. & M., N. P. C., 299, *R.* v. *Rowley*; S. C. 1 Moo. C. C. 111.
(6) 3 C. & P. 498, *R.* v. *Munton.* See this case also in chapter 2, concerning perjury committed from motives of malice.
(7) Peake, 170, *R.* v. *Dowlin.*
(8) Under the statute they must have been immediately material, but indictments are rarely preferred now on 5 Eliz.
(9) Supp. to Vin. Ab. vol. 5, p. 379, K. 9; see also Palm. 382, 535, *Jary & King*; Ld. Raym. 889.

for the prosecution, certain declarations of the same witness, not upon oath, were proved upon cross-examination, and although these were material to the defendant, they were held to have been properly rejected, not being on oath (1). A notice of set-off, intituled in a cause A. B. *v.* C. D., and signed by C. D.'s attorney, will not satisfy an allegation that a cause was depending between A. B. and C. D. (2)

Lastly, the assignment of perjury must be proved as laid. And this must be done by showing, that the matter sworn to was really false, and not merely supposed to be so from the circumstance of the defendant having written a letter to that effect, or otherwise. The recital of a deed is evidence in other cases, but not to prove perjury, nor a letter of the party indicted, though sworn to be the hand-writing of the defendant (3).

Where perjury was assigned upon a statement by the defendant, that his property qualification was 300*l.* a year, in order to enable him to sit in parliament, it was held, that the jury must be satisfied of the negative of this qualification, and likewise of the guilty knowledge of the defendant respecting it (4).

And if one assignment be shown to be good, there must, upon a general verdict, be judgment for the crown (5), unless, indeed, several assignments be crowded together into one count, and there be an allegation that the defendant swore *in substance and effect*, in which case all the assignments in that count must be proved (6).

Evidence—Answer in Chancery.] In this case it is necessary to prove. 1.—The bill. 2.—The answer, and that it was made upon oath before a master in chancery. 3.—The falsity of the matters contained in the answer.

First, the bill is produced, or an examined copy, and then the answer, but it is worthy of attention, that no copy of the answer can be received. The *original* of that instrument must always be brought forward in prosecutions for perjury. It is said, however, that, perhaps, a copy might be sufficient to warrant the grand jury in finding the bill of indictment, although the original must, of course, be produced at the trial (7).

A copy of the bill, however, has been admitted, but, if the bill be taken off the file, it is not evidence (8).

(1) 3 Dowl. 242, *R.* v. *Parker.*

(2) 6 C. & P. 489, *R.* v. *Stoveld.*

(3) 1 Sid. 418, *R.* v. *Carr.* The defendant was indicted for perjury, he having sworn falsely to his schedule of debts. It was proposed to show, that persons, whose names were *not* mentioned in the indictment, were also debtors to the defendant, and omitted in the schedule; but Lord Tenterden would not permit it. 1 Moo. & Rob. 128, *R.* v. *Mudie.*

(4) 7 C. & P. 17, *R.* v. Sir *J. E. de Beauvoir.*

(5) Ld. Raym. 886, *The Queen* v. *Rhodes and Cole*; 1 Keb. 213.

(6) See 1 Sid. 377, *R.* v. *Buckworth* & others. It is not competent for a defendant to offer evidence to disprove an assignment of perjury upon which the prosecutor offers no evidence. 5 C. & P. 468, *R.* v. *Hemp.*

(7) Bull. N. P. 239, *Chambers* v. *Robinson*, Trin. 12, G. 1; 2 Show. 486, *R.* v. *Baspoole*; S. C. Comb. 38, as to depositions in Chancery.

(8) Skin. 327, *Fanshaw's* C.

In proceeding upon an answer to a bill before amendment, the amended bill was put in, and the amendments were proved to have been made by the clerk according to his duty, but the person who actually wrote these corrections was not called. Lord Tenterden held, that these proofs were sufficient, and that the amendments were not material to the case (9).

Next, it must be shown, that the answer was put in upon oath before a master in chancery. And this is done by proving the jurat, and that the name subscribed is the defendant's handwriting. The defendant's signature proves that he was the person who exhibited the answer, and the signature of the master is proof that the person who did exhibit it was regularly sworn to the truth of its contents. Therefore, where the answer purports to be sworn before a master, it is sufficient to prove the handwriting of the master, and that of the defendant (1). And so in proving perjury committed in an answer sworn before a baron of the exchequer, you need only prove the hand-writing of the baron and that of the defendant (2). However, although no proof of identity beyond the facts of a person calling himself A. B. being sworn, and his signing the answer is necessary (3), yet no return of the master will be sufficient without proof of the defendant's oath (4). The same law prevails with respect to the proof of depositions in cases of perjury (5).

It lies upon the defendant to prove that he has been personated, if such should be the case (6); that is to say, as soon as the evidence of his hand-writing, and of that of the master have been tendered as above-mentioned. The recital of the place in the jurat where the oath is administered is sufficient proof that it was there taken (7). The third and last proof is the falsity of the answer.

Evidence.—Affidavit to hold to Bail.] The affidavit sworn by the defendant, and the falsehood of it, are the chief features of evidence necessary to support this indictment. There are, therefore, to be proved. 1.—The affidavit sworn by the defendant. 2.—The averments of perjury.

The proper officer will produce the affidavit at the trial, and the hand-writing of the defendant must then be proved, or that he was sworn to the contents of the instrument, and also, if under the statute, that the affidavit was in some way used in the prosecution to which it has relation, but not if at common law. And the hand-writing of the officer who administered the oath must be proved (8).

(9) 4 C. & P. 326, *R.* v. *Laycock.*

(1) See 2 Burr. 1189, *R.* v. *Morris*; S. C. 1 Leach, 50; S. C. Bull, N. P. 239; 2 Camp. 508, *R.* v. *Benson*; 1 Phil. on Ev. 4th ed. p. 394.

(2) 2 Str. 1043, *R.* v. *Nunez*, in marg.; 3 Mod. 117, note (*a*).

(3) Bull, N. P. 239; 1 Show. 397, *R.* v. *James*; 2 Burr. 1189, *R.* v. *Morris.*

(4) Bull, N. P. 239; 3 Mod. 116, *Anon.*

(5) Archb. Crim. Pl. 87.

(6) 2 Burr. 1189.

(7) Ry. & M., N. P. C. 97, *R.* v. *Spencer*; S. C. 1 C. & P. 260.

(8) 1 C. & P. 260.

Notwithstanding some ancient opinions to the contrary (9), it is now necessary to produce the original affidavit, and, therefore, a copy would be rejected as insufficient. The officer will prove that the indictment in question has been filed of record, although at common law the allegation and proof are unnecessary. But it is otherwise upon the statute, for there it must appear, that the affidavit was affiled of record (1). Next, if the proceeding be on the statute, it must be shewn that the affidavit was used (2); but the crime is complete at common law, whether any use be made of the affidavit or not (3); for the perjury is complete when the affidavit is sworn, and the omission of some formal regulation is immaterial (4).

The statute 23 Geo. 2, having directed, that the authority of the person who administers the oath should be alleged, it must appear, that the officer who administered the oath upon this occasion was acting in his usual capacity, upon which the judge will take notice of his authority. In cases where judicial notice cannot be taken of the power to give oaths, evidence must certainly be adduced to prove that authority (5). But the appointment need not, in general, be shown, as in the case of a commissioner who takes affidavits in the country, and in many other instances (6).

Evidence.—Subornation of Perjury.] In this case the principal heads of evidence are the perjury and the subornation. The perjury is proved, as we have already shown in a former page. Thus, the proceedings before the judge, as stated in the present indictment, must be proved, together with the oath of the person suborned, the matters which he swore to, and the falsehood of them. It was, indeed, attempted upon one occasion to produce the record of conviction as sufficient evidence of the perjury, but the prisoner's (7) counsel insisted, that this would not be conclusive, that the prisoner had a right to controvert the guilt of the individual whom he was charged with having suborned, and that the evidence given on the former trial ought to be submitted to the consideration of the present jury. The recorder entertaining the same opinion, compelled the counsel for the crown to go through the whole case as though the jury had the question of the original prisoner's guilt solely before them (8).

Thus it is also in the cases of subornation of perjury before commissioners of bankrupts, and concerning a bastard child,

(9) See 1 Show. 397, *R.* v. *James*; Holt, 284, S. C.
(1) 7 T. R. 315, *R.* v. *Crossley*.
(2) Holt, 534, *R. & Reg.* v. *Taylor*.
(3) 7 T. R. 315, *R.* v. *Crossley*.
(4) K. & P. 260, *R.* v. *Spencer*.
(5) Archb. Crim. Pl. p. 365.
(6) See 1 Show. 397, *R.* v. *James*; 3 Campb. 432, *R.* v. *Verelst*; 1 Moo. & Rob. 187, *R.* v. *Howard*. "I must take it," said Patteson, J., in the last case, "that somebody swore this affidavit before the commissioners;" and the learned judge recognized the authority of the commissioners without proof of the appointment.
(7) He was indicted for suborning another to take a false oath concerning a seaman's will.
(8) 1 Leach, 454, 455, n. *Reilly's* C.

above alluded to. The proceedings before the proper tribunal, the oath of the defendant, the matters which he has sworn to, and the falsity of them, constitute the necessary evidence to prove the perjury. There is, however, this distinction in cases of perjury before commissioners of bankrupts between the bankrupt himself and third persons, namely, that where the former is indicted for perjury, strict proof of the proceedings is necessary, whereas in the latter case, the adjudication of the commissioners is sufficient to prove the fact of bankruptcy. Thus, in an indictment against a bankrupt for perjury upon his last examination, Lord Ellenborough was disposed to think, that not only the commission of bankruptcy, but also the trading, the debt of the petitioning creditor, and the act of bankruptcy, should have been given in evidence. His lordship said he would save the point for the defendant, who was, however, acquitted on the merits (9). In an indictment, on the other hand, against a third person who had been examined before commissioners, their declaration of the bankruptcy was held sufficient by Abbott, J. (1). But, secondly, you must prove the subornation. This is done by showing that the defendant wilfully incited the other person to take the false oath, (which, as we have seen, must, in fact, be taken in order to constitute this offence,) and, it seems, that the bare solicitation of the defendant for this purpose would be evidence for the jury to consider, in the absence of proof to the contrary, whether the defendant had not acted knowingly and corruptly.

It has been held, that a prisoner convicted of taking a false oath, but pardoned before judgment, was a competent witness against the party who had suborned him, being restored to his former competency and credit by virtue of the pardon (2).

Evidence.—Perjury before a Committee of the House of Commons.] In this case the usual proofs are, the election, the return of the members, and the matters falsely sworn to. Then follow the proof of the assignments by demonstrating the wilful untruths advanced by the defendant (3).

The following evidence was deemed sufficient to support an indictment for perjury by falsely taking the freeholder's oath at an election for Middlesex. That oath was administered to a person who polled on the second day in the name of J. W. There was no such person as J. W. The defendant, himself no freeholder, voted on that day, and subsequently boasted of the success his fraudulent vote had met with. No more than *one* false vote was given on the day in question, and there was no proof that the defendant voted in his own name, or in any other name than that of J. W. This evidence was considered effective for the purpose of inducing the jury to presume that the defendant had voted

(9) 3 Campb. 96, *R.* v. *Punshon*; S. C., 1 Rose, B. C. 223.
(1) At Devon Lent Ass. 1818, *R.* v. *Raphael, Mann.* N. P. Digest, 232.
(2) 1 Leach, 454, *Reilly's* C.
(3) See 2 Campb. 134, *R.* v. *Leefen.*

thus fraudulently in the name of J. W., and the court held, that he had been properly convicted (4).

The allegation in an indictment, that a committee were sworn to "try the matter of the petition" was held good, although the stat. 10 Geo. 3, uses the words "to try and determine the merits of the return" (5).

Evidence of Perjury.—Court of Review.] In a case of perjury before the court of review in bankruptcy, the petitioning creditor proved the handwriting of the defendant to the affidavit on which perjury was assigned, and he likewise gave evidence of the trading and act of bankruptcy. A creditor who had not proved his debt likewise gave evidence of the trading and act of bankruptcy; and an assignee proved the act of bankruptcy. These were the principal witnesses, and the judges were of opinion, upon a reserved case, that their testimony was properly received in support of the prosecution (6).

Actions on 5 Eliz. c. 9.] Actions upon the statute of Eliz. by the party who has been aggrieved by perjury are of such rare occurrence, that very few words will be sufficient upon the subjects of pleading and evidence.

First, he must be the party grieved who brings the suit (7), and he is not at liberty to join any other with him. Thus, an exception was taken where an action had been brought against three, that a surrender, which had been in question, enured to the use of two of the plaintiffs only, so that the third person was not an injured party, and it was the opinion of Wray and Southcote, Js., that the writ should abate (8). On the other hand, it was said at the bar, upon one occasion, and not denied, that if two parties be grieved, they must join, the one being incompetent to maintain his suit without the other (9).

Great accuracy is required in setting out the statute if it be attempted to do so; but this is not necessary, for where it was moved to arrest the judgment because the plaintiff had omitted the words of the statute in his declaration, the court would not hearken to the objection, but gave judgment for the plaintiff (1).

The only ground for the objection was, that it ought to have appeared whether the defendant had been guilty of perjury, or of subornation; but as Mr. Serjeant Hawkins has observed, all perjury whatsoever must come under one of those heads, there being no medium, and, therefore, the prosecutor would be equally grieved in either case. He would be placed under the difficulty not only of proving the perjury, if such an objection were to prevail, but also of shewing it to be within one of the branches of the distinction, which would be superfluous (2).

(4) 6 East, 323, *R.* v. *Price*, alias *John Wright*; S. C. 2 Smith, 528.
(5) 1 D. & R. 10, *R.* v. *Dunn*.
(6) 2 Moo. C. C. 24, *Keat's* C.
(7) 3 Bulst. 147.
(8) 2 Leon. 12 Anon.
(9) Hetl. 73, *Deakins's* C.
(1) 3 Bulst. 147, *Cockerill* v. *Apthorp*.
(2) 1 Hawk. P. C. c. 69, s. 18.

Nevertheless, the words of the statute must be strictly pursued in the allegations of the defendant's oath, and of his tortious intention. Thus it was adjudged that the plaintiff should take nothing by his writ for want of the word, voluntarie, in an action of debt upon the statute (3). An action of debt was brought upon the statute for perjury committed in an action of debt, and the record of this last action was stated to have been as of Hil. 27 Eliz. In truth, the action was brought in Hil. 28 Eliz. and so the "recital did miss the record." It was contended, that here was a fatal variance, inasmuch as the party charged with perjury might thus be doubly proceeded against. But by Coke arguendo, it is between the same parties, and in the same cause, and a circumstance only is mistaken. Clench, J. It is needful to shew in what action the first perjury was committed, for he says in trespass, whereas in truth it was in debt; all is naught. Gawdy, J. If no action be alleged, he cannot sue upon the statute of 5 Eliz. (4).

The authority of the judge or commissioner must also appear upon the record. Where it was alleged that the defendant came to R., a master in chancery having authority to take affidavits, &c., and that the defendant made a false affidavit, but did not allege that the affidavit in question was in chancery, *in curiâ cancellariæ*, it was held to be no perjury within the statute (5).

Moreover, it must appear upon the face of the declaration, that the party was in reality aggrieved, so that where upon a question concerning the surrender of a copyhold it was alleged that perjury had been committed, it was held a good exception that the certainty of the copyhold did not appear upon the pleading (6).

Trial.] The record being duly made up, and the venire facias (7) complied with by the appearance of a proper jury, the trial commences. But the judge is authorized to refuse the inquiry altogether if the indictment appear unquestionably to be bad. As where it could not be in any way collected from the record that the matters sworn to and alleged as perjuries were material to the question at issue (8). So again, where an indictment for perjury had been found at the quarter sessions, and had been removed into the court of king's bench by certiorari, because the quarter sessions have no jurisdiction over the offence, Mr. Justice Gaselee refused to try the charge in this instance (9). But it is otherwise where the materiality of the thing sworn can be traced on the record, although there be no allegation to that effect. The objection for want of such an allegation is on the record, and can be taken advantage of in arrest of judgment, if necessary (1).

(3) Hetl. 12, *Kitton* v. *Walters*, S. P. 2 Ro. Rep. 76; *Brookes* v. *Hall*, S. P. 1 Leach, 71: see *Hawkins*, ut supra.

(4) Godb. 88, *Dennie* and *Turner's* C.

(5) Lat. 38, Anon.; Id. 132, *Luther* v. *Holland*.

(6) 2 Leon. 12, Anon.

(7) See 1 Keb. 182, 198, 213, 214; Doug. 791, 794.

(8) Ry. & M., N. P. C. 147, *R.* v. *Tremeurne*.

(9) Id. 293, *R.* v. *Haynes*.

(1) 2 Stark. 423, *R.* v. *Souter*, and S. C. Id. 424 n. (a).

The trial being over, and the verdict given (2), judgment is entered up according to the finding of the jury. And there is this additional penalty to the statute of Eliz., namely, that the disability forms a part of the judgment. Consequently, a pardon under the great seal or sign manual will restore the attainted perjurer to his competency, after a conviction at common law, but not so if he have received judgment under the statute 5 Eliz. (3).

One R. was convicted of perjury upon the oath of D., but R. subsequently caused D. himself to be convicted of perjury in accusing R. It was thereupon moved, that as judgment had not been given, an entry might be made upon the record that R. was acquitted of the first perjury, but the court said, they could not do that. R. might bring error if he would. However, the court restored him to his place of one of their attornies (4).

The following is an example of an erroneous entry of the intended judgment:—"It is *ordered*, that the said L. K. be transported, &c.," the mistake being in the word, 'ordered,' instead of 'considered.' The defendant brought a writ of error, but the court observed that no *judgment* had been given, there being merely an *order*, and they awarded a procedendo to the court below to give judgment on the conviction. In the meantime, they thought that the prisoner might procure bail for his personal appearance to receive that judgment at the next Chester sessions (5).

New Trial.] The judgment being pronounced, the defendant in perjury has three courses open to him for the purpose of avoiding the mischief which he has encountered. He may move for a new trial, or in arrest of judgment, or may bring a writ of error (6). First, as to the new trial. If there be a verdict of acquittal, the courts will not suffer it to be disturbed; but if the jury find for the crown, there are some circumstances, which we shall mention presently, which will induce the granting of another inquiry. Two persons were charged with perjury and *acquitted*, and after some discussion the judges, except Windham, J., were of opinion that no new trial should be had (7). And this opinion of Windham, J., was the more strange, because he had himself laid it down two years before, that no new trial could be had in the event of

(2) Which must be, if against the defendant, that he is guilty of wilful and corrupt perjury, otherwise the jury must acquit him; 5 Mod. 351.

(3) 2 Salk. 514, 689, 691; 3 Salk. 155, Anon.; 1 Ld. Raym. 257; Holt's C. 135; Bull, N. P. 292; 1 Phil. on Ev. 4th ed. p. 36.

(4) 1 Sid. 217, *R.* v. *Read*; see Trials per Pais, 226.

(5) 1 B. & C. 711, *R.* v. *Kenworthy*; S. C. 3 D. & Ry. 173.

(6) It is no ground for postponing the judgment upon a convicted defendant that the witness against him is indicted for perjury, for giving the very evidence, upon which the defendant was found guilty; at least not if the defendant be so interested in the event of the second trial as to become thereby disqualified as a witness. 3 Burr. 1387, *R.* v. *Haydon*.

(7) 1 Sid. 153, *R.* v. *Fenwick & Holt*; 1 Lev. 9, *Anon.*; S. P. 1 Lev. 124; S. P 1 Lev. 9, *R.* v. *Bowden*, cited there.

an acquittal for perjury, *unless by consent*, to which the judges then agreed (8).

On the other hand, where a verdict has passed for the crown, it is quite clear that a new trial may be awarded in favour of the defendant. At one time, indeed, it was supposed, that this could not be done without the consent of the king's counsel (9), although the court said, they could do it without such consent in debt upon an information, inasmuch as the party had an interest in that case (1). However, some years afterwards, upon a conviction by information for perjury, it turned out, that the false oath had not been taken wilfully, and the court granted a new trial upon motion, mentioning Sir John Jackson's case (2), and Fenwick's case, (3) as authorities for doing so (4).

The granting of the new inquiry is, nevertheless, entirely at the discretion of the court, who sometimes will refuse the application, if they should think that the matter has been fully heard. In the case of a trial at bar, it appeared that the jury hesitated very much, and, in fact, found at first a verdict of guilty, but not of wilful and corrupt perjury. They at length pronounced the defendant guilty generally, but some of them said at the time that they were not satisfied that the perjury had been wilful and corrupt. The court held, that when a cause was tried at bar (5), a new trial was never granted, for the single reason that the jury went against evidence, but it seems that the matter was adjourned upon the other point (6). And it is quite clear, that a judge at the present day would not receive a verdict of guilty accompanied by such a qualification as we find in the preceding case.

Costs.] By 7 G. 4, c. 64, s. 23, the costs and expenses of prosecutions in certain cases of misdemeanor may be allowed by the court as in cases of felony; and the offences of perjury and subornation of perjury are included within the last. The prosecutor is entitled to his costs, as prosecutor, though his name be included in a subpœna, and although he be not bound over to prosecute, and his expenses are not thereby limited to such as he has incurred in being a witness (7).

Costs upon new Trial.] The court will not in general allow the defendant the costs of the former prosecution upon the granting of a new trial in cases of perjury. Should the defendant make out a charge of oppression, the court might possibly interfere on his behalf, but not under ordinary circumstances. The prose-

(8) 1 Keb. 134. By Windham, J., citing *Williams's* C.

(9) 1 Sid. 49, *Read* v. *Dawson*; S. C. 1 Keb. 127.

(1) Ibid.

(2) 1 Keb. 841. 1 Lev. 10, 124.

(3) 1 Sid. 149, 153. 1 Keb. 546, 568.

(4) 2 Show. 165, *R.* v. *Smith*. Sir Tho. Jones, 163. Pemberton, C. J., at first doubting. S. P. 3 Keb. 525, *R.* v. *Cornelius*. 5 Mod. 350.

(5) But this strictness is no longer kept up; see Tidd. Prac. 7th ed. p. 912.

(6) 5 Mod. 349, *R.* v. *Melling*; S. C. 12 Mod. 128; S. C. Holt, 535. As to the effect of perjury with reference to the granting of new trials in causes wherein it may have been committed, see Tidd. Prac. 7th ed. p. 914.

(7) 7 C. & P. 440. *R.* v. *Sheering*.

cutor having removed an indictment into the king's bench by certiorari, it was moved on behalf of the defendant, that the proceedings should be staid until the costs of former indictments for the same offence had been paid by the prosecutor. On the first occasion, the judge refused to try the case, by reason of the appearance of manifest imperfections upon the face of the record; and on the second, a new trial was granted, because a minor was sworn and served upon the jury in the room of his father. The prosecutor did not carry that record down again, but preferred a new indictment. By the court.—No case of oppression has been made out by the defendant. His application for a new trial has made further expenses necessary, and it can make no difference to him, as to such expenses, whether he is again tried upon the old or upon a new indictment (8).

Arrest of Judgment.] Another course which the defendant may avail himself of, is to move in arrest of judgment, if there be a ground for doing so. And he may do this after verdict, or after judgment by default, but not after a failure upon demurrer. Judgment having passed against a defendant by *nihil dicit*, it was doubted whether he could then move to arrest, but Holt, C. J., observed, that he was not too late, although it was otherwise upon demurrer (9).

The time for moving in arrest of judgment is when the party is called up for sentence, so that if he be afterwards taken upon a capias on account of the nonpayment of a fine, or otherwise, it will then be too late to insist upon moving as of right. In such a case, Holt, C. J. said, that the court would hear the objections in mitigation of the fine, although they could not allow them in arrest of judgment after the capias (1).

Further, a defendant can only move in respect of errors on the record of the indictment or information for perjury; he cannot interfere with the prior record, on the trial of which the false oath is alleged to have taken place (2).

Punishment for Perjury.] It seems that, at common law, except in the case of attaint of jurors, (3) there was not any particular course for the punishment of perjury, but the heinousness of the offence was such, that the star chamber and spiritual courts took cognizance of it (4), and, treating it as a high misdemeanor, inflicted a penalty accordingly. And the king's counsel also used to meet occasionally for the same purpose, when they were accustomed to punish for this offence at their discretion (5). Before the Conquest, indeed, the severity of death was sometimes exer-

(8) 5 B. & C. 761, *R.* v. *Tremearne*, S. C. 8 Dowl. & Ry. 590.

(9) 2 Ld. Raym. 1221, *The Queen* v. *Deman*.

(1) 7 Mod. 100, *The Queen* v. *Darby*; S. C. 1 Salk. 78.

(2) 1 Sid. 148, *R.* v. *Wright*; S. C. 1 Keb. 531; S. C. but not S. P. Tho. Raym. 74.

(3) Dy. 242.

(4) See Dy. 242 *Onslowe's* C.; Hob. 62, *Spicer & Read.*

(5) Cro. El. 521.

cised against this crime, and sometimes offenders were banished. Corporal punishment also, as the cutting out of the tongue, was now and then inflicted; but, subsequently, the rigour of the law gradually declined, till the forfeiture of moveables, and an incompetency to bear testimony, were the only known penalties (6); and at length, as at the present day, the common law recognized fine and imprisonment (7), and "never to bear testimony," to which, both as to perjury and subiornation, the statute 3 G. 4, c. 114, has added hard labour.

By 5 El. c. 9, s. 3, (8) all persons who shall corruptly procure any witness by letters, rewards, promises, &c., to commit wilful and corrupt perjury, in any matter depending in suit by writ, action, bill, complaint, or information, concerning lands or hereditaments, goods, debts, or damages in any of the queen's courts of record, &c., (9) or shall corruptly procure or suborn any witness sworn to testify *in perpetuam rei memoriam*, such offenders shall, on conviction, forfeit 40*l*. By sect. 6, the crime of perjury whether committed in consequence of subornation, or by the voluntary act of the false swearer, is made liable to a fine of 20*l*., and imprisonment for six months, together with incompetency as a witness.

Lastly, by 2 G. 2, c. 25, s. 2 (1), besides the punishments already in force against perjury and subornation, the court, or judge before whom the conviction takes place, may sentence the offender to be sent to some house of correction for seven years, there to be kept to hard labour during all the term, or may award judgment of transportation for seven years. The breaking prison or voluntary escape, or return from transportation was declared, moreover, to be capital. The transportation or commitment was also expressly declared to be over and above such punishment as should be adjudged to be inflicted agreeably to the laws then in being.

But by s. 5, no attainder for any offence thereby made felony should work any corruption of blood, loss of dower, or disherison of heirs. By 18 G. 2, c. 18, s. 1, for the punishing of perjuries at county elections, the punishments awarded by both the acts of 5 El. and 2 G. 2, were directed to be inflicted on the offender, and these penalties have since been held to be cumulative. For in a case where the court of king's bench had passed sentence upon certain persons convicted of such a perjury, that they should be imprisoned for one calendar month, and then be transported for

(6) 3 Inst. 163, 164; 16 Vin. Ab. 310. B. 1; 4 Comm. 138.

(7) 3 Inst. 163; 1 Sir W. Bl. 416, *R.* v. *Nurys* and another; see 3 Burr. 1901, *R.* v. *Lookup*. The pillory was likewise added. See 1 Hawk. c. 69, s. 16; 3 Inst. 219. But it was entirely abolished by 1 Vict. c. 23.

(8) Made perpetual by 29 El. c. 5, and 21 Jac. 1, c. 28, s. 8.

(9) The queen's courts of chancery or of record, the leet; view of frankpledge or law day; ancient demesne court; hundred court; courts baron; courts of the stannary in Devon and Cornwall.

(1) Made perpetual by 9 Geo. 2, c. 18. This act does not extend to Scotland, but the crime of perjury is made punishable there by the confiscation of moveables, piercing of the tongue, and infamy. In aggravated cases, the judge may, moreover, direct any other punishment which the occasion calls for—1555, c. 47. The Irish act is 3 Geo. 2, c. 4, s. 2.

seven years, that court resolved afterwards to arrest its judgment. For, on consideration, they found that the penalties were cumulative, and Lord Ellenborough observed, that the sentence might be vacated at any time within the same term in which it had been pronounced. Accordingly, the prisoners were fined 20*l*., and ordered to be imprisoned for six months, and judgment of incompetency as witnesses was added. This is part of the judgment by statute, but at common law it is only the consequence (2). And moreover, that at the end of six months, the prisoners should be transported for six years (3).

But the court may still punish at common law, without inflicting the punishments prescribed by the 2 G. 2, and accordingly, they frequently inflict fine and imprisonment only, without the severer penalty.

Consequences of a Conviction and Judgment in Cases of Perjury.] We come now, in the last place, to explain the consequences which attach upon the parties who are convicted of perjury or subornation. And the most striking evil which falls upon the attainted offender is a disability to be examined in any court of record, or elsewhere, as a witness. It is also a principal cause of challenge to a juror, that he has been convicted of perjury as a witness (4). But it is necessary to shew that the party has had sentence, because there might have been an arrest of judgment (5). The statute disables the party from being a witness in any court of record, but it seems that a legal incapacity to bear testimony any where arises as a consequence at common law (6).

By 5 El. c. 9, s. 5, no person convicted of subornation of perjury, and by s. 6, no person convicted of perjury shall he received as a witness in any court of record, until his judgment be reversed by attaint or otherwise, and also until damages be recovered by the convicted parties in an action on the case against such as originally procured the judgment to be given against them.

However, the mischief, heavy as it is, ends there. The law does not go the length of preventing such convicts from making affidavits in certain cases for their own benefit, as to set aside a judgment for irregularity. For by Holt, C. J., upon an objection being made to the reading of a defendant's affidavit, because he had been convicted of perjury, "Must he, therefore, suffer all injuries, and have no way to help himself?" Powell, J. You ought to have the record of conviction in your hands when you make this objection. Holt, C. J. If he had, it would be nothing to the purpose (7). However, this course can only be allowed to rescue a defendant from the consequences of a charge, and cannot be permitted him in support of a complaint (8).

(2) 2 Salk. 514.

(3) 6 East, 327, *R.* v. *Price* & others.

(4) 16 Vin. Ab. 320 H. 1, citing Trials per Pais, 141, c. 9; 2 Hawk. c. 43, s. 25.

(5) Cowp. 3, by Lord Mansfield.

(6) 2 Hawk. c. 46, s. 101.

(7) Holt's Ca. 501, *Davis* & *Carter's* C.; 2 Salk. 461; Mich. 4 Ann. cited there.

(8) 2 Hawk. c. 46, s. 103, and see 2 Str. 1148, *Walker* v. *Kearney*.

By 12 G. 1, c. 29, s. 4, If any person convicted of perjury or subornation shall act or practice as an attorney or solicitor, or agent in any suit or action in any court of law or equity in England, the judge or judges where such suit or action is brought shall, upon complaint or information thereof, examine the matter in a summary way in open court, and if it shall appear to the satisfaction of such judge or judges that the party has offended contrary to the act, they shall cause the offender to be transported for seven years.

Pardon.] The strong words of the statute of 5 El., which inflicts the pain of incompetency as a witness naturally lead us to inquire whether a pardon will have the effect of restoring a party to his ancient privileges, and it seems to be the better opinion that a pardon for a perjury at common law will so operate, but that the words of the statute are too strong to allow the beneficial result of a pardon (9).

" I do not find it clearly settled," says Mr. Serjeant Hawkins, " whether the pardon of a conviction of perjury makes the party a good witness" (1). And formerly it was said, on one or two occasions, that a pardon would not restore the party to his credit (2), or to his *liberam legem* (3). But in this last case, Holt, C. J., spoke of the party as having stood in the pillory, from whence it is clear that the statute of Eliz. operated immediately to destroy the competency, and it does not appear but that in the other case the conviction might have proceeded on the statute. To render the distinction still more clear, it may be added, that a case occurred not many years since, where a person was admitted to bear testimony against a prisoner who had suborned him to take a false oath for the purpose of obtaining prize money, and his majesty's pardon having been specially granted for that offence was produced. It is true that he never received judgment, but Wilson, J., who delivered the opinion of the judges in favour of the evidence thus received, distinctly declared that the pardon not only respites the convict from punishment, but entirely absolves him from the crime, and restores him completely to his former competency and credit (4). Nevertheless, if there be an act of parliament pardoning all crimes whatsoever, it should seem, that perjury under the statute of Eliz., will be included. And thus it was said, that one convicted of perjury would be competent to give evidence by reason of the act of oblivion (5).

Sect. VI.—*Of Conspiracy.*

Entering upon the subject of conspiracy, which is a combination and agreement by persons to do some illegal act, or a combination

(9) 2 Salk. 689.
(1) 2 Hawk. c. 37, s. 52; Id. c. 46, s. 112.
(2) 1 Sid. 52.
(3) 5 Mod. 16, by Holt, C. J.
(4) 1 Leach, 454, *R.* v. *Reilly*, case of *Macdaniel*.
(5) 1 Keb. 780.

and agreement to effect a legal purpose by illegal means (6), it is to be observed that, under the present head, we purpose to treat of such confederations as are instituted for fraudulent purposes, leaving those which have their origin in malice, or public evil, for future consideration. The conspiracies which we shall now speak of may be designated as public and private. Instances of both kinds are very numerous, but there are certain principles applicable to both which must be adhered to in order to support an indictment against parties for the crime. There must, in the first instance, be a legal foundation for the charge in question with reference to the particular circumstances which form the subject-matter of it. For where the cause of complaint is without legal existence, there cannot be a conspiracy in respect of it. There must, again, be somewhat of certainty in the ground-work of the prosecution, for where the alleged fraud concerns a profit or advantage so precarious as to admit of doubt whether it will, in reality, turn out to be beneficial, the court will not entertain an indictment for conspiracy in regard of it. Again, the mere breach of a civil contract, without a violation of public morals, will not amount to a conspiracy, although several persons may be engaged in a transaction by no means creditable to their character, and may, even virtually, be said to defraud the object of their intrigue. And, we shall see, by and by, that the same principle exists in the case of a civil trespass, unless it is intended to commit a breach of the public peace.

Frauds, Public.] If people conspire together to defraud the community at large, the rule is general that they may be indicted for such an illegal combination. Thus to endeavour by an united agency to raise the price of necessaries is an example of this rule. Thus an information was applied for and granted for combining to fix the price of salt (7). And the same law would apply in the case of corn, or any other commodity.

If a false rumour be raised for the purpose of raising or lowering the price of government securities, with a fradulent intent, it is an offence of this nature, for it is a fraud levelled against all who might possibly have any thing to do with the funds on the particular day when the trick operates. And it is no excuse to say, that there might not be any purchasers, for it is a principle in conspiracy, that whether the intended evil be successful or not, the character of the crime, and it's consequences, remain the same. De Berenger and others were convicted of a conspiracy of this nature by spreading reports of the death of Buonaparte during the war, and the likelihood of immediate peace (8). A conspiracy to

(6) By Alderson, B., 9 C. & P. 109.

(7) 2 Lord Keny, 300, *R.* v. *Norris* & others.

(8) 3 M. & S., 67, *R. De Berenger* and others. In this case likewise the court took judicial notice of the existence of a war with France, there being so many statutes upon that subject. Id. 69. It was also objected that no person in particular was alleged to have been defrauded; but this omission was held to be quite immaterial, since it was possible that no one had been defrauded. The offence was

defraud the king of his revenue is punishable under this head. As where certain persons entered into a confederacy to impoverish the farmers of excise (9). So where persons united to cheat the crown through the medium of false vouchers (1).

Again, combinations on the part of masters to lower the wages of their workmen, and by workmen to raise the price of labour, were, till a modern date, illegal. The journeymen tailors of Cambridge were once convicted of such a conspiracy. And a principle applicable at this day to the subject of conspiracy was recognised upon that occasion, that the refusal to work was not the crime, but the conspiracy to advance the rate of wages. But in connection with this law, there existed, at the same moment, a code which fixed the price of wages, and when the legislature resolved to remove all restrictions from trade, it was also determined to legalize combinations of this nature, provided there should be no intimidation nor violence towards individuals. Accordingly by the 4th section of 6 G. 4, c. 129, the following combined meetings amongst workmen were excluded from prosecution or penalty:—such as take place for the *sole purpose* of consulting upon and determining the rate of wages or prices, which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work in any manufacture, trade, or business, and that persons so meeting for the purposes aforesaid, or entering into such agreement aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.

Then follows the 5th section for the protection of masters, excluding likewise from prosecution or penalty similar meetings on the part of masters, for the sole purpose of consulting upon and determining the rate of wages or prices which they shall pay to their journeymen or servants, or the hours of work in any manufacture, trade or business. And agreements for the same purpose, whether verbal or written, are within the same protection.

But no threats, violence, intimidation, or molestation can be lawfully used in respect of these meetings, or any association upon the subject of wages. The third section provides for this case. It is thereby enacted that, if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent, or endeavour to prevent any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from

complete, independently of that consideration. And it was objected that there were not any funds of the *United Kingdom*, as stated in the indictment, the charges for the interest and debt being imposed upon Great Britain and Ireland separately, but this objection was likewise overruled, and judgment was passed.

(9) 1 Sid. 174, *R.* v. *Starling* & others; S. C. 1 Lev. 125.

(1) 4 East, 164, *R.* v. *Brisac* & another.

accepting work or employment from any person or persons, or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute, to any common fund, or to pay any fine or penalty, or on account of his not having complied, or of his refusing to comply with any rules, orders, regulations, or resolutions made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer, or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants, every person so offending, or aiding, abetting, or assisting therein, being convicted thereof in manner thereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour for any time not exceeding three calendar months.

This removal of restraint, however, was never intended to enable workmen to dictate to the masters the persons whom they should employ. And therefore, where the defendants were proved to have entered into an association, for the purpose of procuring the discharge of certain workmen, Patteson, J., told the jury that the statute never contemplated such a meeting as this had been, and he held the compulsion to be clearly illegal (2).

Another public fraud is accomplished by brokers at auctions, who arrange amongst themselves to effect biddings under particular circumstances, so as to interfere with a fair competition on the part of the public, and then to divide the goods or supposed profits thus obtained at another place. It is not usual to prosecute persons for this offence, but such a practice has been branded with the character of illegality, and is certainly the subject of an indictment for conspiracy (3).

It is manifestly a public fraud for persons to unite together for the purpose of defrauding tradesmen. And, therefore, where the defendants were indicted for conspiring together for the purpose of causing themselves to be reputed persons of considerable property, no question was entertained as to their liability to be tried for this offence. It was an indictment, said Lord Ellenborough, for

(2) 1 Moo. & Rob. 179, *R.* v. *Byker-dike*. See likewise Leach, 274, *R.* v. *Eccles*.

(3) 6 C. & P. 239, *Levi* v. *Levi*.

a conspiracy to carry on the business of common cheats (1). So strong, indeed, is the feeling of the court against these general depredators, that where an information was applied for against cheats, and it turned out, that the application was made by other gamblers against their own brethren, the court refused to interfere, and left the complainants to their ordinary remedy by indictment (2). So where persons joined together in order to defraud any person they might be able to trick, by means of falsely assuming themselves to be the payees or indorsees of bills of exchange, they were held liable to an indictment for a conspiracy, and were accordingly convicted (3).

A conspiracy to issue out a fraudulent commission of bankruptcy is clearly indictable, and the chancellor will direct the proper documents to be laid before the attorney general for the purpose of a prosecution (4). And either an indictment or an information may be adopted (5). So a fraudulent representation by bankers, that they have laid out money in the funds may amount to a conspiracy (6).

It used to be a common practice for overseers and others to compel marriages under certain circumstances, for the purpose of shifting the burthen of a woman's maintenance to another parish. This, although now a rare occurrence, is a public fraud, and punishable as a conspiracy where two or more are concerned in it (7). But there must be some duress or compulsion. Where upon an indictment against parish officers, the man and woman swore that they were willing to marry at the time; Buller, J., directed an acquittal, notwithstanding the proof of money having been given to obtain such consent, and of the putative father having been apprehended under a magistrate's warrant, and being in the overseer's custody. For there must be an absence of the voluntary consent, or inclination of the parties (8). And it must likewise appear, that the parties were chargeable to the indicting parish. Where, therefore, A. B. was described as a poor man unable to maintain himself and his family, and it turned out, that he was a servant in husbandry, and quite of ability to support himself, Ashhurst, J. held that the averment was negatived, and that the inducing a person to marry under such circumstances was not an offence, and an acquittal was directed (9). This case

(1) 1 Campb. 399, *R.* v. *Roberts* & others.

(2) 1 Burr. 548, *R.* v. *Peach* & others.

(3) Leach, 232, *R.* v. *Hevey* & others; East, P. 1010.

(4) Buck. B. C. 422.

(5) 19 Ves. Jun. 260; *Cawthorn* ex parte. See Id. 163, *Warren* ex parte.

(6) 18 Ves. jun. 203.

(7) See 8 Mod. 320, *R.* v. *Edwards* & others; S. C. 11 Mod. 386; Say. 260; Anon. S. C., 2 Str. 707; 4 Burr. 2106, *R.* v. *Tarrant*; Cald. 246, *R.* v. *Carpenter*; Id. 247, note, *R.* v. *Upsdale*; East, P. C. 461, *R.* v. *Herbert* & others; S. C. 2 Ld. Keny, 466; 1 Wils. 41, *R.* v. *Wilson* & others.

(8) East, P. C. 461, *R.* v. *Fowler* and others.

(9) 1 Esp. 306, *R.* v. *Tanner* and others. It was determined in the same case, that if the party, at the time of his removal, was settled in the parish which indicted, it should not be presumed that he had acquired a subsequent settlement. Such proof must be given by the defendants. Ibid. See also Ca. T. H. 370, *R.* v. *Flint*.

has been sustained upon a recent occasion, where the principle of consent was recognised, and the use of forcible or fraudulent means combined with an unwillingness to marry, was laid down to be necessary, in order to constitute the offence. And, at the same time it was determined, that the person must be actually chargeable. The facts of a woman being poor, and unmarried and with child, are not sufficient to shew that she is a burthen to the parish (1).

Again, a bribe given by overseers, in order to procure a marriage, is illegal (2). So again, a conspiracy to let land to a pauper, for the purpose of conferring a settlement upon him, is illegal (3).

The issuing of false certificates on the part of magistrates, and others (4), either fraudulently, or for the purpose of misleading the court before whom the documents are presentable, is an offence. And, therefore, where certain parties combined to certify that a way was in good repair, in order to deceive the court of quarter sessions, no doubt was entertained of their liability to be tried for conspiracy (5), although it was attempted to be argued that the guilty knowledge of non-repair should have been alleged to have existed at the time of the conspiracy (6). The justices should have known, said Lord Kenyon, that the road was in repair before they agreed to certify that it was so (7).

And it is a conspiracy of a very foul nature to accuse a person of a crime, for the purpose of obtaining an advantage or reward upon his conviction (8), or to extort money from him (9). Nor does it make any difference whether the indictment be actually preferred or not (10), or whether the party be guilty or not (11). So to lay an information for penalties, wrongfully and with a fraudulent intent, will amount to a conspiracy (12). However, an association for the prosecution of felons is not an illegal confederacy, not although they propose to include political offenders within their rules (13).

Frauds, Private.] Numerous private frauds may be the subjects of indictments for conspiracy. As the suppression of a will (14). Causing an illiterate person to execute a deed to his prejudice, by

(1) 3 Nev. & M. 557, *R.* v. *Seward*; S. C. 1 Ad. & El. 706; and see 11 East, 381.

(2) 1 Wils. 41, *R.* v. *Wright* & others; see also 1 Bott. P. L. 335, *R.* v. *Rushby*.

(3) 8 Mod. 321, by the Court.

(4) 6 T. R. 635.

(5) 6 T. R. 619, *R.* v. *Mawb-y* & others.

(6) Id. 634.

(7) Ibid.

(8) Fost. 130, *R.* v. *M'Daniel* & others, S. C. Leach, 44. They were acquitted upon one indictment. See Leach. 45. "A fr'se indictment is no crime as referred to the individual, but a conspiracy for that purpose subjects the offender to the villanous judgment." 2 Russ. C.M. 557.

(9) 1 Lev. 62, *R.* v. *Kimberry* & another; 1 Sid. 68; S. P. 1 Salk. 174, *R.* v. *Best* & others; 1 Ventr. 304, *R.* v. *Armstrong*; 1 Str. 193, *R.* v. *Kinnersley* & another; 3 Burr. 1320, *R.* v. *Rispal*.

(10) See the above cases.

(11) 12 Rep. 90, Sir *A. Ashley's* C.

(12) 1 Ad. & El. 327, *R.* v. *Biers* & another.

(13) 1 Ch. Burn. 817, *R.* v. *Murray* & others.

(14) Noy. Rep. 103, *Breerton* v. *Townsend*; 1 Hawk. c. 71, s. 1; East, P. C. 823.

reading it over to him in false words (1). Cheating at a foot race by a previous combination (2). Pretending to procure an office for a person upon the payment of a certain sum, whereas, in fact, no such office existed (3). So, likewise, the concerting an arrangement for creating a fraudulent commission of bankruptcy is a conspiracy (4). So to combine with another, by personating the master of one of the defendants, and so solemnizing a marriage together, in order to raise a title to the property of the master, was deemed to be an act of fraudulent conspiracy (5). So, by false representations to persuade an individual into a marriage, for the sake of a fortune, and so to get him to execute bonds to a stranger (6). The same law prevails in cases of enticement from the paternal roof, in order to procure a marriage. And it was held no objection, that it was not the eldest son and heir who was seduced from his father's dwelling (7). Mackarty and Fordenbourgh were charged with a cheat, in bartering pretended wine for hats. The liquor turned out to be neither wine, nor even wholesome to drink, and after some consideration, judgment was given for the queen (8), on the ground, said Denison, J., in another case, of its being a conspiracy (9).

Again, it has been held, that to fabricate shares in addition to a limited amount already issued on behalf of a company, is indictable in this manner, although there was originally an imperfection in the formation of the company (10).

And there is this distinction between a false pretence which common care can guard against, and a conspiracy:—in the one case, it is the duty of a person to be awake to an intrigue which he can easily detect,—in the other, ordinary caution will not afford protection (11).

Upon a survey of the authorities above mentioned, some few principles may be deduced upon the subject of conspiracy generally. First, there must be a combination of two persons (12), for although twenty may be included in an indictment for conspiracy, yet, if it should turn out that the matter at issue was worked by one without the concurrence of the rest, the charge falls to the ground. And there must be a union for the purpose of accom-

(1) 1 Sid. 312, *R.* v. *Skirret* & others.

(2) 6 Mod. 42, *R.* v. *Orbell.* There may be judgment against one conspirator, although the other or others may be absent or dead. S. C. 12 Mod. 499.

(3) 2 Ld. Raym. 865, *R.* v. *Parry* & others; and see post, c. 4. That a conspiracy to procure an office under government, even without fraud, is indictable.

(4) 19 Ves. Jun. 360, ex parte *Cawthorne.* Concerning matters of account, see 2 Show. 339, *R.* v. *Snead.*

(5) East, P. C. 1010, R. v. *Robinson* & another; S. C. Leach, 37.

(6) Trem. P. C. 97, *R.* v. *Allibone* and others; S. P., Id. 98, 99.

(7) 3 Doug. 36, *R.* v. *Green* & others; see several cases cited; id. 37; S. P. Id. 38; *R.* v. *Lord Ossulston* and others.

(8) 2 Ld. R. 1179, *R.* v. *Mackarty* and another.

(9) 2 Burr. 1129; East, P. C. 824; and see 6 Mod. 301, *R.* v. *Macarty*, 1 Sir Wm. Bl. 275.

(10) 2 C. & P. 521, *R.* v. *Mott* and others. And this is not like a case where the society is in itself illegal. See 1 Campb. 549, n.

(11) 2 Burr. 1127, by Ld. Mansfield.

(12) Sty. 57; 3 T. R. 58, per Buller, J.

plishing the same fraud. So that, however fraudulent the general habits of A. and B. may be, if A. engage himself in working out one fraud, and B. employ himself in attempting another, neither of them can be convicted of conspiracy in respect of their several frauds (1). Whereas, if they are labouring to perpetrate the same fraud, both need not be present at the same time during any part of the transaction (2). Nor, indeed, is it necessary, that all the conspirators in an illegal transaction should even be acquainted with each other (3). And if A. and B. even were to meet together, and devise a general system of fraud, without agreeing upon the particulars, they would be guilty of a conspiracy (4).

Secondly, this combination must have reference to some matter which has a legal foundation, or for which a person is criminally responsible, or which affects his character. A man cannot be answerable with reference to an illegal society, nor is such a society without the protection of the law, so as to make a defendant criminally liable for an offence against it. Certain individuals were charged with attempting to deprive one Thompson of the office of secretary to the philanthropic annuity society, and to prosecute him without reasonable or probable cause for obtaining money under false pretences. This society turned out to be an unincorporated company with transferrable shares, and it appeared that the secretary had been tried and acquitted for so obtaining subscriptions, on the ground of his having acted with a fraudulent intention. Lord Ellenborough, upon this, directed an acquittal. There was no legal foundation for the matter in question to rest upon. The society was illegal, and to deprive a person of an office in it could not be a crime. Nor was the prisoner indicted for obtaining money upon false pretences without reasonable or probable cause, for he pretended that there was a real society of which he was secretary, whereas no such society existed, and then, although without any fraudulent intention, he did, in effect, obtain money under a false pretence (5).

Again, a man cannot be charged criminally in respect of that which is only a civil injury. And therefore, where the defendant was indicted for a conspiracy to cheat by selling an unsound and worthless horse with a warranty, Lord Ellenborough said, that an action might be maintained on the warranty for the breach of a civil contract, but that the case did not assume the shape of conspiracy. Had there been evidence of concert between the parties to accomplish a fraud, the case might have been different (6). Turner and seven others were charged with conspiracy, for agreeing together to go by night into a certain preserve for hares, in order to snare and take them away, and also for uniting with

(1) See 2 Chit. Rep. 168, *R.* v. *Hilbers*.

(2) 1 Str. 144, *R.* v. *Cope* & others; 9 St. Tr. 127, *R.* v. *Lord Grey* & others.

(3) By Lord Mansfield, 1 Hawk. c. 72, s. 2, in the note. Although some must, in all probability, be respectively acquainted, in order to set the illegal transaction on foot.

(4) 2 B. & A. 204, *R.* v. *Gill* & another.

(5) 1 Camp. 549 n., *R.* v. *Stratton* & others.

(6) 1 Stark. 402, *R.* v. *Pywell* & others.

large bludgeons, to obstruct any one who might attempt to oppose them. After a verdict of guilty, however, it was moved to arrest the judgment, and Lord Ellenborough said, that the cases of conspiracy against individuals had been pushed far enough, and that he should be sorry "to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment." The rule was made absolute (6).

Again, although perhaps, the fact in question may not be one which involves a criminal responsibility, yet if it should affect the character of the prosecutor, an indictment for conspiracy may be entertained. As where the charge was for conspiring to accuse another of taking hair out of a bag, but the taking was not alleged to be felonious. Lord Mansfield observed, that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and whether it be to charge a man with criminal acts, or such only as may affect his reputation, it is sufficient (7). A fortiori, where the defendants conspired to charge the prosecutor with being the father of a bastard child; for that act was at least punishable in the spiritual court (8). And the acquittal of the party charged does not seem to be necessary to be shewn, in order to prove the accusers guilty of conspiracy (9).

A third principle is thus developed, that is, that the conspiracy itself is the gist of the whole transaction. And hence it is no matter whether the fraud be prosecuted or not for successful issue (1). And lastly, it may be remarked, that a lawful object may be attempted by an unlawful association, and illegal means. So that if the purpose of a confederation be not improper, it lies on the prosecutor to shew that it has been put in action by a course of irregular conduct. Thus, there is no illegality in persuading certain parties to consent to a marriage, but as soon as it appears that threats or duress have been used for the purpose of compelling such a union, the character of the transaction is altered, and that proceeding, which in itself is lawful, becomes vitiated by the unlawful measures employed to accomplish it (2).

So, before the statute 6 Geo. 4, c. 129, if one man refused to work for certain wages, he was quite at liberty to do so, but if he brought others into an association for that object, he immediately became involved in the guilt of conspiracy (3). It was the appli-

(6) 13 East, 228, *R.* v. *Turner* & others.

(7) 1 Sir Wm. Bl. 368, *R.* v. *Rispal*; S. C. 3 Burr. 1320.

(8) 2 Ld. Raym. 1167, *R.* v. *Best.*

(9) 1 Hawk. c. 72, s. 2; contra, 3 Inst. 143; see 33 Ed. 1, st. 2; and, of course, on the other hand, an acquittal of a defendant does not make those guilty of conspiracy who have lawfully indicted him. Keilw. 81.

(1) See 3 M. & S. 67, *R.* v. *De Berenger* & others. And herein is the difference between an indictment and an action. The latter will not lie unless the conspiracy be carried into execution. See 1 Ld. Raym. 378, *Savile* v. *Roberts.*

(2) See East, P. C., 461, 462; and ante. See also, 2 Str. 866.

(3) 8 Mod. 11, *R.* v. *Tailors of Cambridge.*

cation of unlawful means to a lawful act. And even now, if the workman combines with others to use any threat or menace to induce persons to come into his terms, that combination as to wages, which by itself is correct, becomes the medium of a conspiracy (4). So, where certain persons went to a debtor, and threatened him with imprisonment if he did not give security for his debt, it was held that as they did this under a false pretence of being officers, the whole party were indictable for conspiracy (5).

Of the Indictment (6).] The indictment for a conspiracy to cheat usually states that the defendants (or if there be only one, that he with certain persons unknown) (7) intending to defraud the prosecutor, did amongst themselves, conspire (8) to cheat him, and it is then very common to set out the manner by which the design was effected, or set on foot (9). And it may be said, that in all indictments for conspiracies, the gist of the offence being the conspiracy, it is sufficient to allege the combining, and that it was for a fraudulent purpose, together with the means employed to carry that end into execution. Not but that an indictment would be correct upon some occasions without mentioning the means, as where the act attempted to be accomplished is, upon the face of it, illegal and criminal (1). Yet where several circumstances must be taken together, in order to verify the accusation, and the conspiracy becomes a matter of inference to be deduced from those events (2), it is then necessary to allege one or more overt acts done in prosecution of the plan which forms the subject-matter of the indictment (3). The point as to the general omission of overt acts has indeed been a matter of objection more than once. Upon one occasion the defendants were indicted for a con-

(4) See also upon this point generally, Leach, 37, *R.* v. *Robinson* & another; 3 Burr. 1439; 1 Salk. 174, *R.* v. *Best*; S. C. Ld. Raym. 1167.

(5) 6 C. & P. 75, *Bloomfield* v. *Blake*. A. was bail for D., and B. & C. were pretended officers.

(6) In aggravated cases an information will be granted, but the court will not adopt this measure when the parties are poor, or indeed in an ordinary situation of life. And circumstances will weigh with the court either towards granting or refusing an information. See 8 Mod. 320, note (b); 1 East, P. C. 462.

(7) See 1 Hawk. c. 72, s. 8; 2 Russ. C. M. 567, citing 3 Chit. C. L. 1141.

(8) "Conspire" is the usual word, and it would be most imprudent to leave it out, but perhaps a statement that the defendants did the acts charged *together*, might be tantamount. See East, P. C. 824; 6 East, 133.

(9) If the indictment omit the words "on divers other days and times," it is still competent at a'l events to give evidence of acts done on different days where there is more than one count in the indictment, and so it was held, in a case where the 13th of September was the only day mentioned, and there were two counts for a conspiracy and one for a riot, 2 Stark. 458, *R.* v. *Levy* & others, cor. Abbott, C. J.

(1) As a conspiracy to extort money, 4 B. & C. 329, *R.* v. *Hollingberry*; S. C. 6 D. & Ry. 345. See Leach, 796; 1 Chit. Rep. 698, *R.* v. ——, where the court was applied to to quash an indictment, because the particular goods of which the prosecutor had been said to have been defrauded, were not set out. But the court denied the motion, observing that the gist of the matter was the conspiracy.

(2) See 4 East, 171.

(3) Stark. C. P. 155.

spiracy to cheat, and it was urged that no information had been given to the defendants of any specific charge, against which they were to defend themselves. But the court held the indictment correct. And Abbott, C. J., observed, that as a general resolution to commit frauds was indictable without any particular cheat in immediate prospect, the law could never require that the particular means should be set forth (4). And this was not a new doctrine. Certain defendants were indicted for a conspiracy to hinder a man from working at his trade, and an objection for not setting forth the overt acts was overruled (5). In this last case Willes, J., referred to an authority in Strange, where the matter was fully considered, and the principle above laid down with regard to overt acts recognised by the court (6). So a charge of cheating and defrauding the lawful creditors of A. was held insufficient without explanation, but the case was not stopped. But as all these decisions refer to matters obviously illegal in themselves, the qualification we have submitted must be taken into consideration where the deed is not criminal, unless it become such by accompanying circumstances. So that if A. B. & C. be concerned in a system of swindling, and A. & B. become active agents in the business, and C. remains behind, it is necessary to recur to some overt act in order to implicate C. It is not illegal for C. to be in the company of A. & B. at particular times, nor for C. to address himself to an individual for the purpose of effecting some minor machinery of the fraud, but when all these incidents become linked together, and are expressed in the indictment as overt acts, the jury can then draw their conclusion, if they please, that C.'s presence with A. & B., and his conversation with other persons were intended to promote one common design of cheating. So if A. & B. be manifestly connected with a dishonest combination, and C. come forward and do a single act calculated to favour the success of the trick, it would be proper to lay that as an overt act in order to involve C. in the conspiracy; for C. might not, in point of fact, be acquainted either with A. or with B., as the case might happen. So, where the defendants were charged with conspiring to defraud persons of certain merchandizes, the count was held bad for want of setting out the means by which the fraud was to be effected. But the court observed, that the names of the persons to be cheated need not be set out (7). So, in the same case, the second count was held defective which charged a confederacy to defraud by means of a fraudulent deed of bargain and sale of certain stock in trade, without adding facts to shew in what manner the deed was fraudulent (8).

Enough has been said to shew that the gist of these unlawful deeds is the conspiracy, and that, in general, it is not material to set out the overt acts. If the conspiring be well alleged, the re-

(4) 2 B. & A. 204, *R.* v. *Gill* & another.

(5) Leach, 274, *R.* v. *Eccles*; S. C. 3 Dougl. 337; S. C. cited, 6 T. R. 628; S. C. cited, 13 East, 231.

(6) 1 Str. 193.

(7) 1 Per. & Dav. 508, *Peck* v. *The Queen*.

(8) S. C.

quisites demanded by the law in most indictments will be satisfied. And it is more prudent to avoid stating too much, than to hazard an incorrect allegation which might prove fatal upon the ground of it's misleading the defendant. As where a charge was alleged in the indictment as having been made at a "general sessions holden before the justices of the great sessions," and the proof was that the issue was joined at "great sessions." So where the indictment spoke of "John Doe, on the demise of W. R. and D. T.," and the proof was "John Doe plaintiff, on the joint demise, and also on the several demises of W. R. and D. T." These were held to be fatal variances, not being mere allegations, but matters of description (9). Upon the same principle, it is not necessary in an indictment for a conspiracy affecting the public interest, to give the names of any persons who have been defrauded, for the gravamen being the combination for an illegal purpose, perhaps no individual might have sustained injury (1). Again, upon the same ground, the innocence of a person charged by conspirators with some crime or offence need not be averred, and the distinction between this case and perjury where the falsehood of the oath must be alleged, has been recognised (2). Innocence will be presumed until the contrary appears (3). And, again, the same principle involves the falsehood of the charge. So that although very usual, it is not necessary to say that the defendants did "falsely" conspire. Therefore an indictment which charged the defendants with having wickedly and maliciously conspired, was held sufficient without the addition of "falsely"(4). And hence it follows that the charge itself need not be averred to be false (5). So that it was deemed unnecessary to allege that the prosecutor was not the father of a certain bastard child, or that the child was likely to become chargeable, in an indictment for conspiring to accuse him of fornication (6). If the defendants were in a situation to have pleaded a conviction for that offence, the indictment would then have been barred (7).

Again, carrying on the same principle, the particular accusation need not be mentioned in the count. And, therefore, upon a general verdict of guilty against two persons for charging the prosecutor with a capital crime; where the first count of the indictment omitted to set forth the particular offence in question, the court rested upon the doctrine so frequently propounded, that the charge could be well enough maintained for the unlawful agreement and conspiracy without more (8). Nor need it be said, that the defendants knew that their proceedings were false. Where

(9) 1 C. & P. 472, *R.* v. *Thomas* & others.

(1) 3 M. & S. 67, *R.* v *De Berenger* & others.

(2) 1 Str. 193, *R.* v. *Kinnersley* & another.

(3) 1 Salk. 174, *R.* v. *Best*; S. C. 2 Lord Raym. 1167.

(4) 2 Burr. 993, *R.* v. *Spragg* & another.

(5) 2 Ld. Raym. 1167, *R.* v. *Best*; S. C. 11 Mod. 55.

(6) Ibid. S. C. 11 Mod. 137. An indictment lies before acquittal, but an action on the case not till afterwards, Ibid.

(7) 2 Ld. Raym. 1169.

(8) 2 Burr. 993, *R.* v. *Spragg* & another; S. P. Godb. 444, *Tailor* and *Towlin's* C.

certain parties published a false certificate as to the repair of a highway, it was held, that they ought to have known the fact to be true which they had agreed to certify as such, and the omission of an allegation of the guilty knowledge was held to be immaterial (9).

However, notwithstanding the broad ground above commented upon and illustrated,—that the conspiracy is the gist of the matter, and that it is, consequently, unnecessary as a general principle, to set out the means by which it is worked, and although it is enough to say that the defendants conspired without adding "falsely," it is, nevertheless, indispensable to place such facts on the record as will in point of law amount to an offence, for uncertainty upon so grave a charge cannot be allowed, much less can defendants be convicted for doing acts which of themselves are harmless. Therefore a charge against persons for conspiring to deprive the prosecutor of the fruits of a verdict is too general, and cannot be supported (1). But it is not too uncertain to allege that by means of the conspiracy, the prosecutor had been defrauded of certain goods, without specifying them (2).

A persuasion by officers or others to induce A. to marry B. is not illegal, and therefore an indictment against such persons for conspiring to effect that union would, alone, be insufficient (3). But where it is stated upon the record, that the solicitation was accompanied by threats and menaces, the case is altered, for intimidation is of itself illegal. And, although it must, indeed, be proved that the marriage took place against the consent of the parties, yet that fact need not be averred, since the mainspring of the business is the combining with menace. The remainder of the transaction, material as it is, is only matter of evidence (4). Again, if this confederacy be set on foot, as it commonly was, for the purpose of relieving the parish from the burden of maintaining, it must be averred that the woman was actually chargeable at the time of the marriage (5). To say that she was a poor unmarried woman with child, is not equivalent to an averment that she was chargeable (6). And it would likewise be insufficient to allege in an indictment that the woman was merely an inhabitant of the indicting parish. It should be averred that she was last legally settled in the parish from whence she was removed by reason of her marriage (7).

Upon the trial of an indictment which charged the defendants with conspiring to hinder the prosecutor from taking *any* apprentices, it turned out in evidence, that no objection had been made

(9) 6 T. R. 119, *R.* v. *Mawbey* & others.

(1) 1 M. & Rob. 402, *R.* v. *Richardson.*

(2) 1 Chit. Rep. 698, *R.* v. ——.

(3) 3 Nev. & M. 557, *R.* v. *Seward;* S. C. 1 Ad. & El. 706.

(4) East, P. C. 462, *R.* v. *Parkhouse* & another.

(5) See 11 East, 381, *R.* v. *Inhabitants of Holm.*

(6) 3 Nev. & M. 557, *R.* v. *Seward.*

(7) 8 Mod. 320, *R.* v. *Edwards* & others; S. C. 11 Mod. 386; S. C. 2 Str. 707.

by the parties combining to the eight apprentices which the prosecutor already had in his employment, and it was objected, that this was an attempt to prevent *more* apprentices from being set to work, and not a union against all. But Wood, B., was of opinion that the indictment was valid, and well supported by the evidence, for the effect of the confederacy was to prevent any person from being taught and instructed, and the court subsequently confirmed this ruling (8).'

So where the indictment charged a conspiracy to prevent the workmen of J. G. from continuing to work in a certain colliery, it was held sufficient to prove that a section of the workmen were required by the remainder of the body to abandon the service of J. G. (9). Had the indictment laid the offence with reference to *all* the workmen, it might still have been a question whether the conduct of the defendants had not a tendency to destroy the labour of the mine altogether, and so virtually to prevent *all* the workmen from serving the prosecutor (1).

In setting forth a conspiracy to embezzle the goods of a bankrupt, it is not sufficient to say that a commission issued, under which the party was duly found and declared to be a bankrupt. The indictment must include the trading, the debt of the petitioning creditor, and the fact of the bankruptcy (2).

Joinder.] Counts may be joined in an indictment for conspiracy which do not include a charge of conspiracy, although the judgment respecting each may be different. "Nothing is more familiar," said Lord Ellenborough, upon one occasion, "than such a practice" (3).

Evidence.] Although we do not purpose to enter particularly into the subject of evidence in discussing every offence known to the criminal law, yet, the points upon this head, both with reference to the witnesses required and the matters of the indictment, have been occasionally so much the subject of legal discussion, as to make it desirable that we should, for a moment, request the reader's attention to them.

Witnesses.] The law respecting husband and wife is not relaxed in the case of conspiracy. Where three persons were indicted for procuring the marriage of a ward in chancery, it was proposed to call the wife of one of them, not as a witness for her husband, but on behalf of the other defendant. Lord Ellenborough, however, held, that she was not admissible. The evidence must in some way tend to the prospect of an acquittal upon a joint charge in which her husband was implicated, and the rule is the same whether her evidence were to affect him either mediately or im-

(8) 2 Stark. 489, *R.* v. *Ferguson* & another.
(9) 1 M. & Rob. 179, *R.* v. *Bykerdike.*
(1) S. C.
(2) 1 Nev. & M. 78, *R.* v. *Jones* & others; S. C. 4 B. & Adol. 345.
(3) 3 M. & S. 550.

mediately (4). Nor can a defendant who suffers judgment by default be called (5).

Three persons, Kroehl, Gibson, and Koech, were involved in a charge of conspiracy, but Koech only, who had no counsel, called a witness in his defence. The witness was examined as to a conversation which took place between himself and another of the defendants, Kroehl. It was proposed for the prosecution to cross-examine the party as to another conversation which had taken place between Kroehl and Koech, and which might affect Kroehl. And Abbott, J., held that this might be done, although it might be a matter for future consideration whether the counsel for the defendant thus affected by the cross-examination should subsequently address the jury upon the new matter. Several conversations, which bore upon the conduct of Kroehl, were then elicited, but the jury acquitted him, and convicted the others (6). If the counsel for the prosecution declare his intention to offer no evidence against certain defendants, he may apply for their acquittal, in order that he may call them as witnesses, and it is not competent to raise an objection against that course (7).

Where bankruptcy was stated as an allegation, it was held, that the subscribing witness to the assignment must be called (8).

Evidence.] The usual evidence upon an indictment for conspiracy is to shew the existence of the illegal combination, and then to connect the defendants with it (9). In the year 1792, a confederacy had been formed amongst the journeymen shoemakers for the purpose of raising their wages, and various arrangements were made from time to time for the purpose of furthering this design. It being proposed to bring this general evidence forward, in the first instance, to prove an indictment for a conspiracy to raise wages, the counsel for the defendants objected, that his clients must previously be made parties to the stated combination. But Lord Kenyon admitted the evidence, observing, that men might be implicated in such an association, after the lapse of years from the time of its establishment, and although they might reside at a great distance from the place where the general plan was carried on. And his lordship referred to the state trials of 1745, where it became necessary to go into evidence of what was going on in France, Manchester, Scotland, and Ireland, at the same time (1). And a similar course has been pursued upon many trials for high treason, including those in 1796 (2).

Having thus laid before the jury the fact of the existence of an illegal confederation, it becomes the duty of those who conduct the prosecution, to affect the defendants with a guilty knowledge of it, and with acting in concert upon the terms of it. This is

(4) 5 Esp. 107, *R.* v. *Locker* & others.

(5) 5 Esp. 155, *R.* v. *Lafone* & others.

(6) 2 Stark. 343, *R.* v. *Kroehl* & others.

(7) Ry. & Moo. N. P. C. 401, *R.* v. *Rowland* and others.

(8) 5 C. & P. 208, *R.* v. *Pope* & others.

(9) 2 Brod. & B. 302, *The Queen's* C.

(1) 2 Esp. 719, *R.* v. *Hammond* & another.

(2) Id. 720.

done by proving certain overt acts connected with the offence charged upon defendants, and by satisfying the jury that the defendants were in some way or other engaged in union with reference to those acts. And, as to the first point, several of these overt acts taken together, although of themselves insufficient to make out the charge, will furnish a body of evidence fit to be left to the jury. It is from collateral circumstances that the fact of conspiring may be collected (3).

Certain defendants being accused of representing themselves as persons of property in order to defraud tradesmen, after having proved their false statement as to one tradesman, it was proposed to shew that a similar representation had been made to another. Upon objection made, Lord Ellenborough admitted the evidence, laying it down, that cumulative instances were necessary to prove the offence. It was a conspiracy to carry on the business of common cheats, and the same evidence would be allowable in barratry, and even in high treason where the prisoner is charged with having written several traitorous letters, or with having attended at divers consults upon that subject (4).

Handbills published by a defendant, constitute an overt act of combining, if the cognizance and assent of other defendants be proved (5).

Having shewn the respective overt acts, which are, of course, infinitely varied according to circumstances, the participation of at least two defendants in the fraud must be developed, and the guilty union of all those involved must be shewn, in order to procure the conviction of all. Not that it is absolutely necessary for two defendants to be included in the indictment, for one of the parties to the fraud may have died (6), or one co-conspirator may not be found, and then the indictment may charge A. B. with having conspired with one C. D., &c. Or, again, various persons to the jurors unknown may have been associated with A. B. in the fraud, and yet A. B. may be indicted, for that he, together with certain unknown persons did certain acts. But, in general, more defendants than one are found to appear for the purpose of answering this charge.

The ordinary way of shewing an illegal confederation amongst defendants is, in addition to any overt act of the transaction in question, to bring them as much together as possible. When the evil conduct, which is the matter of the charge, is brought forward in evidence, it tends considerably to a conviction, to shew that all the defendants had a hand in advancing and encouraging that proceeding.

No clearer evidence of illegal union could well be produced. But the chief questions upon this head of proving combination have arisen where the defendants have not been much, if at all, together, and yet, where there has been such a communion amongst

(3) 1 Sir Wm. Bl. 393, *R.* v. *Parsons* & others.

(4) 1 Campb. 399, *R.* v. *Roberts* & others.

(5) See 8 C. & P. 297, *R.* v. *Murphy*.

(6) 13 East, 412, note, *R.* v. *Nicols*.

them, one with another, respectively, as to leave no doubt of their having been engaged in one common design. Two persons are discovered in the pursuit of the same object by the same means, and that more than once; the one accomplishes one portion of a plan, and the other brings it to a conclusion. It is for the jury to say, whether this is not proof of a conspiracy between the two individuals (1). And, we have seen, that it is not necessary for all the conspirators to be acquainted with each other (2), so that such a mutual knowledge need not be proved.

Several persons belonging to one family were found in the employment of making cards, and were detected, at the same time in giving money to the apprentices of the king's card maker for the purpose of putting grease into the paste so as to spoil the cards. They were indicted for a conspiracy to ruin this card maker, and, although one only was present at a time, when the bribe was given, yet, as all had, in their respective turns, offered the money, it was held that they might be convicted without any proof of a previous communication with each other (3). The same point was decided upon the trial of a conspiracy for carrying off a young woman (4). It has even been held, that if a banker be cognizant of the fraudulent purpose to which a sum of money lodged at his house is to be applied, he may be included in an indictment for conspiracy (5). But it must in such a case appear clearly, that he was acquainted with the object of the conspiracy, and of the mode stated in the indictment by which it was to be carried into effect. Therefore, where the charge was for conspiring to obtain a situation for one H., upon payment of a certain sum, which was to be shared amongst all the defendants except the banker, it was held, that proof must be given of the banker's knowledge that each defendant was to have a portion of the amount, and as there was not any evidence to this effect with respect to one S. H., Lord Ellenborough ordered an acquittal of the banker (6).

In conspiracy, it is not necessary to prove an actual conspiracy, nor expressed malice: a conspiracy and malice may be inferred from the circumstances taken together (7).

However, not facts merely, but declarations made at any time or place in pursuance of the plan (8), by any one of the conspirators constitute evidence against all. It was at one time contended, but unsuccessfully, that the rule was limited to acts done (9). And it may be noticed, in passing, that both acts and declarations of a co-conspirator are admissible, although he be not tried in company with his associates (10).

(1) 8 C. & P. 297, *R.* v. *Murphy*; see also 9 C. & P. 277, *R.* v. *Sheilard*.
(2) Ante.
(3) 1 Str. 144, *R.* v. *Cope* & others.
(4) 9 St. Tri. 127, *R.* v. *Lord Grey* & others.
(5) 2 Campb. 233.
(6) 2 Campb. 229, *R.* v. *Pollman* & others.
(7) Loft. 156, *R.* v. *Curril* & others.
(8) See East, P. C. 96.
(9) 5 Esp. 125, *R.* v. *Salter* [& another; S. P. Id. 127, *R.* v. *Bower*, cited. S. P. by Buller, J., *Hardy's* C., cited Ibid.
(10) See 2 St. Ev. 411.

The rule above stated, with respect to declarations is quite in accordance with that adopted in cases of high treason. But if the declarations are detached, and not made in prosecution of the object of the conspiracy, the case becomes altered, and they cannot be allowed (1).

Letters and documentary evidence are likewise admissible under the same qualifications, and it does not signify that the letters are not sent (2). So, where there was a scheme to accuse the prosecutor of forgery by means of imputing to him the fabrication of a cheque upon the bankers of one of the defendants, a letter written by another defendant and containing the charge was given in evidence, together with conversations referring to the cheque in question. However, in the same case it was deemed unnecessary to produce the cheque itself, although it was shewn that such a document was in existence (3).

So, again, the manuscript of a hand-bill tending to annoy an individual was admitted in evidence as having been published by order of a defendant, whilst, at the same time, it was held sufficient for a witness to state that he received a number of printed copies of that manuscript from the defendant, without producing those copies (4).

When an instrument is brought forward in evidence as part of a fraud, it is observable that the absence of a stamp is quite immaterial (5). Whereas, if the instrument be introduced collaterally upon an indictment distinct from the offence, it cannot be received unless it be so stamped (6).

It has been before remarked, that the success of the confederacy need not be proved. The bare attempt at fraud, or to carry an illegal design into execution is sufficient (7).

Defence.] Nevertheless, as the acts of one defendant may, as we have shewn, be given in evidence to promote the conviction of another, it is certainly competent for any defendant to produce proof of his having been made the dupe of a co-defendant. Thus, letters were received in evidence upon one occasion in order to satisfy the jury that this was the fact (8). In this case written correspondence between the parties had been admitted on behalf of the crown, and it was held, that all the correspondence should be laid before the jury, at the desire of one of the defendants, to shew how he had been deceived by the other (9).

It is no defence for a defendant to prove that the original meeting between him and other defendants was innocent, if they afterwards ally themselves to the illegal object charged in the indict-

(1) Id. 407; 1 Phil. on Ev. 96.
(2) 2 St. Ev. 407. It is the same rule as in cases of treason; see 6 T. R. 527, *R.* v. *Stone*; 2 Stark. 140, *R.* v. *Watson.*
(3) 1 Nev. & M. 776, *R.* v. *Ford* & another.
(4) 8 C. & P. 297, *R.* v. *Murphy.*
(5) 4 C. & P. 592, *R.* v. *Fowle* & another. The minute book of the court of quarter sessions is not sufficient to prove the finding of a bill.
(6) 5 C. & P. 201, *Smyth's* C.
(7) Ante.
(8) 1 C. & P. 67, R. v. *Whitehead.*
(9) S. C. 1 Dowl. N. P. C. 61.

ment (1). And the person who joins in a conspiracy already formed, cannot allege in excuse that fact, because if he comes into the plot, he is equally guilty with the original conspirators (2). The record of acquittal of one defendant is evidence for another defendant subsequently tried (3).

Trial.] Before the prosecutor proceeds to trial, it may not appear to be irrelevant to call upon him for some account of the charges upon which he means to rely at the hearing of the case, but this power of asking for particulars is confined within very narrow limits. Indeed, Abbott, C. J., observed, upon one occasion, that the only case in which the court would order a particular to be delivered under an indictment for a misdemeanor, was that of barratry, or where a man was charged with being a barrator. "It appears to me," said the learned chief justice, "that the best course for the defendant in this case to take, is to apply to the prosecutor to give him some information as to the particulars upon which he means to rely in support of the indictment. If he refuses, then an application may be made to postpone the trial, in order that this question may be more maturely discussed. But whether discussed or not, the objection now suggested may be matter of very strong observation to the jury on the trial" (4). And the court declined to make a rule for the delivery of such a bill of particulars (5). But, upon a subsequent occasion, the court, upon application, where the conspiracy was charged in a general form, ordered such information to be afforded by way of particulars as would be given by a special count. Although they still refrained from directing any statement as to the specific acts with which the defendants were charged, or the times and places where such acts were committed (6).

If there be an indictment for felony, and another for conspiracy grounded upon the felony, an acquittal of the felony will induce the judge to direct an acquittal for the conspiracy, if the evidence be the same (7).

Unlike to perjury, the crime of conspiracy is cognizable at quarter sessions, a conspiracy being a trespass, and tending to a breach of the peace (8).

With regard to the county where the offence is to be tried, any one may be selected where an overt act of conspiracy has been attempted. Thus, where the indictment was found by a jury of Middlesex, but no proof of an actual conspiracy embracing all the several conspirators was offered in Middlesex, and where the individual actings of some of the conspirators were confined to other counties than Middlesex, the trial was still holden to be rightly had in the latter county upon proof of overt acts done by some of the conspirators there (9).

(1) 2 St. Ev. 401, *R.* v. *Lee.*
(2) 8 C. & P. 297, *R.* v. *Murphy.*
(3) 1 Ch. Burn, 823, *R.* v. *Tooke.*
(4) 1 Chit. 699.
(5) Id. 698, *R.* v. ——.
(6) 7 C. & P. 448, *R.* v. *Hamilton.*
(7) Lew. C. C. 51, *R.* v. *Maudsly* and another.
(8) 3 Burr. 1320, *R.* v. *Rispal*; S. C. 1 Sir Wm. Bl. 368.
(9) 4 East, 171, *R.* v. *Bowes* & others, cited there; S. C. cited by counsel, arg.; 6 East, 590.

So, again, certain persons had entered into a plan to fabricate false vouchers, in order to cheat the crown. One of the conspirators transmitted these fictitious documents to the commissioners of the navy in Middlesex, and this distinct overt act of conspiracy justified the trial in Middlesex (1).

Judgment.] The judgment upon a conviction for conspiracy is fine and imprisonment, together, it being a trespass, with sureties for the good behaviour. And a conspiracy to raise the rate of wages is punishable with hard labour, under 3 Geo. 4, c. 114, in addition to fine and imprisonment. But a question was made at one time how far it was competent for the court to pronounce judgment upon one person alone, the other, from various circumstances, being absent at the trial of the convicted conspirators. It was, however, soon determined, that this course might be pursued (2), even in a case where the other party might be shortly afterwards tried, and so, by possibility, a contrary verdict might be given, and this decision has been ever since abided by. A defendant had been convicted of a conspiracy to cheat with false dice, and it was moved that judgment should not be entered till the others came in, for that, if the others were acquitted, no judgment could be given against him. But by Hale, C. J.—True it is, that if one be acquitted the other cannot be found guilty (3); yet, if one be found guilty, and the other come not in upon process, or die hanging the suit, judgment shall be upon the verdict against the other. However, the court gave the convicted defendant two or three days in order to bring in the other two, and ordered that the judgment should be staid in the meanwhile (4). James Stamp Sutton Cooke was indicted with three others for a conspiracy. One did not appear. A second, R. S. Cooke, pleaded in abatement. J. S. S. Cooke was put upon his trial with the fourth, who was acquitted. The person who pleaded in abatement was ordered to answer over, upon which he pleaded the general issue, and before his trial judgment was moved for against J. S. S. Cooke. It was then moved to stay the judgment against Cooke, for if the other party were acquitted, Cooke would be virtually acquitted (5), and the cases above cited were distinguished on the ground of the defendants not having pleaded on those occasions, whereas here, R. S. Cooke had pleaded not guilty. But the court overruled the objection. When J. S. S. Cooke was convicted there was no plea of not guilty by R. S. Cooke upon the record, nor had judgment

(1) 4 East, 164, *R.* v. *Brisac* & another; S. C. mentioned by Abbott, arg., 6 East, 590.

(2) Jenk. 27; See Id. 31, Bellewe, 108.

(3) 3 Mod. 220, *R.* v. *Grimes* & another.

(4) 1 Ventr. 234, *Thody's* C.; S. P. 1 Str. 195, *R.* v. *Horne*, cited. A. & H. were charged in this case *cum multis aliis*, &c. The grand jury ignored the bill as to A., and the conviction of H. was held right, because he had been found guilty of conspiracy *cum multis aliis*. S. P. Id. 193, *R.* v. *Kinnersley* & another.

(5) The verdict being "guilty of conspiracy with R. S. Cooke," (the other person who pleaded in abatement.)

of respondeat ouster been given upon the demurrer. There might be a repugnancy upon the record if R. S. Cooke were to be acquitted, but the court would not presume that possible event against the verdict. The rule was discharged (6)

A fortiori, then, one conspirator may be tried and convicted after the death of another, for there cannot then be any repugnancy, nor a possibility of contradictory verdicts. Niccolls and Bygrave were charged with conspiracy, but before the indictment could be preferred, Bygrave died, and an objection was taken, that one could not be convicted of conspiracy, but it was overruled upon the authority of *R.* v. *Kinnersley* (7), and judgment was given for the king (8).

SECT. VII.—*Of Extortion.*

The last misdemeanor to which the reader's attention shall be directed in this Chapter is that of Extortion. The very name implies a fraud. It imports a taking from a person who would not have given without reluctance. And, in a large sense, it means any oppression under colour of right (1); but it is often recognized in a more limited sense, as the taking of money by any officer, or person in authority, by colour of his office, either where none at all is due, or not so much is due, or before it is due. As where persons in power formerly attached the goods of strangers without jurisdiction, an act which by 3 Edw. 1, c. 35, was declared to be a misdemeanor (2). It is a rule, that, in extortion, the threat must be such as a man of firm mind cannot be expected to resist. As, where the prosecutor, being first in custody, was told, that unless he would give a certain sum and his note, he should be sent to Newgate, imprisoned, and set in the pillory (3). In this case, Holt, C. J., said, that every extortion was an actual trespass (4). And Lord Ellenborough, in referring to this same law upon a subsequent occasion, observed, that, in *R.* v. *Woodward*, there was an actual duress, such as would have avoided a bond under similar circumstances (5); whilst, in delivering his judgment, the lord chief justice remarked, that the distinction lay very strongly between threats made when the party is in custody, and when he is at liberty. So that in the case at that moment before the court, the diversity was acknowledged and relied on.

(6) 5 B. & C. 538, *R.* v. *Cooke* & others; S. C. 7 D. & Ry. 673.

(7) 2 Str. 1227, *R.* v. *Niccolls.*

(8) S. C. 13 East, 412, n., and the same principle has been recognized in the case of a riot. 3 Burr. 1262, *R.* v. *Scott* and another; S. C. 1 Sir Wm. Bl. 291, 350.

(1) 1 Hawk. c. 68, s. 1.

(2) See as to extortion by officers of the forest, 7 Ric. 2, c. 4, by which any forest officer taking or imprisoning any man without due indictment, or being taken in the mainour or trespassing in the forest, or constraining any man to make any obligation or ransom, is punishable by fine and ransom at the king's pleasure. Ecclesiastical officers are punishable for this offence at common law. Palm. 318, *Smythe's* C.

(3) 11 Mod. 137, *R.* v. *Woodward* & others; 6 East, 133. S. C. cited.

(4) 11 Mod. 137.

(5) 6 East, 140.

One Southerton had been convicted upon an information filed by the attorney-general, for extorting money under a threat of prosecuting certain medicine vendors for selling their wares without stamps. It was moved to arrest the judgment, inasmuch as the parties must have been cognizant of the law, and, consequently, that they must have been aware of the defendant's inability to institute or relinquish a prosecution. But the court referred to the general principle, whether a firm man must not be presumed to be in a condition to resist such a threat as the present, and after hearing the attorney-general at another day upon this point, they stopped the counsel for the defence, and arrested the judgment upon the suggestion which they themselves had previously thrown out (6). But it was added, that an indictment might have been sustained upon 18 Eliz. c. 5, s. 4, an act against compounding penal actions without leave of the court (7). And, by possibility, the charge might have been so laid as to raise the question, whether the defendant could not have been punished for an attempt to commit a statutable misdemeanor (8). And, lastly, it was said, that an attempt to stifle a public prosecution against the policy of a statute might have been a proper charge at common law against the defendant, had the indictment contained a statement that the persons threatened were actually guilty of the offence in question (9).

However, to return to the offence itself; we have said, that any officer or person in authority, to which may be added, any one having a colour of right, is an individual capable of committing extortion. Thus, a ferryman who demands and takes more than his fare for a common passage boat is chargeable with this misdemeanor, for the necessity of the case evidently induces a payment upon compulsion (1). Certain justices of the peace, who, instead of taking the fee of 1*s.* allowed by 5 & 6 Edw. 6, c. 25, for granting licences to publicans, refused to issue such licences unless 10*s.* were paid upon each, were deemed guilty of extortion, and heavily fined (2). A churchwarden took a silver cup from a person whom he appointed pew opener in the gallery of the church, and the court refused to quash an indictment for extortion, saying, that it must be tried whether the cup were corruptly taken, for, perhaps, the churchwarden might have accounted to the parish for it (3). So, if a miller should take more than the toll warranted by the custom, he is indictable, especially if there were not any other mill in the neighbourhood where a person could legally grind his corn (4). So, if the lord of a market should occupy the ground with his stalls in such a manner as to compel the inhabitants to hire his stalls for want of room to stand and sell their wares, he is guilty of extortion. On the other hand, if

(6) 6 East, 126, *R.* v. *Southerton.*
(7) Id. 140.
(8) See the same case.
(9) Id. 142. By Lawrence, J. But the defendant was struck off the rolls of the court. Id. 143.
(1) 4 Mod. 101, *R.* v. *Roberts.*
(2) 7 Mod. 382, *R.* v. *Seymour* and others; see Cunn. Rep. 84, 133, *R.* v. *Lloyd.*
(3) 1 Sid. 307, *R.* v. *Eyres*; S. C. 2 Keb. 100.
(4) 1 Ld. Raym. 149.

he leave sufficient room, and the neighbours voluntarily hire the stalls, his conduct cannot be deemed to be extorsive (5). So, if the clerk of the king's market take extravagant fees from tradesmen, he is guilty of this offence (6).

The chancellor and registrar of the bishop of Salisbury forced one T. H. to prove a will in the bishop's court, well knowing that it had been previously proved in the prerogative court of Canterbury, and thus obtained 40*s.* from T. H. And this act was held to be an extortion by the court of king's bench (7).

By 26 H. 8, c. 3, s. 20, any officer of the exchequer who shall take of any archbishop, bishop, &c. any reward as a bribe for making a quietus respecting the tenths, shall be given to the king and lose his office.

A coroner is guilty of extortion who refuses to hold an inquest until his fees has been paid (8). A counsellor, it seems, may be guilty of extortion (9).

An under-sheriff refused to execute a fi. fa. unless his shillingpence were first paid; and the court said, that he might be indicted (1). And it was said to be extortion for a sheriff to take a bond for his fee before the suing out of execution (2). So, where a bailiff agreed to bail a person in consideration of so much money to be received from one of the sureties, it was held, that he could not recover in assumpsit. Both parties were in fault, but *in pari delicto, potior est conditio defendentis* (3).

An information was granted against the mayor of Wallingford for taking more money for press warrants than was due (4).

The case above concerning bail leads us to illustrate the proposition, that, where a party is in custody, he is most especially within the protection of the law in respect of extortion. In the instances of the ferryman, the justices, the coroner, and so on, the individual from whom the money was demanded could not have derived a legal and necessary benefit unless he had submitted to the fraud, but the principle does not, as we have seen, extend to cases where a party has been threatened with a prosecution for an offence, and is not in custody. As soon, however, as the intended victim becomes under duress, the affair is immediately altered. The defendant in an action for crim. con. had a verdict against him for 200*l.* and wanting to get a release upon payment of a smaller sum, he got a warrant from a justice to apprehend the plaintiff for murder, and then, having secured him, entered an arrest for 500*l.* at his own suit in order to extort the release. These facts appearing to the court, they made a rule for him to shew cause

(5) 1 Ld. Raym. 149, *R.* v. *Burdett.*

(6) 7 Mod. 220, *R.* v. *Refit*; S. C. Cunn. Rep. 36; S. C. 2 Barn. 436.

(7) 1 Str. 73, *R.* v. *Loggen* & another; see 3 Leon. 268. The case of a commissary for extorting money for absolution; see also 3 Inst. 149; 13 Rep. 24. Case of *Neale* and *Rowse.*

(8) 3 Inst. 149.

(9) Holt's Ca. 179.

(1) 1 Salk. 330, *Anon.*; S. P. Id. ibid. *Hescott's* C. The court said, that the plaintiff might sue him for not doing his duty, or pay the fees, and then indict him for extortion.

(2) Hutt. 53; Noy. Rep. 76.

(3) 2 Burr. 924, *Stotesbury* v. *Smith.*

(4) 1 Sess. C. 159, *R.* v. *Wing.*

why an attachment should not issue against him, and the constable, the bailiff, and the justices' clerk were included in the rule (5). So where a gaoler had obtained a note from his prisoner before he would return a habeas corpus directed to him, an attachment was ordered (6). And if more fees be taken than are really due, an indictment for extortion will lie under any circumstances, for this is an evident demand under colour of process (7). So a collector of taxes is answerable for taking a larger amount than he ought (8). And, moreover, by the stat. of Westminster 1, 3 Edw. 1, c. 26, no sheriff nor other minister of the king, whose office in any way concerns the administration or execution of justice, (a term which includes escheators, coroners, bailiffs, gaolers, and other inferior officers,) may take any reward excepting that which he is entitled to from the king (9). No prescription can be set up in opposition to this statute, so that a claim of certain fees by prescription on the part of the clerk of the market for the examination of weights and measures was held to be merely void (1). By 55 Geo. 3, c. 50, s. 9, any clerk of the court or of assize, &c. who shall exact any fee from prisoners charged with felony or misdemeanor after their acquittal, or discharge by proclamation, or against whom no bill shall be found, in respect of the discharge of such prisoner, shall be guilty of a misdemeanor (2).

Lastly, by 33 Geo. 3, c. 52, s. 62, to demand or receive any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether for the use of the party receiving it or under a pretence of its being for the use of the East India Company, or any person whatever, such demand being made by a British subject holding or exercising any office or employment under the king, or the company, in the East Indies, shall be deemed to be extortion, and a misdemeanor. The present so re-

(5) 8 Mod. 189, *Williams* v. *Lyons*. For it is no defence on the part of an agent, that he has been employed by another. The collector of the post-horse duty demanded of the prosecutor 5*l*. for letting out certain horses without having paid the duty. A promissory note was thereupon given. The collector gave the note to his principal, and relied upon this fact as a defence. But it was held, that he could not avail himself of his principal's participation in the offence. 4 C. & P. 247, *R.* v. *Higgins*. There are no accessories in this offence, but he that is assisting is as guilty as the extortioner. By Parker, C. J. 1 Str. 75.

(6) 8 Mod. 226, *R.* v. *Colvin*. See Stark. P. C. 588, "It is a great misdemeanor." Per Cur. 11 Mod. 62, *R.* v. *Johnson*. 1 Russ. C. & M. 145, citing Trem. P. C. 111, *R.* v. *Broughton*, 13 Rep. 127. But where a gaoler advanced money to a prisoner for his habeas corpus, the latter was remanded upon his refusal in court to repay the gaoler, Comb. 36.

(7) See 1 Sid. 420, *R.* v. *Benson*; 2 Ld. Raym. 1265, *R.* v. *Baines*; S. C. 6 Mod. 192; S. C. 1 Salk. 660.

(8) 1 Sess. C. 160, *R.* v. *Orm*; S. P. 3 Ld. Raym. 64, *R.* v. *Atkinson* & another; 11 Mod. 79, S. C.

(9) See 1 Russ. C. M. 144; 1 Leon. 295, *Mayor of Lynn's* C.

(1) 1 Hawk. c. 68, s. 2.

(2) And punishable by fine and imprisonment, and incapacity to hold the office. See likewise as to justices' marshals taking more money from persons recovering seisin of land, or gaining their suits, or from jurors, towns, &c. attached upon pleas of the crown, than they ought. 3 Edw. 1, c. 30. To be "grievously punished," *i. e.* fined and imprisoned.

ceived is moreover to be forfeited, or the full value thereof, but the court may, if they should think fit, either order such present to be restored to the person who offered it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

Nevertheless there are some acts which, although they may seem very much to savour of disobedience to the statute of Westminster before mentioned, if not of extortion, have yet been held not to amount to that offence. Thus it has been said, that where a voluntary gift to an officer for his diligence and exertions is united with a custom in such cases, the acceptance of such a present on the part of the officer is not a misdemeanor (3). Much less can the taking of reasonable and allowed fees be construed into an offence (4). And certain payments which are called perquisites of right may also be taken. As the fee of 1*s.* from every prisoner who is acquitted which the sheriff demands as his perquisite (5). And of the same nature was the fee of 1*d.* which the coroner used to claim from every visne when he came before the justices in Eyre (6).

It has not been unusual for the collector of a toll-gate to demand more than is due from the person seeking to pass through it. And if he should act bonâ fide, or under a mistaken impression of right, a jury would rarely find him guilty of extortion. And if the right to pass be not clearly explained to the toll-gate keeper, he cannot be charged with extortion under any circumstances, because the taking of toll is not in itself a criminal act. Should an exemption, therefore, be the claim which the passenger conceives he has a right to insist upon, it must be notified to the collector of tolls. So that where the prosecutor was compelled to pay 3*d.* for carrying manure and he remained silent upon the subject, Lord Ellenborough at once held, than an indictment for extortion could not be supported (7). But it should be remarked, that a collector may, under circumstances, where the exemption has been duly notified, be convicted of *unlawfully* demanding toll, although the jury should expressly negative the extorsive character of the transaction (8). Indeed, it has not been very uncommon for parties to try the right to toll by preferring an indictment against the keeper of the gate.

An indictment for extortion will not lie for taking an excessive distress. Nor will an indictment lie for accusing another of felony, and for robbery by such means (9); nor, of course, concerning private matters (1).

Indictment.] The indictment usually sets out the colour of law or other ground upon which the defendant acted, and then states the nature of the extortion which was practised upon the prosecutor,

(3) 3 Bac. Abr. 108, tit. Extortion.
(4) Co. Litt. 368.
(5) 1 Hawk. c. 68, s. 2.
(6) Ibid.
(7) 4 Campb. 379, *R.* v. *Hamlyn.*
(8) 6 M. & S. 52, *R.* v. *Adams.*
(9) 3 Salk. 188, *R.* v. *Stonehouse.*
(1) 2 Keb. 336, *R.* v. *Carre.*

negativing the right of the defendant to take the sum of money in question. The cause of the taking ought, therefore, to be mentioned, but if the objection should not be raised on demurrer, it will be too late after verdict to move upon this point, for it will stand on the record, that the defendant extorsively took more than was his due by colour of his office (1). Nor is the sum itself at all material in cases where no fee nor payment of any kind was due (2). And again, where it becomes necessary to name a sum, and to state that the defendant exceeded that amount in his demand, proof that he extorted 1*s.* is quite sufficient to satisfy a charge for taking twenty (3); and any number of acts may be charged in the same indictment (4). Nor, indeed, does it seem to be necessary, although it is usual, to aver that the defendant had no right to act in the manner stated in the count. As where there was an omission to allege that the defendant had no warrant to take the prosecutor to Newgate, the threat having been that the prosecutor should be so taken upon a warrant for perjury (5). A fortiori, the offence imputed need not be negatived under such circumstances (6). But, on the other hand, where a fee was due, it must be stated in the indictment (7); and the offence must be sufficiently expressed. Where the defendant was charged with taking money by colour of his office *as* bailiff (8), without averring that he was the bailiff, or that he took more than was due to him, the court quashed the indictment (9). Therefore the sum must be stated where there exists a right to take certain monies (10). So, again, too general a charge will be insufficient; as, where the defendant had been acquitted upon every count excepting one which was general and alleged that he had under colour of his office, caused his agents to demand and receive of *several other persons several sums of money* for examining weights and measures; judgment was arrested for the generality of this charge (11). The taking, moreover, must be averred. An extorsive taking constitutes the offence, and not an illegal agreement to take; for a pardon after the agreement and before the taking, does not pardon the extortion (12). And it is further to be remarked, that every taking is a separate offence, so that it is improper to heap together several acts of extortion in one count. A common ferryman was indicted for extorting, at certain times,

(1) See 1 Sid. 91, *R.* v. *Cover*; 7 Mod. 220, *R.* v. *Refit.*

(2) 1 Str. 75.

(3) 1 Ld. Raym. 149, *R.* v. *Burdett*; 6 T. R. 267.

(4) Trem. P. C. 111, *R.* v. *Broughton.*

(5) 11 Mod. 137.

(6) Ibid.

(7) 3 Leon. 268, *Lake's* C.

(8) See 3 Keb. 357, *R.* v. *Gover.*

(9) Comb. 64, *R.* v. *Hill.* Although, in general, they will put the defendant to demur in cases of extortion, 5 Mod. 13, *R.* v. *Wadsworth.*

(10) 6 Mod. 31, *Tracy's* C. where a justice was charged with extorting money by force of a forged warrant, knowing it to be forged. The jury having acquitted him of the forgery, but found him guilty of the rest, upon objection taken, that the forgery was the principal charge, the court quashed the indictment, but ordered the defendant to enter into a recognizance to appear to answer a fresh indictment.

(11) 2 Str. 999, *R.* v. *Robe.*

(12) 1 Ld. Raym. 149, by Holt, C. J.

from divers persons unknown divers sums of money exceeding the ancient rate and price of passage, that is to say, two pence for carrying over a man and horse, &c. and judgment was stayed for the uncertainty (1).

Joinder.] It has been determined, that where the defendants had no title to take any fees, it could not be an objection to say that they ought to have been separately indicted, or where they took a certain sum in gross and then parted it betwixt them, whilst, on the other hand, if the indictment were for taking more than was due, such an exception might, possibly, be warranted, because that which might be extortion in one, would not necessarily amount to that offence in the other (2). But, in general, two may be indicted for extortion (3).

Trial and Judgment.] The trial may be in any county, by virtue of 31 El. c. 5, s. 4 (4).

The sessions have jurisdiction over this misdemeanor, extortion being particularly mentioned in the commission (5).

The judgment for extortion at common law is fine and imprisonment, together with an incapacity to hold the office in respect of which the exaction has taken place. As where any clerk of assize, clerk of the peace, &c., or their deputies, or other officers, shall exact any fees, upon their discharge, from prisoners charged with felony or misdemeanor, or with being accessory to felony, against whom no bill has been found, or who shall be acquitted, or discharged by proclamation (6). So, where any gaoler shall exact any fee or gratuity from any prisoner on account of his entrance, commitment, or discharge, or shall detain him in custody till such fee be paid, he is made liable to similar punishment (7). There is an old act inflicting fine and ransom, and the loss of office at the king's pleasure, for extorsive conduct on the part of the admiral, or his officers, with respect to licences for passing out of the realm (8); and another which prescribes a fine to the king, together with loss of the office, against any officer of the exchequer who shall take any manner of reward or thing from any archbishop or bishop, or any other having charge of the collection and payment of tenths, for making their account or quietus est in the exchequer (9).

By 3 Ed. 1, c. 26, Any sheriff or king's officer who shall take

(1) 4 Mod. 101, *R.* v. *Roberts*; S. C. Carth. 226; S. C. 1 Show. 390. See 2 Burr. 984.

(2) 1 Str. 75.

(3) 1 Salk. 382, *R.* v. *Atkinson* & others.

(4) 2 Hawk. c. 26, s. 50; see also 1 Russ. C. M. 146; 1 Hawk. c. 68, in the notes at the end, where it seems as though Hawkins had doubted whether the trial could be had in any county.

(5) 1 Str. 75; 3 Inst. 149, as to extortion by the clergy.

(6) 55 G. 3, c. 56, s. 9. Note, this does not extend to sheriffs.

(7) 55 G. 3, c. 50, s. 13. Note, the act does not extend to the King's Bench or Fleet prisons, nor to the Marshalsea and Palace courts.

(8) 2 & 3 Ed. 6, c. 6.

(9) Ante, p. 159.

any reward to do his office beyond his allowance, shall "yield twice as much" (1), and be punished at the king's will. By 1 Hen. 4, c. 11, any sheriff doing any extortion to the people, and being thereof attainted, shall likewise be punished at the king's will, and forfeit double the amount of his exaction (2). And if the sheriff do not lawfully acquit the king's debtors after payment, he shall be fined and pay thrice as much as he has received (3). So, if the sheriff do not let a party see the estreat sealed, and do not tot up that which is paid, he shall be fined, and pay treble damages to the party complaining thereof (4). So, if the sheriff do not release a distress, if the debtor (i. e. probably the *king's debtor*) can find able and sufficient surety in respect of the same, he shall be grievously punished (5).

CLASS III.

OF ADVANTAGES UNLAWFULLY OBTAINED AT THE EXPENSE OF OTHERS.

RECEIVERS.

Receivers generally.] By 7 & 8 G. 4, c. 29, s. 55, if any person shall receive any chattel, money, valuable security, or other property whatsoever (6), the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall on conviction be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment (7).

(1) For which an action will lie. See 1 Russ. 147, citing 3 Com. Dig. 323.
(2) See note above.
(3) 51 Hen. 3, st. 4; 3 Ed. 1, c. 19.
(4) 42 Ed. 3, c. 9.
(5) 28 Ed. 1, st. 3, c. 12. By fine and imprisonment.
(6) No matter whether for profit, or merely to aid the principal, 6 C. & P. 177, *R.* v. *Davis* & another, by Gurney, B.
(7) With or without hard labour, sect. 4, and solitary confinement, Id. 1, provided it do not exceed one month at a time, nor more than three months in one year. 1 Vict. c. 90, s. 5. As to principal and accessory, see 7 & 8 G. 4, c. 29, s. 61. The admiralty jurisdiction, s. 77. Writ for the restitution of stolen property, s. 57. As to a second conviction, 7 & 8 G. 4, c. 28, s. 11. A second sentence, s. 10. The com-

The receiver may be tried in the county where the principal is triable, or where the stolen property is found in possession, or where the receiving has taken place (1). It may be observed, likewise, that many of the general principles upon this subject are the same whether the offence be a felony or a misdemeanor. And the same observation will apply with respect to the indictment (2), the question as to the principal becoming a witness, and the evidence at large (3). The nature of the offence itself should appear in the indictment. And, consequently, where it was stated, that the prisoner received certain goods, knowing the same to have been "unlawfully obtained, taken, and carried away," the charge was held insufficient for want of stating that the goods had been obtained by *false pretences* (4).

By 28 G. 3, c. 55, s. 3, receivers of stocking frames, machines, or engines unlawfully sold or disposed of, shall be punished by solitary imprisonment (5), in the common gaol or house of correction of the county, &c. where the offence has been committed, without bail or mainprize, for not less than three, nor more than twelve calendar months (6).

Receivers at Common Law.] The receipt of stolen goods is still an offence at common law, and punishable by fine and imprisonment.

Public Stores.] By 39 & 40 G. 3, c. 89, s. 2 (7): to sell or deliver, or receive (8), or have (9) unlawfully any public stores, if the same be not *new, or one-third worn* (10), is, if the party be not a contractor (11), an offence punishable by a forfeiture of 200*l.* (12) with costs of suit (13), besides whipping (14) and imprisonment (15),

pensation clause, Id. c. 64, s. 28. And as to the old law, see East, P. C. 744, et seq. Russ. & Ry. 253, *R.* v. *Howell* & another.

(1) 7 & 8 G. 4, c. 29, s. 56.

(2) See East, P. C. 781, *Thomas's* C.; Leach, 578; 1 M. & Rob. 384, *Woolford's* C.; Russ. & Ry. 372, *Bush's* C.; Leach, 925, *Hyman's* C.; 6 C. & P. 156, *Jervis's* C.

(3) See 3 Campb. 265, *Baldwin's* C.; Russ. & Ry. 241: The principal may be a witness against the receiver, and the latter may controvert the guilt of his principal. As to a joint receiving, see 1 Moo. C. C. 257, *R.* v. *Messingham* & another.

(4) 2 Moo. C. C. 52, *Wilson's* C.

(5) But the st. 1 Vict. c. 90, s. 5, enacts, that no such confinement shall exceed one month at a time, nor more than three months in one year.

(6) Under the 2nd section of the same act, persons hiring frames and unlawfully selling them, are subject to the like punishment.

(7) Reciting 9 & 10 W. 3, c. 41, s. 2; 9 G. 1, c. 8, ss. 3, 4; 17 G. 2, c. 40, s. 10.

(8) There was a difficulty at one time respecting the connection of the offence of receiving and having in possession, which is now set at rest by 39 & 40 G. 3; East, P. C. 767, *Cole's* C.

(9) See East, P. C. 767, *Cole's* C.; S. C. 2 Russ. C. M. 276. And the informer was held in this case to be a good witness, for the court might inflict a corporal punishment as well as a pecuniary penalty. S. C. *Peake's* C. 217.

(10) For if new, or not one-third worn, the offence is felony.

(11) And although he be a contractor, the stores must have come bonâ fide into his possession.

(12) See 2 Ld. Raym. 1104, *R.* v. *Harman*.

(13) See 5 T. R. 371, note, *Chapple's* C.

(14) See Leach 595, *Bland's* C.; S. C. 5 T. R. 570; East, P. C. 760.

(15) But without hard labour; 8 East, 53, *R.* v. *Bridges*.

or by any or either of these punishments, at the discretion of the court, but the penalty of 200*l.* may be mitigated by the judge or justices (1). And, by sect. 7, there is a general power of mitigation (2). The 11th section of this act speaks of another misdemeanor upon this head of public stores. Having given certain powers of search and commitment (3) to commissioners and justices, it goes on to say, that unless the commissioner or justice, on proof of the stores being found in the possession of the party, shall be satisfied within a reasonable time to be fixed by the commissioner or justice, of their having been honestly come by, and not embezzled nor stolen, or if embezzled or stolen, of the defendant's ignorance of the fact, such defendant shall be deemed guilty of a misdemeanor (4). Then follows the 12th section, enacting, that if upon search made under the authority of the commissioners of the navy or other departments, any *unmarked* stores should be found which might reasonably be supposed to belong to the king, the commissioner or justice may set a time in like manner as under sect. 11, for the defendant to show that the stores so unmarked were not embezzled, or if embezzled, that they were honestly come by, and in default of satisfying the commissioner or justice, the clause goes on to ordain, that the party found in possession of the stores in question shall be guilty of a misdemeanor (5), and the barge, &c. shall be forfeited. By sect. 13, the power of stopping suspected persons any where is conferred, and a general authority to apprehend offenders is given. By sect. 14, all the stores, &c. and things forfeited are to be returned into his Majesty's warehouses, unless proof be made within three months to the satisfaction of the commissioner or justice, that such stores or other things are the property of other persons. And sect. 15, provides for the sale of the forfeited craft, and for the distribution of the proceeds. The 16th section provides for the jurisdiction of these last-mentioned misdemeanors, (that is to say) the offences comprised in sections 11 and 12, and inflicts a gradation of penalties. And it will be observed, that these are some of the cases which are cognizable by justices as misdemeanors *eo nomine*. The forfeiture for the first offence is 40*s.*, for the second 5*l.*, for the third and any subsequent offence 10*l.*, to be levied, in case of nonpayment, by distress and sale; and if no sufficient distress can be found, the offender may be committed for three calendar months, unless the penalty be sooner paid. By sect. 17, the conviction is

(1) Barges, boats, and other craft may be searched, and any person found in possession of *marked* stores may at once be committed for trial, sect. 12.

(2) The 8th, 9th, and 10th sections relate to rewards. But by s. 25, the buyer of stores may be protected by a certificate, the forging of which, sect. 26, is made punishable by a penalty of 200*l.*

(3) There could not be a commitment by the commissioners of the navy under 9 & 10 W. 3, before an indictment had been preferred and found. 1 Hawk. c. 89, s. 16, *R.* v. *Innell* & another.

(4) And punishable by fine and imprisonment under sect. 16, see post. See as to a certificate, note (2) above.

(5) And punishable with fine or imprisonment under sect. 16, see post. But there might be a certificate authorizing the possession, see note (2) above.

to be returned to the next sessions, and it is declared to be final. The 18th section, however, gives a summary jurisdiction to a commissioner or justice to dispose of cases, of selling and receiving stores not exceeding the value of 20*s.* in a summary manner, provided that the proceeding takes place within three months after the commission of the offence. The fine upon such occasions, which, under sect. 19, may be mitigated to one-half by the commissioner or justice, is fixed at 10*l.*, to be levied by distress, and the offender may be imprisoned for three months in default of sufficient distress 6). The 19th section, however, provides for the costs. But the consent of the respective officers of the navy, &c. must be had, before this summary jurisdiction can be exercised (7). Nevertheless, so that the offender be not twice punished for the same offence, it is provided by sect. 24, that nothing in the act contained shall prevent the defendant from being prosecuted as a receiver of stolen goods. Sect. 27, provides for the security of prosecutors, if sued by the person whose barge or other craft has been seized. Other sections relate to the form of procedure, and extend the provisions of the statute to Scotland. And 52 G. 3, c. 12, extends the acts upon the subject to Ireland, provided that the consent of the naval storekeeper of the port be had, before a summary jurisdiction be exercised by the justice. All public stores were subsequently included within these laws by 55 G. 3, c. 137, the stat. 54 G. 3, c. 60, having previously extended them to certain descriptions of cordage.

Witness.] It has been decided by Lord Kenyon that an informer under these statutes may be a witness (8). Although the lord chief justice had once rejected such a person on the ground of his being interested in the prospect of a fine (9). Subsequently, however, Lord Kenyon came to the conclusion, that as it lay in the discretion of the court to inflict a fine or corporal punishment, the objection could only go to the credit, and not to the competency of the witness (1). Before this latter determination, the point had become of some importance, because questions were made as to the person who should be deemed to be the informer. Thus, it was held, that the party upon whose suggestion the seizure was made, was the informer, and not the individual who, after the seizures communicated the fact to the admiralty (2). So, a peace officer who first discovered the naval stores which were concealed, was considered to be the informer (3).

Joinder.] It was said by Lord Ellenborough in giving judgment upon the case of *R.* v. *Johnson*, that counts for having in possession new stores, or stores not more than one-third worn, may well

(6) Sect. 21 gives an appeal.
(7) Sect. 20.
(8) 1 Esp. 169, *R.* v. *Cole.*
(9) Id. 95, *R.* v. *Blackman.*
(1) Id. 169, *R.* v. *Cole.*
(2) Id. 144, *R.* v. *Banks*, and the cases of bribery were cited, 4 Burr. 2284; Id. 2464.
(3) Id. 95, *R.* v. *Blackman.*

be joined with counts for possessing such stores when not new, or more than one-third worn (4).

Evidence.] As to the proof of these offences, it is settled, that the fact of possession is not conclusive. And even although the person found to be in possession has not got the certificates which is pointed out by the statute as an indemnity to the buyer, yet, other circumstances may still be called into consideration, in order to afford an explanation of the affair. As in the case of the widow who was found in possession of certain canvas which had originally been old sails belonging to his Majesty, and was, accordingly, prosecuted by the crown. She proved that the stores in question had become her husband's property by virtue of a purchase at a public sale; that her husband was no longer living, and that the canvas had been in use for table linen and sheeting in the family for a considerable time. The counsel for the crown insisted, that this evidence could not avail for want of the certificate which was particularly mentioned as an excuse for possession of such stores. But Foster, J., left the evidence with the jury, and said that if they should think that the defendant had become possessed of this linen without any fraud or misbehaviour on her part, they should acquit her, and she was, accordingly, acquitted (5). And, upon the authority of this case, Lord Kenyon admitted a defendant to prove that he had purchased the stores mentioned in the indictment against him from a person who might well be presumed to have been possessed of the proper certificate, from the circumstance of that person having frequently been a purchaser at such sales. For it might be inconvenient for the buyer of a whole lot, and not consistent with his safety to part with his certificate upon the mere sale of a portion of his purchase. The defendant was, accordingly, acquitted upon this evidence (6). Although the lord chief justice laid it down that the onus of proving an innocent possession lay on the defendant as soon as evidence of finding stores with the king's mark in his possession had been offered (7). And so, again, it lies on the defendant to shew that he is within the exception in the statute concerning contractors, and the prosecutor, although he may have alleged that the defendant was not a contractor, is, nevertheless, under no obligation to prove the regular averment (8).

Receivers of Goods on the Thames, of Anchors, Tackle, &c.] By 1 & 2 Geo. 4, c. 75, s. 12, it is a misdemeanor (9) to purchase or receive any anchors, cables, &c., which may have been taken up, weighed, swept for, or taken possession of, with intent to defraud and injure the owners, whether the same shall have belonged to

(4) 3 M. & S. 550.
(5) East, P. C. 765, Anon. citing first ed. of 1792, p. 439.
(6) 1 Esp. 145, *R.* v. *Banks.*
(7) Ibid.
(8) 1 Hawk. c. 89, s. 17.
(9) Punishable by transportation for seven years, or as for a misdemeanor at common law at the discretion of the court.

any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, provided that the directions of the act have not been complied with. And other offences under the act shall be laid to be committed, and shall be tried in any city or county (being a county) where the articles in question shall have been found in the possession of the offender, or if the same shall have been sold in foreign parts, then in the county or place in which the person selling the same shall reside.

By 2 & 3 Vict. c. 47, s. 26, Every person, who, within the metropolitan police district, shall knowingly take in exchange from any seaman or other person, not being the owner or master of any vessel any thing belonging to any vessel lying in the river Thames, or in any of the docks or creeks adjacent thereto, or any part of the cargo of any such vessel, or any stores or articles in charge of the owner or master of any such vessel, shall be deemed guilty of a misdemeanor (1).

By 3 & 4 Vict. c. 96, s. 30, If any person not lawfully authorized, and without lawful excuse (the proof whereof shall lie on the person accused) shall purchase, or receive, or possess any paper used for postage covers, envelopes, or stamps, and for receiving the impression of the die, plates, or other instruments provided for that purpose, before such paper shall have been duly stamped with such impression, and issued for public use, he shall be guilty of a misdemeanor, and shall be imprisoned for a period of not more than three years, nor less than six calendar months.

(1) Punishable with fine and imprisonment.

CHAPTER II.

OF MALICIOUS MISDEMEANORS.

We have not much to say concerning misdemeanors which are committed from motives of malice. The legislature has felt itself called upon in most cases of malicious injuries to ordain that such acts should be deemed felonious, and upon occasions which have not been contemplated in so serious a light, it may, perhaps, be safe to assume as a principle, that whatever evil is inflicted with a malicious intention is a misdemeanor at common law. Thus, in *Treeve's* case (1), where the indictment was for a cheat in supplying prisoners of war with unwholesome food, it was considered that the giving of bad victuals to any person from malice or deceit, is undoubtedly in itself an indictable offence, and it was said, that this circumstance entered very deeply into the demerits of the defendant's conduct (2).

In cases of malicious perjury, the law of which subject has been very fully discussed in a former chapter (3), the offence is not less, nor liable to a different punishment, because, instead of being the offspring of fraud, it was conceived through malicious motives. Thus where the defendant swore certain matters which were false, it was deemed competent for the prosecutor to shew that the oath had been maliciously taken, in order to make out the charge of wilful and corrupt perjury (4).

So, in conspiracy, a matter to which we have likewise directed the attention of the reader (5), the offence is not of a less aggravated character because it did not owe its origin to mercenary considerations. Persons have been known to combine together for the sole purpose of injuring an individual through the medium of a false accusation, and their conduct, which amounts to a malicious misdemeanor, affords matter for aggravation rather than excuse (6). So, where persons united in order to hiss Macklin, the actor, they were indicted and convicted before Lord Mansfield for a conspiracy. For their plan being to hiss him as often as he appeared on the stage, was evidence of an attempt to ruin him in his profession (7). And it is not necessary that an acquittal of the charge in question should precede the indictment.

(1) Ante, p. 21.
(2) East, P. C. 822.
(3) Ante, chap. 1, sect. 5.
(4) 3 C. & P. 498, *R.* v. *Munton.*
(5) Ante, chap. 1, sect. 6; 2 Lord Raym. 1167, *R.* v. *Best.*
(6) See Godb. 444, by Hyde, C. J.; 2 Russ. C. & M. 556.
(7) 2 Campb. 372. S. P. by Mansfield, C. J., Id. 369.

So, in libel, malice is of the essence of the offence, but a man must be taken to have intended to do that which the publication is calculated to bring about, and, therefore, malice need not be proved (8).

However, although several of the malicious mischiefs which men have been found sufficiently ill-disposed to perpetrate have been made felonies, there are some, and especially of late, which the legislature has thought fit to class under the head of misdemeanors. Of this number is malicious damage done to toll gates.

Toll Gates.] Thus, by 7 & 8 Geo. 4, c. 30, s. 14, If any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part any turnpike gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly (9).

By 7 Geo. 4, c. 64, s. 17, It is enacted with respect to property under turnpike road trusts, that in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp board, stone, post, fence, or other thing erected or provided in pursuance of any act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements, provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners.

Fishponds.] By 7 & 8 Geo. 4, c. 30, s. 15, If any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fish pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or

(8) 2 B. & C. 259. The subject of libel will be fully treated of in the fourth chapter.

(9) With imprisonment, with or without hard labour and solitary confinement. Sec. 27: provided the latter do not exceed one month at a time, nor three months in one year, 1 Vict. c. 90, s. 5. Malice is not essential to the commission of any offence against the act, s. 25. By s. 26, all abettors may be indicted and punished as principal offenders. By s. 28, persons found offending against the act may be apprehended without a warrant by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him. Sec. 43 provides for the jurisdiction of the admiralty. Sec. 42 excludes Scotland and Ireland.

other noxious material in any such pond or water with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down, or otherwise destroy the dam of any mill pond, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment (1).

Summary Convictions.] It may just be remarked, that several offences are punishable by summary conviction under this act 7 & 8 Geo. 4, c. 30. As with regard to trees and shrubs (2), fruit and vegetables (3), fences, walls, stiles, and gates (4). And by s. 24, persons committing any damage, not otherwise provided for by the act, may be compelled by the justice to pay a sum by way of compensation, not exceeding 5*l.*, or may be committed in default of payment for two months. There is a proviso, however, which operates as an exception, where the offence has been committed under a colour of right, or in hunting, fishing, or the pursuit of game, unless the trespass were wilful and malicious (5).

Obstructing Grain.] There is likewise a proceeding by summary conviction against persons who wilfully and maliciously obstruct the passage of grain, either by destroying the waggons in which it is conveyed, or otherwise (6). The second offence is felony (7).

(1) Which may be with or without hard labour and solitary confinement, &c., s. 27. And see note (9) above for the incidents. In *Ross's* case, East, P. C. 1067, Russ. & Ry. 10, the prisoner was convicted upon the 9 Geo. 1 for maliciously breaking down the head and mound of two fish ponds, but the judges held that the conviction was wrong, because the manifest object was to *steal* the fish. The words "*take* or destroy" are calculated to meet this difficulty.

(2) 7 & 8 Geo. 4, c. 30, s. 20.

(3) S. 21.

(4) S. 23.

(5) By s. 25 malice is not essential to this offence. S. 28 authorizes the apprehension of offenders without a warrant, see ante, note (9), p. 171. S. 29 limits the time of prosecution in cases of summary conviction to three months. The evidence of the party aggrieved shall be admitted, and also the evidence of any inhabitant of the county, &c., where the offence has been committed, notwithstanding any forfeiture or penalty may be payable to the general rate of such county, &c. S. 30 provides for the attendance of witnesses. By s. 31 abettors are to be deemed principals. S. 32 directs the application of forfeitures. S. 33 ordains the course of procedure in cases of non-payment. S. 34 enables the justice to discharge the party, if it be his first offence, upon his making satisfaction. S. 36 declares that a summary conviction shall be a bar to other proceedings. S. 37 gives the form of conviction. And s. 38 the appeal. S. 39 takes away the certiorari. S. 40 orders that the convictions shall be returned to the sessions, and makes them evidence. And s. 41 regulates the course of procedure when actions are brought against persons for any thing done in pursuance of the act.

(6) 36 Geo. 3, c. 9, s. 1.

(7) S. 2. See also 11 Geo. 2, c. 22, on the same subject, and said to be still in force; East, P. C. 1070. And as to assaults upon this subject, post, chap. 3.

Highways.] Wilful mischiefs in highways are also provided against by 5 & 6 Will. 4, c. 50, ss. 72 and 78 (8), and under the turnpike law similar provisions will be found (9).

Public Places of Worship.] A place for public worship may likewise be maliciously as well as contemptuously disturbed (1), but we shall recur to this subject in the seventh section of the fourth chapter.

(8) See also s. 79.
(9) 3 Geo. 4, c. 126, ss. 121, 132; 4 Geo. 4, c. 95, s. 72.

(1) See 52 Geo. 3, c. 155.

CHAPTER III.

OF MISDEMEANORS COMMITTED AGAINST THE PERSONS OF INDIVIDUALS.

THE present chapter will be devoted to the consideration of those misdemeanors which more particularly affect the persons of individuals. And there is this distinction concerning felonies and the matters which we now enter upon. In the former, all the offences against the person are of a private nature, but many of the misdemeanors under present discussion will be found to be open and public, as assaults, assaults accompanied by illegal arrests, and other cases of violence. Although, at the same time, it may be observed, that several private outrages are misdemeanors, either at common law or by statute, as the carnal knowledge of female children above ten and under twelve years of age, attempts at violation, abduction of women (1), or unmarried girls, &c. (2). In reality, every offence against the person is, in law, either expressly or impliedly, an assault. Outrages against the persons of individuals form, therefore, a combination of assaults, differing in their character according to the intention which governs them, or the quality of the place or parties upon whom they are inflicted, or the nature of the transaction which has given rise to them. We propose to treat of these offences, 1st, by speaking shortly of the common law offence of mayhem. 2ndly, Of the carnal knowledge of children. 3rdly, Of assaults which are estimated according to the intention which has prompted them. 4thly, Of assaults deemed to be aggravated, by reason of the quality of the individual assaulted, or the place where they have been committed. And, 5thly, Of such as have been more particularly noted by the legislature on account of the transaction during which they may have happened.

SECT. I.—*Of Mayhem.*

Notwithstanding the old custom of laying the offence of mayhem to have been done felonicé (3), it seems that it would be sufficient at the present day, should occasion arise, to treat it in terms as a misdemeanor. All maims were originally held to be felonies,

(1) *Holt's* C. 758, *R.* v. *Pigot.*
(2) 1 Keb. 101, *R.* v. *Story*, & ors.
(3) 2 Str. 1100, *R.* v. *Haddock.*

and the judgment of retaliation, or loss of the same member which the criminal had injured by his act, ensued (4). But as this method of punishment has long since been disused, and, indeed, the very principle of the retribution (since Lord Thanet's case) (5) repudiated, we may safely carry out Lord Coke's description of the crime as being under all felonies deserving death, and above all inferior offences, and thus adapt the wrong itself to the common law judgment which remains in respect of it—fine and imprisonment. A maim at common law is said to be such a bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary (6). And thus if a man were merely disfigured, he was not considered as maimed, unless the loss of corporal ability accompanied his hurt (7). The illustration of this was that the loss of an ear, or of the nose were not mayhems, because a man's power as a combatant was not weakened, but the cutting off, disabling, or weakening the hand or finger, or striking out an eye or a fore tooth, made the difference, because, in common with other animals, the natural courage would be abated under such injuries (8). And as the king was considered to have the first right to every man's services, a maim inflicted by a man on his person was held to be equally punishable as though another had done it. So that, as in mayhem, all accessories before the fact are principals (1). Where a youth, in order to escape labour caused his companions to strike off the left hand, both of them were indicted, fined and ransomed (2). And, again, if a person were to maim himself, in order to avoid impressment as a sailor, or enlistment in the army, the same law would apply (3). And the person who maims at the other's desire is equally guilty (4).

Nevertheless, as the statutes 9 Geo. 4, c. 31, and 1 Vict. c. 85, have very fully provided for aggravated injuries of this nature, and the 9 Geo. 4, c. 31, has also embraced assaults in general, it is highly improbable that an indictment at common law for mayhem will be again preferred.

Sect. II.—*Of the Carnal Knowledge of Children.*

It is to be observed, that the forcible violation of a female is a rape, that the carnal knowledge of a child under ten years of age, whether she consent or not, is a felony, that such knowledge of a

(4) See Co. Litt. 127 (a); 1 Hawk. c. 55, s. 3.

(5) See post, sect. 4. Lord Thanet was indicted for striking in a court of justice, and a doubt was entertained whether judgment of amputation ought or not to be passed.

(6) East, P. C. 393. See Co. Litt. 126 (b) 288.

(7) East, P. C. 393.

(8) 1 Hawk. c. 55, s. 2.

(1) Whether there can be any accessories before the fact in mayhem, or whether all are not principals has been much questioned. The law is collected in East, P. C. p. 400, 401. "It no where, however, appears that there can be accessories after the fact in mayhem." Id. 401.

(2) Co. Litt. 127 (a).

(3) 1 Hawk. c. 55, s. 4; East, P. C. 396, *Wright's* C.

(4) East, P. C. ibid.

female above twelve years old with her own consent is neither felony nor misdemeanor unless considered in connection with the question of abduction, but that if the child be above ten and under twelve years, such knowledge, whether with consent or not, is a misdemeanor. Thus by 9 Geo. 4, c. 31, s. 17, If any person shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award (5). Consent in this case is, therefore, immaterial. Attempting to have such carnal knowledge is likewise a misdemeanor (6). But the count must expressly allege that the child was between the ages of ten and twelve; and the first count which did mention the age was held by Patteson, J., to be incapable of helping the second by means of the word "said" (7). It is moreover observable, that if the indictment should contain both the charges of knowing and of abusing, an acquittal of the one will not necessarily prevent a conviction for the other. This was decided by Holroyd, J., in a case where the jury, upon an indictment for assaulting a female child, with intent, &c. negatived the intention carnally to know, but found the prisoner guilty of the rest of the charge (8).

Sect. III.—*Of Assaults, Common, or Aggravated, according to the Intent of the Offender.*

We come now to the consideration of assaults, inferior indeed with reference to the crimes themselves, to those which we have hitherto treated of, but still capable of aggravation according to the particular circumstances which accompany the respective transactions. This section will include those which are called common assaults, and likewise such as by reason of the evident intention of the offender to perpetrate some other wrong are deemed to be aggravated, and deserving of a higher punishment.

Common Assaults.] We will, first, address our readers to the phrase "common assaults." In its legal acceptation, however, the common assault does not mean merely that ordinary attack which so frequently happens when persons are irritated by passion. Whatever pain or inconvenience is wilfully or unlawfully inflicted

(5) By s. 18, proof of penetration only is sufficient. All abettors are principals, s. 31. As to the admiralty jurisdiction, see s. 32.

(6) 9 C. & P. 213, 215, *Martin's* C. But if the girl consent there is no *assault*, S. C.

(7) Id. 215, *Martin's* C. The indictment was quashed.

(8) 3 Stark. 62, *R.* v. *Dawson*. Note, that the taking away of an unmarried girl under sixteen from the custody of her parents, or of those having the care of her, against the 20th section of 9 Geo. 4, c. 31, is not an offence immediately affecting the person, and will, therefore, be found together with seduction at common law under the head of misdemeanors against public morals, post, chap. 4.

upon the person of an individual by the act or agency of the defendant is an assault. And it is a common assault when no circumstances present themselves in the case which manifest an intent to have committed some other crime, or which constitute a separate charge under some act of the legislature. Thus if one administer a mischievous drug to his neighbour, thereby causing him a certain amount of suffering, the act, however hazardous, may not be of a felonious character, and yet, although no blow be struck, it is very clearly an assault at common law (1).

So, if a person of tender years be under the control of a master who withholds proper food from the child, or exposes it to the inclemency of the weather, the party thus misconducting himself is liable to be indicted for an assault (2). And it is no defence to allege that a mere non-feazance, as not providing maintenance, is not punishable (3), although it might be matter of excuse if the child were able to relieve itself from the treatment complained of, because the presumption of coercion would be lessened (4). And, on the other hand, exposure to weather is an assault, whether the servant be of tender years, or of a more advanced age (5). These cases, however, proceed upon the supposition of dominion on the part of the master. Where, therefore, an idiot was found in a dark room without sufficient warmth or clothing, it was held, that no obligation attached on his brother, at whose house he was an inmate, to provide proper food or warmth for him, and consequently, the charge for assault and imprisonment was considered invalid (6).

However, if the charge be for neglecting to provide sustenance or clothing, the indictment must allege that the child was of tender years, and under the control and dominion of the defendant. For want of such allegations a person was held to have been improperly convicted by a majority of the judges (7). And in the case of *R.* v. *Ridley* above mentioned, Lawrence, J., mentioned the case at Exeter, upon finding that these same allegations were omitted in the indictment, and the counsel for the prosecution declining to proceed, the defendant was acquitted.

By 4 & 5 Will. 4, c. 35, s. 8, To require or compel an apprentice or person of any description to ascend a chimney flue for the purpose of extinguishing a fire therein, is declared to be a misdemeanor, and punishable with fine and imprisonment as at common law.

Duress, therefore, amounts to an assault. Whence it is, that an illegal imprisonment is punishable in like manner. And this offence happens where a person is improperly detained in any place, whether it be a private house, or in the street, or in a madhouse (8), and, of course, if in a gaol. No blow need be

(1) 8 C. & P. 660, *Button's* C.
(2) 2 Campb. 650, *R.* v. *Ridley*.
(3) Id. 653.
(4) Ibid.
(5) By Lawrence, J. ibid.
(6) 2 C. & P. 449, *R.* v. *W. J. & S. Smith*.
(7) 2 Camp. 652, Anon. at Exeter, cor. Le Blanc, J. in 1802.
(8) Lofft. 73, *R.* v. *Coate*.

given, for the coercion creates an immediate inconvenience, if not pain to the person of the individual confined, who, if he should attempt to escape, would be met with actual force, and who by remaining passive through fear, is under the influence of an implied restraint. And it probably came to be assumed that every false imprisonment included a battery (9) on the ground of the natural anxiety which would prompt every man to release himself from an unjust thraldom, inasmuch as the effort to escape would immediately create a laying on of hands, and so a battery. In a case, however, which came before the court of common pleas, the judges said they had looked into the authorities, and that it was absurd to contend that every imprisonment included a battery. And they cited Co. Litt. 253 (which was the foundation of the proposition in Bull. Ni. Pri.) to shew that nothing more was said by Lord Coke in the passage relied on than that "imprisonment [was] a corporal damage" (1).

Again, to lift up the hand in a threatening manner so as to exhibit an intention coupled with an ability to do harm is an assault, though no blow be struck, for it is an attempt or offer to do violence, and striking at a person, drawing a sword or bayonet, throwing a bottle or glass, or presenting a weapon within reach of him will come within the same rule (2).

So, the act of setting a dog on to bite; wilful and furious driving over a person; or riding wantonly or carelessly over him, are respectively assaults (3). So where a lighted squib was tossed by the defendant into the street at Taunton, which after passing through several hands, finally fell on the plaintiff and put out his eyes, it was held by three judges that the action for trespass and assault was well brought (4).

So if one push a drunken man against another, and especially if he cause an injury by his act, he may be punished by indictment, or be compelled to pay damages (5).

So, evidence that the defendant spit in the prosecutor's face was held sufficient to prove a battery (6).

So, where the hair of a pauper was forcibly cut off in the poorhouse, it was held to be an assault (7). If a man place an infant,

(9) Bull. N. P. 22; Selw. N. P. Tit. imprisonment, citing *Oxley* v. *Flower*, cor. Lord Kenyon, C. J.

(1) 1 New. Rep. 255, *Emmet* v. *Lyne*, Co. Litt. 253 (b). A person falsely imprisoned may likewise demand surety of the peace, 1 Hawk. c. 60, s. 7.

(2) East, P. C. 406; 1 Hawk. c. 62, s. 1; 1 Russ. C. M. 604.

(3) 1 Russ. C. M. 605.

(4) 3 Wils. 403, Blackstone, J. diss.

(5) Bull. N. P. 16. *Short* v. *Lovejoy*. Secùs if the intention were to assist the drunken man, ibid.

(6) 6 Mod. 172, *R.* v. *Cotesworth*. Every battery includes an assault, but the rule does not hold à converso. But personal violence, as a push, or blow, or stroke of any kind, will constitute a battery. But not a gentle laying on of hands, such as would satisfy an allegation of molliter manus imposuit, which may, indeed, be an assault, but not a battery.

(7) 4 P. C. 239, *Forde* v. *Skinner*, and the cutting off of the hair with a view to degrade the plaintiff and not for the purpose of cleanliness, would be an aggravation, and operate to increase the damages. S. C.

which cannot help itself, upon a dunghill, or openly in the fields, so that beasts or fowls may destroy it, it is a breach of the peace (8). But words alone, although they may serve to explain the defendant's intention at the time of the assault, will never, of themselves, amount to this offence (9). From hence it follows as a necessary consequence, that as soon as the hand is unlawfully laid upon the person of an individual, the offence is manifestly an assault. A blow of any kind, a push(1), or any similar act of violence must be undoubtedly deemed to be assaults. A master taking indecent liberties with his female scholar. They were short of a rape, or of an immediate attempt to commit that offence, and the child, a girl of thirteen, did not resist to the utmost the lustful conduct of the defendant. But she swore that the acts done were against her will, and the judge observed, that the authority and influence of the master were likely to have put the child more off her guard than she would naturally have been through her age and inexperience, that a fear and awe of the prisoner might check her resistance and lessen her natural sense of modesty and decency, and that under such circumstances less resistance was to be expected than in ordinary cases. A verdict of guilty then passed against the prisoner upon a count for an assault with intent to commit a rape, and also upon one for a common assault, but the judgment was respited upon a doubt whether the evidence justified a conviction for the assault with intent, &c. And the judges came to the conclusion that the evidence was fully sufficient to support the count for a common assault, and that judgment should be passed upon the prisoner (2).

A German quack was applied to by a woman for his advice against fits, with which she was troubled. He made her strip naked, himself taking off her clothes, and he then rubbed her for some minutes with some stuff from a bottle. She swore she did not put off her clothes willingly—he made her. In this case again, the judges held that the conviction for the common assault was good, thus laying aside the special count for an assault with intent, &c. (3)

It may be remarked here, that in misdemeanors all are principals. So that although the defendant strike not any blow, yet if he use words of encouragement, as, "Go it, go it," he is equally guilty with the striker (4).

Defences to Common Assaults.] However, the intention of the party upon a charge of assault will be taken into consideration by the jury in common as well as in aggravated cases of that nature. As where a man laid his hand upon his sword, and probably in a

(8) Poph. 13.
(9) 1 Hawk. c. 62, s. 1, although the contrary doctrine was once entertained, ibid.
(1) Although stopped by the plaintiff or prosecutor, 4 C. & P. 349, *Stephens* v. *Myers*.
(2) Russ. & Ry. 130, *Nicholl's* C.
(3) 1 Moo. C. C. 19, *Rossinski's* C.; S. C. Lew. C. C. 11.
(4) Lew. C. C. 17, anon.

menacing manner, but said "If it were not assize time, I would not take such language from you:" here the observation negatived the intent to assault, and the intention not operating with the act, the deed was not complete (1). This intent, again, is negatived in the case of the schoolmaster who properly corrects his pupil, of the parent who chastises his child with moderation, of the gaoler who coerces his prisoner, or even, as some say, the husband his wife, of the officer who compels obedience to the laws (2), of the man who binds or restrains an insane person, or lays hands upon one who is about to commit a violent action (3), or resists in a gentle and reasonable manner an attempt to despoil him of lands or goods (4).

So, if the striking be in defence of a parent, wife, or child, or master, the assault is justified, for the intention which promoted the blow was lawful (5). So again, if the wife should inflict a blow in defence of her husband (6). Or if the master should interfere to protect his servant (7). The relation between master and servant is involved in the transaction. Again, an intention to commit a *battery* is negatived, notwithstanding the infliction of violence, if the circumstances are attended with much outrage on the part of the original aggressor. As where the defendant in an action of trespass for an assault, proved that the plaintiff had taken his horse, and that he only advanced with his staff in a threatening manner in order to regain his property. The defendant had a verdict (8). Or, if a man should discover another in the act of damaging his property (9), breaking down his gates, advancing upon his land with a shew of force. Here it is competent to repel aggression with something more than an ordinary degree of resistance, and if a battery happen, the intention to commit that breach of the peace is set aside by the emergency of the occasion. And thus a plea by the defendant that the plaintiff had endeavoured with a strong hand to break his close, whereupon he resisted and opposed him, *and if any damage happened to the plaintiff, it was in defence of the possession of that close*, was held good (10). And by Lawrence, J., "any further mischief ensued, it was in consequence of the plaintiff's own act, so that the battery followed

(1) 1 Mod. 3, *Turbervile* v. *Savage*; S. C. 2 Keb. 545.

(2) See post of Arrest. As in the case of the churchwarden, who *after request and refusal*, removes the hat of a person from his head in church, 1 Saund. 13, *Hawe* v. *Planner*.

(3) As where two were fighting, and the plaintiff took the defendant by the collar, who, in his turn assaulted the plaintiff, Selw. N. P. Tit. ass. and battery, *Griffin* v. *Parsons*, cor. Legge, B. Plea, Son ass. demesne. Replication, de injuriâ. It was objected that the matter should have been replied specially, but the judge said that the evidence was not offered by way of justification, but to shew the absence of any intention to commit an assault, and that was fit matter to be left to the jury.

(4) 1 Hawk. c. 60, s. 23.

(5) Ibid.

(6) 1 Lord Raym. 62, *Leward* & ux. v. *Basely*. Plea, Son ass. demesne. Replication, defence of the husband. Demurrer, judgment for the plaintiff.

(7) Lofft. 215, *Tickel* v. *Read*.

(8) Keilw. 92.

(9) 2 Salk. 641, in *Green* v. *Goddard*; Ow. 513, 2 Inst. 316. See Cro. Car. 138. There is no time to make a request in such a case.

(10) 8 T. R. 78, *Weaver* v. *Bush*.

from the resistance. And this way of considering the case, said the learned judge, would reconcile all the authorities (2).

So, the intent to commit either an assault or battery is negatived by evidence of accident, provided that the circumstances of the transaction were lawful. As in the case of a soldier who hurts another during the exercise of arms. So where two were playing at cudgels, it was once said that an unintentional hurt was no battery (3). So if a horse run away, and knock a man down, it is no battery by the rider, if the casualty were not caused by the default of the latter (4). So where the defendants were throwing down skins into a yard in the proper prosecution of their business, and the wind taking hold of a skin blew it into the plaintiff's eye, thereby depriving him of sight, it was held, that although the yard was a public way, the casualty could not have been avoided, and the parties were acquitted (5).

But in all these cases the law will watch with jealousy against excess. If the defendants in the last case had been throwing about their skins wantonly, they would have been guilty of an assault. If the rider of the horse had been conducting himself carelessly, he could not have pleaded not guilty with success. The soldier who, in a skirmish, had the misfortune to hurt his comrade, was held answerable in trespass, because he had not set out the circumstances of the case so clearly as to shew to the court that the hurt complained of had been the result of inevitable accident (6). And the case of the cudgels has been questioned, because the act of fighting is in itself unlawful. As where Hayward, Serjt., proposed to shew on the behalf of the defendant that there had been a mutual fight, but by Parker, C. B., the consent of the plaintiff is no bar to the action, and he is entitled to a verdict for the injury done him (7).

So any excess on the part of the schoolmaster, parent, gaoler, or other person, will immediately hinder the presumption of absence of intention from arising, for if an extreme degree of correction or of violence be employed, it cannot be denied that the defendant wilfully committed the battery complained of. As if A. should lift up his hand or stick to strike B., and B. should give way to his passion, and having struck A. should proceed to acts of violence quite incommensurate with the prior assault (8).

So again, the law will not extend the relations which, we have seen, serve occasionally as justifications for assaults. A tenant

(2) Id. 81. See 8 Taunt. 822.

(3) 1 Russ. C. M. 607.

(4) Mod. 405, *Gibbons* v. *Pepper*. But the plaintiff had judgment, because the defendant, the rider, had neglected to plead the general issue, and had pleaded specially instead.

(5) 1 Str. 190, *R.* v. *Gill* & others.

(6) Hob. 134, *Weaver* v. *Ward*. He had merely pleaded casualiter et per infortunium contra voluntatem meam, without setting forth that the accident could not be averted, Bull, N. P. 16

(7) Bull. N. P. 16, *Boulter* v. *Clark*. In pari delicto potior est conditio defendentis. If a person license another to beat him, such license is void being against the peace, Bull. N. P. 16.

(8) See East, P. C. 406.

cannot justify, therefore, for interfering to protect his landlord, otherwise than one individual can raise his hand in defence of an indifferent person (9). Nor can a servant, although at the bidding of his master, justify an assault and battery as servant, in defence of his master's son, because he is not a servant to the son (1). And if, instead of replying molliter manus to a plea of son assault demesne, in respect of an attack made upon the plaintiff's possession of lands by the defendant, he plead that he gently assaulted the defendant, he will have judgment against him, because, unless the violence were very great on the other side, an assault, under such circumstances cannot be warranted (2). It has even been determined, that a servant who saw a person about to beat his master's horse, was not justified in laying his hands gently upon him, because he had not then beaten the horse; and, consequently, that the defendant was entitled to judgment, although he had beaten the plaintiff for touching him (3). Again, a medical man is protected against a charge of assault if he exercises a careful discretion in giving his certificate in the case of supposed lunacy. But if he should make a statement without being properly satisfied of any immediate injury likely to be inflicted by such a person either upon himself or others, he may become guilty of an assault by rendering himself accessary to the coercion of that person (4). And, lastly, with reference to the point of accident, if the occasion be unlawful, the unlawful intention will not be negatived. As where there was a fight, and one of the combatants, without any design to do so, struck a third person. Here the unpremeditated attack would only operate in mitigation of damages (5).

We have reserved one class of cases respecting violence used by magistrates or officers in the execution of process or warrants, because, as several decisions have taken place upon the peculiar circumstances which have arisen in the course of such proceedings, a separate mention of the subject seems to be the most convenient in this place. And it is observable, that whilst an assault upon officers is made especially punishable under various statutes, an assault by them is merely regarded in the light of a common assault. If an arrest on the part of an officer be unjustifiable, he is certainly guilty of an assault, as if he should attempt to execute process on a Sunday, or, on any day, upon a privileged person, or exceed his authority, although his warrant be regular. An excise officer was executing a warrant to search the house of the defendant for an illegal still. The defendant contrived to get possession of the warrant, and refused to give it up, upon which a scuffle ensued, the officer having first touched the defendant. There being evidence of much violence on both sides, Lord Tenterden left it to the jury to say whether the officer had used un-

(9) 1 Hawk. c. 60, s. 24.
(1) Ibid.
(2) 1 Mod. 26, *Jones* v. *Tresilian*; S. C. 1 Sid. 441; S. C. 1 Lev. 282; S. C. 2 Keb. 597.
(3) 2 Lutw. 1481; *Shingleton* v. *Smith*, and see id. 1483.
(4) 4 C. & P. 210, *Anderdon* v. *Burrows*.
(5) 5 C. & P. 372, *James* v. *Campbell*.

necessary violence, and they acquitted the defendant (6). The defendant was a marshal on duty at Guildhall, and meeting with obstruction, he struck the plaintiff on the face, although the latter was unable to move on, and the jury found a verdict against the marshal for this excess of his authority (7). So if a party be seen speaking to a reputed thief, it is not competent for a constable to push him on. By doing so, the constable becomes guilty of an assault (8). A magistrate, likewise, is guilty of this misdemeanor if he detains a known person under the expectation that a charge is likely to be preferred against that individual (9). Many other cases of assault will easily be conceived by comparing the law of arrest with the present subject, and adverting to those cases where the constable or other officer is not justified in effecting a capture. And, on the other hand, where the officer is borne out in his acts, both in respect of his authority and the mode of exercising it, the assault is negatived.

So, in a case where the jurisdiction of the palace court came in question, there was judgment for the defendant upon a special verdict in an indictment for assault (1). Again, trespass was brought for an assault and false imprisonment. The pleas were, not guilty, and that the plaintiff committed the first assault, upon which the defendant gave him in custody to a peace officer who saw the transaction. Replication, that the plaintiff was employed to serve the defendant with process, and, in order to do this, that he necessarily laid his hands on the defendant. Rejoinder, excessive violence, and issue thereon. And, after a verdict for the plaintiff and motion in arrest of judgment, the court said, that by rejoining excess, the defendant had admitted that if in any case it could be necessary to touch a party in order to serve him with process, it was in that instance, and they could not say but that under particular circumstances, it might be necessary and lawful to do so, and the rule was refused (2).

The same rule as to officers extends to those who aid and assist in the execution of their duties. And it has been said to be no battery to lay the hand gently on a man against whom a warrant of arrest had been issued, and to tell the officer that this is the man he wants (3).

Proceedings.] The usual proceeding is by indictment, but the court will sometimes grant an information, as for a malicious impressment (4); and it will be granted in very aggravated cases, even on the face of affidavits of denial on the other side (5). It

(6) Moo. & M. 107, *R.* v. *Milton*; S. C. 3 C. & P. 31.
(7) 5 C. & P. 193, *Imason* v. *Cope*.
(8) 4 C. & P. 477, *Stockell* v. *Carter*.
(9) 1 M. & Rob. 160, *R.* v. *Birnie*.
(1) 3 T. R. 735, *R.* v. *Stobbs*.
(2) 10 B. & C. 445, *Harrison* v. *Hodgson*. Therefore, had the defendant demurred, he would probably have been in no better position. And note, that son assault demesne or an arrest upon process may respectively be given in evidence under the general issue.
(3) 1 Hawk. c. 62, s. 2. As to assaults upon officers, see post, sect. 4.
(4) 1 Sir Wm. Bl. 19, *R.* v. *Webb*.
(5) 2 Barnard. 27, *Anon.*; S. P.

was refused in a case of an assault with intent to extort money, the money not being obtained (1); and again, for a battery committed in Newfoundland (2); and again, for forcibly retaking a wife contrary to articles (3).

Trial.] Upon the trial of an assault, as in other cases, the defendant must perform the terms of his recognizance. So that, if it be to appear, enter, and try his traverse, although he may withdraw his plea of not guilty, and plead guilty, or may give the prosecutor ten days' notice of his intention to try, he cannot otherwise claim to try his traverse at the gaol delivery, unless he *enter* his traverse. And where the defendant neglected to take this step, it was held, that he ought not to have been tried (4).

It was formerly received for law, that a party might indict for an assault and proceed to judgment although an action were depending at the same time for the assault (5). For the fine to the king and the damages to the party are quite distinct in their nature (6). And, accordingly the court of common pleas refused to make a rule upon the prosecutor under such circumstances to put him to his election, saying, they must then make a general rule, that parties must always make their election (7).

But the law upon this subject appears to have undergone some revision. For in a far more modern case, although no determination was come to as to the matter of election, the court of king's bench refused to pass any judgment upon a defendant who was brought up after a conviction for an assault, because it appeared that an action was still depending in respect of the same matter. And the offer of the prosecutor to discontinue the action did not alter the resolution of the court. The defendant, however, having indulged in violent language towards the prosecutor in addressing the court, was ordered to find security for his good behaviour (8).

So again, where the prosecutor had taken out a warrant against the defendant for an assault, the court would not grant him a criminal information, although he was ready to agree that the abandonment of the proceedings on the warrant should form part of the rule (9). But where the defendant admitted the assault in the presence of a policeman, who thereupon took him into custody, the court granted an information although the prosecutor declined to press the charge before the magistrate (10).

A person may be charged in the same indictment with two assaults, although each assault is, in itself, a distinct offence.

id. 138, *R.* v. *Lynn*; see also id. 198, *Anon.* Assault on a farmer by a magistrate, and information granted.

(1) 2 Barnard. 87, *Anon.*

(2) 7 Mod. 193, *R.* v. *Hooker*: see also 8 Mod. 283, *R.* v. *Sir C. Holloway*, a rule to show cause granted against a boy of 15, for assaulting his master.

(3) 1 Sir Wm. Bl. 18, *R.* v. *Lord Vane.*

(4) 1 Leach, 111, *R.* v. *Fry*; see also C. & P. 109, *R.* v. *Featherstonhaugh.*

(5) 1 Hawk. c. 62, s. 4.

(6) 1 B. & P. 191.

(7) Ib. *Jones* v. *Clay.*

(8) 4 Ad. & El. 575, *R.* v. *O'Gorman Mahon.*

(9) 4 Ad. & El. 576, *Ex parte —— Gent.* one, &c.

(10) 8 Dowl. P. C. 476, *R.* v. *Gwilts.*

Such, at least, was the opinion of the court upon an indictment for publishing two distinct libels upon different persons, and the case of *R.* v. *Clendon* (5) where judgment upon a conviction for assaulting *two* persons was arrested, was denied to be law (6). And it is no objection to the finding of a grand jury, that they have rejected that portion of a bill which related to a riot, and found the residue which charged an assault (7).

It sometimes happens that there are cross indictments in respect of the same transaction. When they come on to be tried as traverses, the judge will direct the jury to be sworn in both, and the counsel for the prosecution of that which is first entered will open his case, and call his witnesses. The counsel on the other side will then do the same, and there will not be any reply by either counsel (8).

The words, "against the form of the statute," in an indictment for an assault at common law, have been held to be mere surplusage (9).

Verdict.] A verdict of guilty comprehends, of course, both assault and battery, if both be laid. But should the assault be ill laid, and the verdict pass against the defendant for battery, he will have been properly convicted of both, because every battery includes an assault (1).

Judgment.] The judgment for an assault at common law is fine and imprisonment at the discretion of the court, and surety of the peace may likewise be a part of the sentence (2), although the defendant is occasionally allowed, by a sort of extrajudicial permission to speak with the prosecutor, and thus obtain a mitigation of the fine (3). But an extensive power over assaults was given to justices by the statute 9 Geo. 4, c. 31. By sect. 27 of that act, two magistrates are empowered to adjudicate upon unlawful assaults and batteries unaccompanied by aggravation, and to fine the offender to the amount of 5*l.*, with costs, if they shall see fit. In default of payment, the justices may imprison the offender for two calendar months. But if they shall deem the offence not to have been proved, or shall find the assault and battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith certify to that effect, and shall deliver the certificate to the party against whom the complaint was preferred (4). Then, by sect. 28, The party in possession of the certificate, shall

(5) 2 Str. 870; Ld. Raym. 1572; S. C. 1 Barnard. 337.
(6) 2 Burr. 984; Lofft. 271.
(7) Cowp. 325, *R.* v. *Fieldhouse.*
(8) 8 C. & P. 290, *R.* v. *Wanklyn*; Ibid. S. P. *R.* v. *Vaughan.*
(9) Leach, 585, *R.* v. *Mathews.*
(1) 1 Hawk. c. 62, s. 1; see post. *R.* v. *Powell*, 2 B. & Adol. 75.
(2) East, P. C. 406.
(3) See 1 Russ. C. & M. 611.
(4) Which must be specially pleaded, 6 C. & P. 427, *Harding* v. *King*. The certificate must be given when the complaint is dismissed, or so immediately afterwards as that the magistrates must, of necessity, bear in mind the facts of the case.

be released from all proceedings, whether civil or criminal, for the same cause. And if the defendant in the assault shall have been convicted, and shall have paid the fine, or suffered the imprisonment, he is in like manner discharged from all further proceedings in respect of that offence.

Certain exceptions are introduced in sect. 29, which limit the jurisdiction of the justices. Where the assault is accompanied by any attempt to commit felony, or where the justices shall consider the case to be a fit subject for prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with it as they would have done before the passing of the act. And there is likewise a proviso forbidding them from hearing and determining any case where any question shall arise as to the title to any lands, &c. or any interest therein, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice (5).

Assaults with intent to commit a Rape, or other Offence of a private Nature.] As soon as it becomes manifest that the assault complained of was accompanied by some act which is inconsistent with an ordinary attack upon the person, a more serious inquiry and a heavier punishment are, upon most occasions, the consequence. Thus, to take an instance in which the nature of the intent is very apparent, as soon as the offender is discovered to have contemplated an outrage upon chastity, the intent to commit a common assault is, in a great measure, negatived, and the magistrates will find themselves bound to commit the party upon the more important charge. They are, however, the constituted judges of the evidence, and if they conclude that a common assault only has been committed, the court will not entertain an affidavit on behalf of the defendant, that the point at issue really involved a more aggravated offence. A person was charged with accosting a police officer in Hyde-park, and laying hands on him indecently so as to raise the presumption that a very gross crime was meditated. The justices convicted the party of a common assault, and fined him to the full amount. It was then contended for the defendant, that a certiorari ought to issue to remove this conviction, it being impossible that the legislature could have intended such grave charges as the present to be tried without the intervention of a jury. But the court denied the motion.

The defendant cannot avail himself of the protection given by the statute, without the certificate.

To an action of assault the defendant pleaded a certificate: replication, that he did not obtain it in manner and form as his plea alleged. It was held, that the issue raised was sufficient to embrace the question, whether the certificate should have been granted forthwith, or upon application. Arn. & Hodges, 40, *R.* v. *Robinson*. Coleridge, J., valde dub. Whether the magistrates can refuse to give the certificate.—*Qu?*

(5) All abettors are principals, 9 Geo. 4, c. 31, s. 31. If there be surety for the good behaviour, and the recognitors be proceeded against for a breach of the peace by the principal, scire facias and not an indictment is the proper remedy. Tho. Raym. 196, *R.* v. *More*.

The conviction showed a jurisdiction on the face of it, and the justices negatived the attempt to commit felony by their decision. From the deposition before the court, it was not clear that the act complained of, admitting the statement to be correct, were such as showed a felonious intention. "The conduct may have been in the highest degree indecent, and yet may have fallen short of a felonious attempt" (6). Again, if there be a probability that the proof of an unnatural crime will not be borne out, it is usual to confine the charge to an intent; and the soliciting another to commit such an abomination is of itself indictable (7). The evidence to prove these cases of unlawful attempts is of the same character as is required to substantiate the higher crime. But if the testimony goes too far, so as to establish a felonious act, the defendant must be acquitted, for the misdemeanor is merged in the felony (8).

Liberties used towards the woman upon a former occasion are not evidence unless there was a manifest intention to persevere during the prior attack (9). But the previous conduct of the prosecutrix may be made the subject of inquiry by general evidence. And she may, on her part, repel such evidence by adverse testimony. And it may be elicited from her in cross-examination, that she has been guilty of specific offences, as stealing money from her master. To which she may reply by proving that her character has since been good; for example, that, on leaving the refuge for the destitute, she had been presented with a reward for good behaviour (1). But *evidence* cannot be allowed to show that she has been guilty of specific acts of impropriety. In the above case likewise the husband was called for the purpose of proving that the prosecutrix had complained to him soon after the assault, and also to describe her state and appearance at the time; and he was allowed to do this, but the particulars of the complaint were declared by Holroyd, J., to be no evidence as to the truth of her statement (2).

So a complaint to a female relation immediately after the assault was of course admitted in evidence, but the particulars of the complaint were rejected (3).

No assault can be alleged against a person for attempting to violate a child between ten and twelve, if she consent; but the party may be indicted for a misdemeanor under 9 Geo. 4, c. 31, s. 17. Such a party cannot be convicted even of a common assault (4). Whereas consent is immaterial if the child be under ten years (5).

An indictment for an attempt to violate a woman states, that

(6) 1 B. & Adol. 382, *Anon.*; S. C. Lew. 16, Nom. *ex parte Virgil.*
(7) 1 Russ. C. M. 568.
(8) East, P. C. 411, *Harmwood's* C.
(9) 7 C. & P. 318, *Lloyd's* C.
(1) 2 Stark. 241, *R.* v. *Clarke.*
(2) 2 Stark. 242.
(3) 2 Moo. & Rob. 212, *Walker's* C. Parke, B., observing, that he could never understand the reason for this usage. The counsel of the defendant is left under such circumstances to draw out those particulars by a cross-examination.
(4) 2 Moo. C. C. 123, *Martin's* C.; S. C. 9 C. & P. 213, 215.
(5) Lew. C. C. 15, *Toon's* C.

the defendant made an assault upon the prosecutrix, and did beat, wound, and ill-treat her, with intent feloniously and against her will to ravish her. A charge of an attempt to assault by soliciting and inducing the prosecutor to commit a crime, was held so far to be well-laid, but it omitted to allege that the prosecutrix was between the ages of ten and twelve, and Patteson, J., then held that it was invalid (6).

Verdict and Judgment.] The jury upon an indictment for the compound assault may find a verdict of guilty upon either count, if they see fit. So that they may acquit the defendant of the intent to commit the aggravated offence, and pronounce him guilty of the common assault. The words, "misdemeanor and offence," have been held to reach over both the usual counts. The first count stated an assault with intent to ravish, and the second was for the common assault. The verdict was—"guilty of the misdemeanor and offence in the said indictment specified,"—and the judgment proceeded accordingly under the 25th section of the 9 Geo. 4, c. 31, for an attempt to commit felony, part of the sentence being hard labour. A writ of error was, however, brought, and it was argued, that the verdict left the question in doubt whether the jury had convicted the defendant upon the count which warranted the judgment. It might be equally applicable to the second count, which would not warrant the punishment of hard labour. But the court held, that the word "misdemeanor" was *nomen collectivum*, and that the finding of the jury was, in effect, that he was guilty of the whole matter charged in the indictment. (7) And by Taunton, J., "I am by no means clear that two offences are charged in the indictment." The charge in the second count is that the defendant committed not another assault, but an assault, and "this second count would be borne out by the same evidence as the first, though not *é converso*." (8) And by Lord Tenterden,—"I agree, if the words 'misdemeanor and offence' must be understood as relating to one only of the matters charged, the judgment cannot be supported." (9) The sentence for this crime is imprisonment, with or without hard labour, in the common gaol or house of correction for a term not exceeding two years; and the court may also fine the offender, and require him to find sureties for keeping the peace. (1)

3. *Other Assaults, aggravated by the unlawful Intention by which they are accompanied.*] Some other assaults may be mentioned in this place, where the intent causes the outrage to be viewed in an aggravated light. As where the assault is committed in pursuance of a conspiracy to raise the rate of wages. (2) The judgment is fine and imprisonment, as in the case of an assault

(6) 6 C. & P. 368, *Butler's* C.
(7) 2 B. & Adol. 75, *R.* v. *Powell.*
(8) Id. 78.
(9) Id. 77.
(1) 9 Geo. 4, c. 31, s. 25. Assault with intent to commit felony. All abettors are principals, id. s. 31. As to the admiralty jurisdiction, see 7 & 8 Geo. 4, c. 28, s. 12.
(2) 9 Geo. 4, c. 31, s. 25.

with intent to commit felony. (3) So, if any person shall unlawfully and with force hinder any seaman, &c. from working at his trade, or shall beat, wound, or use any violence with intent to deter him from working, he shall be liable, upon conviction before two justices, to be imprisoned and kept to hard labour for any term not exceeding three calendar months. But persons thus punished shall not be punished for the same offence by virtue of any other law. (4) The like punishment is inflicted by the same section, upon persons who shall beat, wound, or use any violence to any person with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market or other place, or shall in like manner ill treat any person having the care or charge of any wheat or other grain, flour, &c. whilst on its way to or from any city, market town or other place, with intent to stop the conveyance of the same.

By 9 Geo. 4, c. 31, s. 30, if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him as are in a condition to return when he shall be ready to proceed on his homeward bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such term as the court shall award; and all such offences may be prosecuted by indictment or by information, at the suit of his majesty's attorney general, in the court of king's bench, and may be alleged in the indictment or information to have been committed at Westminster, in the county of Middlesex, and the said court is hereby authorized to issue one or more commissions, if necessary, for the examination of witnesses abroad, and the depositions taken under the same shall be received in evidence on the trial of every such indictment or information (5).

A late act for consolidating the laws relating to merchant seamen gives a more full remedy. By 5 & 6 Will. 4, c. 19, s. 40, after premising that great mischiefs have arisen from masters of merchant ships leaving seamen in foreign parts, who have been thus reduced to distress, and thereby tempted to become pirates, or otherwise misconduct themselves, and it is expedient to amend and enlarge the law in this behalf, it is therefore further enacted, that if any master of a ship belonging to any subject of the United Kingdom shall force on shore and leave behind, or shall otherwise wilfully and wrongfully leave behind, on shore or at sea, in any place in or out of his majesty's dominions, any person belonging to his crew before the return to or arrival of such ship in the United Kingdom, or before the completion of the voyage or voyages for which such person shall have been engaged, whether such person shall have formed part of the original crew or not, every person so offending shall be deemed guilty of a misdemeanor, and shall suffer

(3) Ante, p. 188.
(4) 9 Geo. 4, c. 31, s. 26.
(5) All abettors are principals, sect. 31 of the same statute. As to the admiralty jurisdiction, see 7 & 8 Geo. 4, c. 28, s. 12.

such punishment by fine or imprisonment, or both, as to the court before which he shall be convicted shall seem meet, and the said offence may be prosecuted by information, at the suit of the attorney-general, on behalf of his majesty, or by indictment or other proceeding in any court having criminal jurisdiction in his majesty's dominions at home or abroad, where such master or other person as aforesaid shall happen to be, although the place where the offence may be therein averred to have been committed, (which averment is hereby required to be substantially according to the fact) shall appear to be out of the ordinary local jurisdiction of such court, and such court is hereby authorized to issue a commission or commissions for the examination of any witnesses who may be absent, or out of the jurisdiction of the court, and at the trial the depositions taken under such commission or commissions, if such witnesses shall be then absent, shall be received in evidence (6).

By 31 Car. 2, c. 2, s. 12 (habeas corpus act), no subject of this realm, being an inhabitant or resident of England, Wales, or Berwick-upon-Tweed shall be sent prisoner into Scotland, &c., or into any of his majesty's dominions, upon pain of an action for false imprisonment and damages, not less than 500*l.*, with triple costs; the pains of præmunire are awarded against such as frame, &c., any warrant connected with such imprisonment or sending away, and they are declared incapable of any pardon from the king. By sect. 17, prosecutions, if the party grieved be not in prison, must be within two years after the offence, and if he be in prison, then within two years after his death, or delivery out of prison, which shall first happen.

Kidnapping is also a misdemeanor, of an aggravated description, at common law. This offence is the forcible abduction or stealing and carrying away of any person, and sending him from his own country into some other, or to parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity (7). It is punishable with fine and imprisonment (8).

Sect. IV.—*Of Assaults aggravated by reason of the Place where, or the Quality of the Person upon whom they are committed.*

Place.] It is said that a battery in the king's court was formerly punished with death (9). But it afterwards came to be recognized for law, that a blow inflicted there would only draw upon the offender the penalties of forfeiture of lands and goods, and loss of the right hand, together with perpetual imprisonment. And a similar judgment awaited the person who drew a weapon upon any judge or justice, though he struck not. Whilst on the other hand, if the offender merely made an assault upon a juror

(6) As to the admiralty jurisdiction, see 7 & 8 Geo. 4, c. 28, s. 12.
(7) 1 Russ. C. & M. 582.
(8) East, P. C. 430.
(9) 3 Inst. 140.

or private person, but did not strike, he was not subjected to so severe a retribution (1). But the indictment must lay the offence as being done *coram domino rege* (2). And it is not an excuse to allege that the defendant was first assaulted (3). The custom of striking off the hand, at one period not uncommon, has, of course, yielded to more humane considerations, and, indeed, it is most unusual at present to hear of indecorous proceedings within the view of a court of justice. But it became necessary for the attorney-general to enter a *noli prosequi*, as late as in the 39th year of Geo. 3, in a case where Lord Thanet and others endeavoured, in open court, to rescue Arthur O'Connor from the custody of the sheriff of Kent, immediately after his acquittal. The indictment laid a beating, bruising, and wounding in open court, and in the presence of the justices and commissioners, and Lord Kenyon intimated a considerable doubt whether judgment of amputation ought or not to follow the conviction of the defendants. There being counts where judgment of fine and imprisonment could be passed, without the severer sentence, the attorney-general mentioned that he had received the royal command and a warrant under the sign manual to discharge the prisoners in respect of those parts of the charge concerning which a doubt was entertained, and to pass judgment on such only as left the punishment in the discretion of the court, and judgment was given accordingly (4). It is, moreover, said, that an assault in any inferior court of justice (5), although not punishable with amputation of a member, is an offence of magnitude, and that a grievous fine should be inflicted (6).

This sentence for striking in Westminster hall, or other of the king's courts, or drawing a weapon upon a judge there, is the highest known in cases of assault, mayhem not excepted. For in the next particular, that of striking within the royal palace, blood must be shed before the same penalty of amputation accrues (7). By 33 H. 8, c. 12, s. 1, the lord great master, or lord steward shall inquire concerning all malicious strikings, by which blood is shed against the king's peace, within any palace or house where the king may happen to dwell or repair to, and by s. 7, fine and ransom, at the king's pleasure, together with perpetual imprisonment, are ordained, in addition to amputation. It will be remarked here, that not only must some blood be drawn before these severe penalties attach, but that there is not any forfeiture of lands and goods, as in the case of striking in courts of justice.

The point whether the statute extends to striking in a palace

(1) 3 Inst. 140; 1 Hawk. c. 21, s. 3. See 1 Russ. C. & M., 614, note (*u*).

(2) Cro. El. 405, *Carye's* C.; S. C. Ow. 120.

(3) 1 Lev. 106, *Bockenham's* C.; S. C. 3 Keb. 751. Although the court will bind over the prosecutor to his good behaviour if that fact appear. Ibid. See also Cro. Jac. 367; Noy. Rep. 104. But the statute respecting assaults in churchyards was repealed by 9 G. 4, c. 31.

(4) East, P. C. 408, *R.* v. *Lord Thanet* & others. See Comb. 49, *R.* v. *Earl of Devonshire*.

(5) As the court of quarter sessions, &c.

(6) 3 Inst. 141, citing cases. 12 Rep. 71; 1 Hawk. c. 21, s. 10.

(7) 3 Inst. 140; 1 Hawk. c. 21, s. 3.

in which the king is not actually resident does not seem to be settled (8); but instances of this kind of assault are most rare, and it is to be hoped that it will not become necessary to disturb a question which has so long remained dormant.

Quality of persons upon whom the assault has been committed.] The general principle upon this head of the subject is, that officers or persons in general to whom the law has confided powers for the protection of the people at large, for the collection of the revenue, the apprehension of offenders, or other purposes connected with the public interest, shall be more particularly guarded in cases of assault than others, as far as the infliction of punishment is available. It was, indeed, at one time a capital offence, under 9 Ann. c. 16, to assault a privy councillor in the execution of his office, but the act has been repealed by 9 Geo. 4, c. 31. Severe penalties were also ordained against such as should assault a clergyman (9), (and it is now an offence to arrest a clergyman upon any civil process during divine service) (1); but the statute 9 Ed. 2 above alluded to has been repealed, with many others, by the 9th Geo. 4, commonly called Lord Lansdowne's act. That statute comprehends several persons in authority within its provisions, under different circumstances. Thus, by sect. 24, "If any person shall assault, and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award."

It will be observed that a battery, as well as an assault, must (2) have been committed under this statute, in order to warrant an indictment under its provisions; for the words are assault *and* strike, and then the disjunctive *or* wound immediately follows. So that there must be such a striking as will constitute an assault, and such an assault as will amount to a battery.

Peace and Revenue Officers.] The following are included amongst the misdemeanors punishable under sect. 25:—any assault upon

(8) See 1 Hawk. c. 21, s. 2; 6 Mod. 75. By Powell. J.: Although as soon as the king enters a house, for the purpose of dwelling there, the house is within the statute, 6 Mod. 75. By Holt, C. J. It is said in Hawkins, ut supra, that the case of Burchet, for striking his keeper in the *Tower*, as mentioned in 3 Inst. 140, [he struck his keeper, and death immediately ensued] was not warranted by the record, and in 6 Mod. 76, Holt, C. J. is reported to have had the record brought into court, upon which it was found, that striking off the hand formed no part of the judgment [for murder], although, in point of fact, the hand was struck off.

(9) 9 Ed. 2, c. 3.

(1) 9 Geo. 4, c. 31, s. 3.

(2) All abettors are principals, sect. 31. As to the admiralty jurisdiction, see 7 & 8 Geo. 4, c. 28. s. 12.

a peace officer (3) or revenue officer in the execution of his duty, or upon any person acting in aid of such officer, or upon any person, with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any person for any offence for which he or they may be liable by law to be apprehended or detained. And the judgment is, that the offender may be imprisoned, with or without hard labour, for any term not exceeding two years, and may (if it be thought fit) be compelled to find sureties of the peace (4). And at common law, an attack upon any officer is a very great misdemeanor, and punishable by fine and imprisonment. The assaults above mentioned, under 9 Geo. 4, c. 31, s. 25, are moreover withdrawn from the summary jurisdiction clause, so that, if the justices become sensible of the aggravated nature of the assault, they will call upon the defendant to answer the charge at the sessions. So, with force or violence to assault or resist any excise officer, &c. in the execution of his duty in search of, or arresting persons engaged in carrying, removing, or concealing goods, is a misdemeanor under 7 & 8 Geo. 4, c. 53, ss. 40 & 43, and punishable by imprisonment, with hard labour, for three years, either in addition to, or in lieu of, any other punishment or penalty which may by law be inflicted or imposed upon the offender (5). Moreover, by force or violence, to assault, resist, &c. any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty, is made punishable with transportation for seven years, or imprisonment with hard labour for any term not exceeding three years, at the discretion of the court (6). This offence was felony under the

(3) Or special constable, 1 & 2 Will. 4, c. 41, s. 11. But the assault on the special constable may be punished by summary conviction, as well as indictment or information.

(4) Two sureties, with his own recognizance for keeping the peace, in general for twelve months, towards all the king's subjects, and the prosecutor in particular. In the case of officers of the *customs* or *excise*, by 7 & 8 G. 4, c. 53, s. 43, the trial may be *in any county in England*, and the offender may be imprisoned, with hard labour, for any term not exceeding three years, in addition to any other punishment or penalty which may by law be inflicted. It was held under the old act, 9 Geo. 2, c. 35, that a provision similar to the above related to officers in their capacity as such. So that where the defendant was convicted of a common assault upon an excise officer, and it appeared that the offence was committed in Surry, whilst the venue was laid in Middlesex, the court arrested the judgment. And it made no difference that the prosecutor was described in the count for a common assault as an excise officer. 4 T. R. 490, *R.* v. *Cartwright*.

(5) A separate penalty may be recovered against each defendant. Cowp. 610. *R.* v. *Clark* and others. Where the offence is in its nature single, and cannot be severed, there the penalty shall be only single, because, though several persons may join in committing it, it still constitutes but one offence. But where the offence is in its nature several, and where every person concerned may be separately guilty of it, then each offender is separately liable to the penalty. *Id.* 612.

(6) 3 & 4 Will. 4, c. 53, s. 61. See 7 Mod. 63, *R.* v. *Lilly*.

statute 6 Geo. 4, c. 108, s. 59. It will be noticed, that the imprisonment with hard labour is part of the sentence, and that the discretion of the court applies to the term of imprisonment.

These seem to be the chief statutes upon the subject of assaulting officers and persons in authority. And the same want of legal right which would make an officer guilty of an assault in arresting another will likewise operate to produce an acquittal in cases where the defendant is charged with this offence. Therefore, where the prosecutor, a constable belonging to the Thames police office, acting under a general warrant, endeavoured to apprehend the defendants, who thereupon drove away the officer, Lord Kenyon directed an acquittal, for there was no competent authority to make the arrest (7). In this case, there was a count for a common assault, but it will be observed, nevertheless, that that circumstance will make no difference if there be a general verdict. The defendant was indicted for an assault, false imprisonment, and rescue, but it turned out that the indictment had omitted to allege that the prosecutor was an officer of the court out of which process had issued, and it was in vain suggested that the term "serjeant-at-mace" had supplied the omission. Judgment was arrested (8); and by Lord Ellenborough, "Though the jury, in finding the defendant guilty generally upon the second count, must necessarily have included the assault, yet finding as they do the whole count, we must take it that they found the assault committed under the circumstances charged in that count" (9). So, under a warrant directed to the constables of W., a constable of W. was held not justified in executing it within the parish of D., and a verdict of not guilty was entered against the defendant (1).

It is not a defence to the charge of assaulting an officer, that an affray is likely to be the consequence of persisting in a capture. As where bailiffs endeavoured to carry a process into execution, of the regularity of which there was no doubt, and a scuffle ensued, which ended in the infliction of some injury on a woman by the bailiffs. Supposing her to have been killed, the constable took the bailiffs into custody, and did not liberate them until the next morning, when it was ascertained that the woman had recovered. The constable and his assistants being indicted for the assault and rescue, Heath J. directed the jury, if they believed the evidence, to find the defendants guilty (2). "For if one, having a competent authority, issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a command contrary to the first, for that would be to legalize confusion and disorder" (3). An officer has a right to enter a public house, if he hear a disturbance, and an assault

(7) 3 Esp. 262, *R.* v. *Lawson* and others.
(8) 5 East, 304, *R.* v. *Osmer*.
(9) Id. 308.
(1) 2 D. & R. 444, *R.* v. *Weir* and others. Had the warrant been directed to the constable by name, the case might have been different.
(2) East, P. C. 305; Anon. Exeter Sum. 1793.
(3) Id. 304. See 1 Hale, 460.

committed under such circumstances is an assault upon him in the execution of his duty (4).

Collectors of taxes are within the protection of the law upon this subject, and likewise are within the provisions of 9 Geo. 4, c. 31, s. 25. An assault upon such a revenue officer is, therefore, a serious misdemeanor. It has been held, that the arrears of assessed taxes need not be demanded from the debtor by the collector in person, and that there need not be a direct refusal of payment to the collector in person. If the demand be made by any one on behalf of the officer, and payment has been refused, either through inability or any other cause, the stat. 43 Geo. 3, c. 99, s. 33 will have been satisfied. An indictment was drawn against a defendant for assaulting a collector, and it stated that the officer held lawful possession of certain goods under a levy for a specified sum of money for arrears of assessed taxes. The prosecutor was not in a condition to prove the amount of this sum, and Lord Denman, although he thought that no sum need have been mentioned, ruled, nevertheless, that it was imperative upon the prosecutor to shew the amount of the allegation which had been introduced, especially if the debtor understood the nature of the arrears at the time of the demand (5). But the defendant was convicted on the second count, and upon a motion for a new trial, the court held that no personal demand was necessary under the statute, and that if the debtor understood what the amount of the demand was, it was not necessary to specify it, in order to support that count (6). But a collector has no right to take a constable with him when he goes to collect his rate, unless he has grounds for believing that an assault will be committed upon him, or that payment of the tax will be resisted. A collector went into the house of the defendants in order to demand a land tax, and introduced a constable. No objection was made, but afterwards, having reasonable grounds to apprehend violence, the officer brought in another constable, and upon this last person an assault was made by the defendants. The court held that the collector was justified in asking for the services of the last mentioned constable, and that the attack made upon the officer was whilst he was in the execution of his duty, and moreover, that the wrongful introduction of the first constable furnished no ground for an answer to the indictment (7). If an officer strike first, his situation will not protect him against the return of the blow. It was so held, where the mayor of Yarmouth struck a defendant, and an information was denied to the mayor (8).

(4) 6 C. & P. 136, *R.* v. *Smith* and others; 9 C. & P. 474. *R.* v. *Mabel.* The officer in this last case laid hold of the defendant without a probability that there would be a breach of the peace, and Parke, B. desired the jury to consider whether the violence used by the defendant in consequence was more than necessary to repel the policeman's assault, for if so, they should find him guilty of the common assault. The jury acquitted the party.

(5) 4 Nev. & M. 451, *R.* v. *Ford*; S. C. 2 Ad. & El. 588.

(6) 2 Ad. & El. ut supra.

(7) 3 Ad. & El. 287, *R.* v. *Clark* and another; S. C. 4 Nev. & M. 671.

(8) Cas. Temp. H. 240, *R.* v. *Symonds.*

Gamekeepers—Owners of Land, &c.] Persons who have authority to apprehend offenders taking or destroying, or in search of game, are protected by the statute, 9 Geo. 4, c. 69, s. 2. It is enacted by that clause, that where any person shall be found upon any land, committing any such offence as is hereinbefore mentioned (9), it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor, wherein such land may be situate, and also for any gamekeeper or servant of any of the persons therein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend every offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence, with any gun, cross-bow, firearms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

By sect. 4, the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction by virtue of this act, shall be commenced within twelve calendar months after the commission of the offence (1).

Sect. V.—*Of Assaults distinguished by the Legislature, on account of the Transaction during which they happen.*

In proposing this section to the notice of the reader, it might be said, that several assaults already adverted to have been contemplated and provided for by the legislature on account of the particular transaction which gave rise to them. As where parties assault their fellow workmen, in order to raise the rate of wages, &c. But these assaults, as well as others mentioned in the third

(9) That is, unlawfully taking or destroying game or rabbits in any land, whether open or inclosed, by night: or entering or being unlawfully in any land, whether open or inclosed, by night, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, sect. 1. Night is declared by sect. 12, to commence for the purposes of the act, at the first hour after sunset, and to conclude at the beginning of the last hour before sunrise. Game, by sect. 13, shall be deemed, for the purposes of the act, to include hares, pheasants, partridges, grouse or moor game, black game and bustards.

(1) See upon the subject of trespasses in search of game, and taking game, ante chap. 1, sect. 4.

section, are mainly referrible to the intention made manifest during the attack. There are again, assaults which receive their aggravation according to the place where, or the person on whom they are committed: these have been mentioned in the last section. But there is still a character of assault independent of all these, which is not perpetrated with any previous intention, nor depends either upon place or particular individuals, but which sometimes arises out of a matter illegal in itself, and especially marked with reprobation by the legislature. This is an attack upon a person in respect of money won at play, by 9 Ann. c. 15, s. 8, in case any person or persons whatsoever shall assault and beat, or challenge, or provoke to fight, any other person or persons whatsoever, upon account of any money won by gaming, playing, or betting at any of the games aforesaid (*i. e.* by s. 1, at cards, dice, tables, tennis, bowls, or other game or games whatsoever,) such person or persons assaulting and challenging upon the account aforesaid, shall, being thereof convicted upon an indictment or information, forfeit all his or their goods, chattels, and personal estate whatsoever, and be imprisoned in the common gaol of the county where such conviction shall be had, for two years. This act extends to all persons connected with the gambling transaction. So that whether the loser or the winner be the person assaulted, or vice versâ, the case is the same. And so it would be, if the friend of either party committed the assault, by reason of the money so won. But if the cause of the outrage turns out to be on account of abusive language only, the charge is negatived, and this point is sometimes proper to be left to the jury (2). At one time it was considered, (and the opinion of a very learned judge (3) sanctioned the decision,) that the assault must arise during the time of play. So that even so early as when the game had just been finished, and the defendants struck the prosecutor because he remonstrated with them for their refusal to give him an opportunity of recovering his money, Buller, J., held, that there must be an acquittal, because the assault intended by the act, was one which arose during the time of playing (4). And the learned judge added, that in the case before him, the assault sprang not from the game, but from the subsequent language of the prosecutor (5). And as far as this latter point is concerned, the ruling of Buller, J., seems to be sound, but the doctrine of confining the assault to the time of play, has been denied by the court of king's bench; although it was argued, that the object of the severe penalty was to repress violence upon the spot, "when it might be reasonably imagined that ruined men in the first paroxysm of despair, would be tempted to vent their passion in this manner" (6). The dispute in this case arose on the day after the play, and warm language passed on both sides, especially on the part of the defendant, the loser, upon which the

(2) 4 East, 179.
(3) Buller, J.
(4) East, P. C. 423, *R.* v. *Randel* and others, where the defendants were the winners.
(5) Ibid.
(6) 4 East, 178.

latter followed up his angry language by violently assaulting the prosecutor. And the court declared, that they could not concur in opinion with Buller, J., so as to restrict the statute to the continuance of the play, for, said Lord Ellenborough, " it more frequently happened, that disputes of that nature did not arise till after the play was over " (7). And the court having satisfied themselves, that Heath, J., (the judge who tried the cause,) had distinctly presented the two questions to the jury, whether the assault had arisen by reason of the ill language alone, or on account of the money lost on the previous day, the point was abandoned. It was then moved to arrest the judgment, because the verdict was general, and there being a count for a common assault, there would be inconsistent judgments, the statute prescribing a positive penalty, and the punishment for the common assault being discretionary; but this rule was likewise abandoned, and sentence was passed (8).

(7) 4 East, 178-9.

(8) Id. 174-5, *R.* v. *Darley.*

CHAPTER IV.

OF MISDEMEANORS AGAINST PUBLIC POLICY.

We propose in this chapter to treat of such misdemeanors as are not immediately prompted by the love of gain, nor conceived maliciously, and which have no direct tendency to inflict injury on the persons of individuals, but which are, nevertheless, antagonists to sound policy and morality.

These offences form a large class, and we will consider them under the respective heads of misdemeanors against public safety,—the public peace,—public health,—religion and public morals,—the public revenue,—public trade,—public economy and convenience,—and misdemeanors committed in opposition to the administration of justice.

Sect. I.—*Of Misdemeanors against Public Safety.*

Misdemeanors against the public safety, may be said to be either open or disguised. As on the one hand, when bodies of persons assemble illegally for various purposes, or, on the other, where seditious writings are published, or secret societies are organized, or unlawful oaths are administered, or dangerous advice and solicitations are offered.

First, with respect to open demonstrations against the safety of the community, a riot, a rout, and an unlawful assembly, may e..ch, according to their respective circumstances become misdemeanors against the public safety. The riot, which consists in an assemblage with an unlawful intention and a perpetration of some overt act; the rout, which is the assembling with a wrong motive, but without carrying it into execution, and the unlawful meeting, simply considered, which is a gathering with or without an original intent to do evil (1), but which may well be deemed illegal by reason of its formidable appearance, may certainly, if allowed to proceed too far, be not only subversive of the public peace of a district, but may likewise threaten the general safety. Still, inasmuch as these disturbances are in their beginnings of a private nature, (for if public and general, they would amount to high treason,) and as they do not, in the majority of cases, advance to a greater degree of annoyance than

(1) Hawkins considers that the presence of an intention to do wrong, as stated in some definitions of an unlawful assembly, is too narrow a meaning, and that the term should be extended to such meetings as may be likely to raise fears and jealousies. "For no one can foresee what may be the event of such an assembly." 1 Hawk. c. 65, s. 9; see also 3 Stark. 103, 106; 5 C. & P. 154.

a temporary injury of the public peace, we will, with the exception of unlawful assemblies, postpone the consideration of them till the next section, which treats more particularly of misdemeanors against the peace. There are other offences, however, independently of riot, which threatens the safety of the community at large. A proposition to hold a convention, a national convention, for example, is clearly illegal, for it is not possible to anticipate with certainty the peaceable result of such a design. And, therefore, where a meeting was called for the purpose of adopting preparatory measures for holding such a convention, it was held to be unlawful, and it was no good defence to allege, that the proclamation had not been read (2). This was in fact, an unlawful assembly with an original intention to do a wrongful act (3).

Tumultuous Petitioning.] A gathering of people with the design of presenting their petitions in a clamorous manner, which is called tumultuous petitioning, has likewise been declared illegal by statute. The 13 Car. 2, c. 5, reciting the mischiefs of tumultuous petitioning, enacts, that no person shall solicit or procure the getting of hands or other consent of any persons above the number of twenty to any petition to the king or the houses of parliament for alteration of matters established by law in church or state, unless the matter thereof shall have been first consented unto and ordered by three justices or by the major part of the grand jury in the county, and at the assizes or quarter sessions, or in London by the lord mayor, aldermen, and common council, and that no person shall repair to his majesty or the houses of parliament upon pretence of presenting or delivering any petition, and accompanied with excessive number of people, nor at any one time with above the number of ten persons upon pain of incurring a penalty not exceeding 100*l.*, and three months imprisonment for every offence, such offence to be prosecuted in the court of king's bench, or at the assizes or quarter sessions within six months, and proved by two credible witnesses.

But it is provided, that persons not exceeding ten in number may present any public or private grievance or complaint to any member of parliament, or to the king, for any remedy, and, moreover, the statute is not to extend to any address to his majesty by the member of either house of parliament during the sitting of parliament. This act, however, although not repealed by the bill of rights (4), is in some measure qualified by that declaration which recognizes the right of subjects to petition the king, and ordains, that all commitments and prosecutions for such petitioning shall be illegal. Nevertheless, the petition must be offered in

(2) 6 C. & P. 81, *R.* v. *Fursey*.

(3) "All persons assembled to sow sedition, and bring into contempt the constitution, are in an unlawful assembly. All persons assembled in furtherance of this object are unlawfully assembled too." By Bayley, J., in *Hunt's* case, cited 3 Stark. 103; by Holroyd. J., in *Redford* v. *Birley* and others. See 1 Ld. Keny. 108, *R.* v. *Hunt*, all persons countenancing a riot are liable to an information.

(4) Nor by any other act. Lord Mansfield, Dougl. 593.

a peaceable and orderly manner, and the two acts may then well stand together.

Military Array.] A formidable public meeting in military array, and with seditious ensigns, especially if the parties be armed with clubs and other weapons is an unlawful assembly (5). And a previous concert to disturb the peace in this manner may be charged as a conspiracy (6). In order to connect Henry Hunt with an illegal assemblage, and to verify his intentions, resolutions passed a short time since at a former meeting where he presided, and which meeting was called avowedly to forward the gathering mentioned in the indictment, were admitted in evidence, although those resolutions were passed at Smithfield in London, and the proposed meeting was to take place at Manchester (7). Again, in order to prove the general character of the meeting, evidence was likewise introduced to the effect that a number of persons had been seen in the neighbourhood practising the marching step before daybreak two days before the meeting, and that this body of men illtreated a person who saw them, compelling him, at the same time, to take an unlawful oath (8). All these matters were evidence not only to shew the nature of the congregating at that time, but also as matters of aggravation, and which is still more material, as proof in support of those counts which charged a conspiracy (9). For such an assemblage as may be calculated to inspire terror into the minds of individuals at large is of itself, and without any further overt act, a misdemeanor.

So, again, Alderson, B., in the case of Vincent, desired the jury to consider the way in which the meetings in question were held, the hour of the day when the parties met, and the language used by the persons assembled, and by those who addressed them. "I quite agree," said the learned judge, "that the alarm must not be merely such as would frighten any foolish or timid persons, but must be such as would alarm persons of reasonable firmness and courage" (1).

Drill.] Indeed, meetings for the purpose of military exercise are prohibited under a severe penalty by 60 Geo. 3, & 1 Geo. 4,

(5) 2 B. & Ald. 566, *R.* v. *Hunt*, & others.

(6) S. C.

(7) S. C.; S. P. 3 Stark. 93, in *Redford* v. *Birley* & others. And a copy of the resolutions delivered to the witness by Henry Hunt at the first meeting as and for the resolutions intended to be proposed, and corresponding with those which the witness heard read from a written paper, was admitted without producing the original; 3 B. & A. 566. And, in the same case, parol evidence of inscriptions upon banners displayed at the meeting was likewise permitted without producing the banners; S. P. 3 Stark. 96, n.

(8) 3 B. & Add. 566. Drillings which excite the alarm of an individual witnessing them are evidence to shew the general character of a confederacy; 3 Stark. 87.

(9) There was also a count for a riot.

(1) 9 C. & P. 91; 109, *R.* v. *Vincent* & others. Persons who have really been alarmed need not be called. The evidence of a constable or other person is sufficient to shew this. Id. 275, *R.* v. *Vincent* & others; see also Id. 431, *R.* v. *Neale* & others.

c. 1, unless by authority lawfully had from the king, or the lieutenant, or two justices of a county or riding, &c. And all persons present at such meetings for the purpose of training or drilling others, or who shall train or drill others, or aid or assist therein, shall be liable to be transported for seven years, or be imprisoned for a term not exceeding two years. And the parties who are drilled, or who are present for that purpose may be fined and imprisoned for a term not exceeding two years (2). The appearance of bodies of men marching along the road, and expressions used by them as to the drill, are evidence to shew that they were proceeding to a given spot in order to learn the military exercise (3). So, where a witness was called to prove that he was asked by a party of men to join them as well as declarations on the part of some of these persons, Holroyd, J., held that he might give evidence to that effect, because the character of the transaction would appear from such conduct (4).

Yet, a man may "drill for a mere innocent purpose, as children at schools are taught, instead of being with a dancing master to learn to walk; yet, if the object is to overawe the government, that object is high treason" (5). And, as in the case of the man who hired a boat with the intention of embarking in order to assist Louis XIV. in his attempt to dethrone William III., a bare intent to commit treason is a high misdemeanor against the public safety (6). "Any preparation to assist the king's enemies is a prejudice to the public, and an offence at common law" (7).

Foreign Enlistment.] The subject of foreign enlistment may be mentioned here, since it might be inconvenient for an unrestricted enlistment to take place in foreign service, although the provisions of the statute are not very rigidly enforced. The act of 59 Geo. 3, c. 69, s. 2, ordains, that no natural born subject shall accept any commission, or serve as an officer, or enter himself to serve as a soldier, or to be engaged in any warlike operation on the behalf of any foreign state without a licence from the crown. The section goes on to include the naval service within these provisions. And again, a similar prohibition extends to such as shall go abroad with the intent of enlisting either as soldiers or sailors, although no enlisting money or reward shall be actually paid, and likewise to persons hiring others for such services, or endeavouring so to do, whether any money or reward shall have been paid or not.

By sect. 7 no person shall equip or furnish any vessel for the service of a foreign prince as a transport or store ship, or a cruiser, against any state with the inhabitants of whom his majesty shall not be at war, nor shall he issue any commission with the like

(2) The prosecution for offences against this act must be within six months after the commission of the misdemeanors.

(3) 3 Stark. 85, in *Redford* v. *Birley* & others.

(4) Id. 87. The rulings of Holroyd, J., on these points of evidence, were subsequently confirmed by the court of king's bench; 3 Stark. 112, note, et seq.

(5) Id. 105, by Holroyd, J.

(6) 5 Mod. 207, *R.* v. *Cowper*. The defendant was fined 100 marks, and committed till paid; S. C. Skin. 637.

(7) Id. 208. Per Cur.

intent, unless in each case the licence of the crown shall be first had. And by sect. 8, it is forbidden to add to the number of guns of any foreign ship of war upon her arrival in any of the king's dominions, or to change those on board for other guns, or to add any equipment, or to increase the warlike force of such ship. And the offender in any one of the above cases shall suffer fine and imprisonment, or both, at the discretion of the court. It may be remarked too, that this act of enlisting without leave into the service of a foreign power is a high misdemeanor at common law. And so is disobedience to the royal mandate directing a subject to return home (8).

Disguised Attacks upon the Public Safety—Illegal Societies—Unlawful Oaths.] However, there are covert attempts to interrupt the welfare of the community, as well as open demonstrations. Thus, any private company of persons, or secret society having objects inconsistent with the safety of the commonwealth, are deemed to be unlawful. So it would be if a party of men were to meet for the purpose of taking oaths for ends incompatible with the tranquillity of the country at large, as for the redress of supposed grievances, &c. Such conduct is a misdemeanor at common law. But about the years 1799 and 1819, several societies occasioned so much apprehension to the governments of those days as to induce them to apply for aid to the legislature. And so particular was the parliament thus appealed to, to give powers sufficiently full, that places devoted to lectures, debates, or reading, where money or any other valuable thing was received from the persons admitted, were included within the new provisions as places requiring scrutiny. And certain societies were declared absolutely illegal, and suppressed by the law. Such as societies of united Englishmen, united Scotchmen, united Irishmen, &c. (9). So, again, certain societies or clubs which were in the habit of allowing unlawful oaths to be mutually taken, and of subscribing to illegal tests and declarations, and of corresponding with other clubs and societies in order to increase the general body of members, were likewise declared to be absolutely suppressed (1). Spencean societies and clubs (2) were also placed under a similar interdict by the same section, as being unlawful combinations and confederacies against the government. The second section of the statute 39 Geo. 3, c. 79, condemns generally all societies where the members take unlawful oaths and engagements, or where there exists secrecy either as to the officers or members of the society, or where there are branch or corresponding societies. And the 25th section of 57 Geo. 3, c. 19, likewise contains several provisions against societies taking unlawful oaths, or tests, whether the assent be by words, signs, or otherwise, and includes all aiders

(8) East, P. C. 81.
(9) 39 Geo. 3, c. 79, s. 1.
(1) 57 Geo. 3, c. 19, s. 24.
(2) Having for their object the confiscation and division of the land, and the extinction of the funded property of the kingdom. A very dangerous and ignorant political heresy.

and abettors within its enactments. And every oath or engagement which may be deemed to be unlawful within the statute 39 Geo. 3, c. 79, or the statute 52 Geo. 3, c. 104, is included within this act of 57 Geo. 3.

Again, by 57 Geo. 3, c. 19, s. 28, any person knowingly permitting any meeting of such a society or club at his house, or at any place in his possession or occupation is declared liable to a forfeiture of 5*l.* for the first offence (3), and to be prosecuted under 39 Geo. 3, c. 79, for an unlawful combination in respect of every subsequent offence. And if such meeting be held at a house licensed for the sale of liquors, two justices, upon proof to that effect on oath, may adjudge the licence to be forfeited (4).

The 39 Geo. 3, c. 79, s. 15 (5), enacts, that all places used for lectures, debates, or reading, where any money or other valuable thing, or any ticket may be received for admission, whether under the pretence of paying for refreshment or otherwise, shall be deemed disorderly houses, unless they shall have been licensed by two justices (6) at a special session held for the purpose. And if admittance to such a place so licensed be refused to two justices demanding admittance, it shall still be a disorderly place, notwithstanding the licence. And further, under sect. 15, one justice only may demand admittance to an unlicenced house, if he shall have reason by information on oath, to suspect that the house is used contrary to the act, and if admittance be refused, the place shall be deemed disorderly. By sect. 16, any person appearing as master, or as having the management of any such place, shall, although he be not the real owner or occupier, be deemed to be a person by whom the same is opened, or used, and liable to be sued or prosecuted accordingly.

And lastly, by 57 Geo. 3, c. 19, s. 23, no person shall convene, nor give notice for that purpose, any meeting consisting of more than fifty persons, nor shall any number of persons exceeding fifty meet in any street, square, or open place, in the city or liberties of Westminster, or county of Middlesex, within one mile from the gate of Westminster hall (except such parts of the parish of St. Paul, Covent Garden, as are within such distance) for the purpose of considering or preparing any petition for the alteration of matters in church or state, on any day on which the two houses, or either house of parliament shall meet and sit, nor on any day on

(3) To be recovered before a justice by summary conviction, sect. 30. And the prosecution to be within three calendar months, Id. There is not any appeal clause. See as to the application of the penalty and other matters; sect. 31, &c.

(4) 57 Geo. 3, c. 19, s. 29.

(5) See also 36 Geo. 3, c. 8, upon which this part of 39 Geo, 3, c. 79, is founded.

(6) Under sect. 18. Which licence may be revoked at a general sessions, and any two justices may declare the licence forfeited if it be proved on oath before them that such a place is used for lectures or discussions of a seditious or immoral tendency, or that books of such a nature are kept there, and delivered to be read; sect. 20, Every house licensed for the sale of liquors shall be deemed to be a house licensed for reading within the act, but two or more justices may declare the licence to be forfeited, if it be proved on oath before them, that seditious or immoral publications are distributed there for the purpose of being read; sect. 21.

which the courts shall sit in Westminster hall, upon pain of being guilty of an unlawful assembly. Any meeting for the election of members of parliament is excepted, and persons attending upon either house of parliament, or any of the courts are likewise excluded (7).

Penalties.—Judgment.] Certain penalties and punishments are prescribed by these respective statutes for disobedience to their ordinances. First, with reference to such persons as may be guilty of an unlawful combination and confederacy, they may either be convicted in a summary manner before one or more justices, &c., and fined 20*l.*, or may be committed for three calendar months. And should the justice decide upon fining the offender, he may be committed in like manner in case of non-payment, or want of sufficient distress. But the party may be proceeded against by indictment, and if that course be pursued, he may, upon conviction, be transported for seven years, or imprisoned for any time not exceeding two years, and every such offender so transported shall be liable to all laws concerning persons ordered to be transported (8). However, the person cannot be doubly punished. So that summary conviction may be pleaded in bar of an indictment, and a conviction may be shewn to the justice as a discharge against any proceedings before him (9). And persons may be prosecuted by indictment, independently of the act, if thought fit, for any offence, although it should come within the meaning of the act, a conviction or acquittal being the only legal discharge for such an offence (1). By sect. 9 the justice may mitigate the punishment, so that it be not reduced below one-third either of the fine or imprisonment (2).

Similar provisions are enacted by 57 Geo. 3, c. 19, which declares that certain societies shall be obnoxious to the punishment ordained against unlawful assemblies by the stat. 39 Geo. 3, c. 79 (3).

By 57 Geo. 3, c. 19, s. 37, proceedings may be stayed by the attorney-general, or the lord advocate of Scotland, and in case of any judgment or conviction, one of the secretaries of state may mitigate the fine, or remit it, or stay the execution of such judgment or conviction.

Again, the forfeiture for opening places unlicensed for lectures,

(7) See also 57 Geo. 3, c. 19; 60 Geo. 3 & 1 Geo. 4, c. 6, containing several enactments concerning assemblies which are supposed to have expired; 1 Russ. C. M. 260. See also the Irish acts 33 Geo. 3, c. 29; 4 Geo. 4, c. 87. And by 11 Geo. 4 & 1 Will. 4, c. 73, s. 1, the sentence of banishment ordained by 60 Geo. 3, for the second offence of publishing a blasphemous or seditious libel is abolished.

(8) 39 Geo. 3, c. 79, s. 8.

(9) 9 Geo. 3, c. 79, s. 10.

(1) Id. s. 11.

(2) By sect. 34, prosecutions must be commenced within three months after the commission of the offence.

(3) See sections 35, 36 of the act. And this 36th section exempts persons from prosecution under the act who have not acted as members of an illegal society after the passing of the act, and then the clause reserves a form of proceeding otherwise than under the act, although the offence might happen to be within its meaning.

&c., under 39 Geo. 3, c. 79, s. 15, or using the same, is 100*l.* for each offence of opening or using. And a fine of 20*l.* is awarded against all persons conducting the proceedings, debating, or furnishing books, &c.; likewise against every person giving or receiving money, &c., or tickets for admission with a guilty knowledge. The prosecution must be within three months after the commission of the offence (4).

Exceptions.] We have already intimated an exception in favour of election meetings and attendance on business in the case of holding meetings within a mile of Westminster hall. There are also other exceptions to the general law of illegal meetings and confederacies, and disorderly houses of unlicensed lecturing. Freemasons' lodges—provided there be a certificate and registry of their being held as such—are excepted out of the 39 Geo. 3, c. 79 (5). Unless, indeed, after complaint made upon oath that the meetings of any lodge are likely to be injurious to the public peace and good order, the justices at a general sessions shall order the discontinuance of such meetings, in which case the assembly will be deemed unlawful like the rest. Freemasons are likewise protected by 57 Geo. 3, c. 19, s. 26, provided that the regulations of 39 Geo. 3, c. 79, be complied with.

Meetings of Quakers, and of societies of a religious or charitable nature only, and where no other matter or business is discussed are likewise excepted by this clause. And sect. 27 exempts these same meetings of Quakers, &c., from the provisions of 37 Geo. 3, c. 79, concerning divisions, or branch societies.

The exceptions as to lectures are those delivered in the universities by members, and such as are delivered in the halls of the inns of court by persons authorized, and payments to schoolmasters are not to be deemed payments for admission to lectures, within the act (6).

Lastly, with respect to the unlawful oaths, the act of 37 Geo. 3, c. 79, was declared not to extend to declarations approved by two justices, and registered with the clerk of the peace (7); but since the statute 5 & 6 Will. 4, c. 62, s. 13, which abolishes voluntary oaths before justices, it is doubtful whether these exceptions are now of much interest. Unlawful oaths, it may be remarked, are highly improper at common law, and they are in that view also the subjects of misdemeanor (8).

Persuasion to Desert.] Again, the offence of persuading soldiers to desert has been visited by penalties and other punishment. The stat. 1 Geo. 1, c. 47, enacted, that if any person (other than enlisted soldiers, against whom a sufficient legal remedy is already provided) shall (1) persuade or procure any soldier to desert he shall forfeit 40*l.* to any informer, or if he has not property to that

(4) By sect. 34.
(5) By sect. 5.
(6) 39 Geo. 3, c. 79, s. 22.
(7) Sect. 3, and also 57 Geo. 3, c. 19, s. 26.
(8) As to unlawful oaths in trade, see post, sect. 6.
(1) In Great Britain, Ireland, Jersey, or Guernsey.

amount, or if it be thought fit to prosecute him for a misdemeanor by reason of the heinous circumstances of the case, he shall be imprisoned for a term not exceeding six months (2). The court of king's bench is the proper court to award judgment in this case, although the words of the act, "court before which the said conviction shall be made," might seem to point at the assizes (3). By the mutiny act, every person who shall in any part of her Majesty's dominions, directly or indirectly persuade any soldier to desert shall suffer such punishment by fine or imprisonment, or both, as the court before which the conviction may take place shall adjudge, and every person who shall assist any deserter, knowing him to be such, in deserting or concealing himself, shall forfeit for every such offence the sum of 20*l*. Similar provisions are to found in the marine mutiny act.

Libels and Slander.] Seditious libels are also indirect means by which the general tranquillity is sometimes menaced. These publications may be against the monarch, or either house of parliament, or the constitution and government, or the administration of justice. And as it certainly tends to promote an unkindly feeling between two countries, the result of which might be hostile if the ruler of the one were to be at the mercy of a libeller in the other state, it is likewise a seditious act to utter such a publication with reference to a foreign potentate (4). To write against the person or government of the king is, therefore, a libel; for by lessening him in the esteem of his subjects such an act may weaken his government or raise jealousies between him and his people (5). Thus falsely to assert that the monarch is insane is clearly libellous, and to add to the statement that it proceeds from authority is, if untrue, an aggravation of the offence, and the defendant must take upon himself the charge of proving that authority to the satisfaction of the jury (6). And slander to that effect would likewise be a high misdemeanor. And so again, all words tending to vilify the sovereign are of themselves punishable (7), although they

(2) And under the stat. 1 Geo. 1, c. 47, be set in the pillory. But the pillory has been abolished by 56 Geo. 3, c. 138.

(3) 16 East, 404, *R.* v. *Read*, and before the abolition of the pillory, the court felt themselves bound to add that sentence to the imprisonment, S. C.

(4) See 1 Russ. C. & M. 209. By 1 Eliz. c. 1, ss. 27 & 28, the first offence of affirming by word or deed the pre-eminence of any foreign prince or of doing anything towards the maintenance of such pre-eminence, or abetting or counselling the same is punishable with forfeiture of goods and chattels both real and personal, and if the offender be not worth more than 20*l*. he shall, moreover suffer one year's imprisonment.

(5) See 4 Com. 123; Cro. Car. 117; case of *Pine*; see Id. 117, 127; 12 Mod. 311; *R.* v. *Lawrence*.

(6) 2 B. & C. 259; *R.* v. *Harvey* & another. Supposing the matters of the libel to be untrue, and that the authority predicated were proved, the character of untruth only would belong to it, and not that of falsehood or criminal untruth. Id. 264, Bayley, J.

(7) East, P. C. 117; as "Damn the Queen," Gilb. Ca. 57, *R.* v. *Smith*, defendant fined 30 marks. See also 1 Sir Wm. Bl. 37, *R.* v. *Whitmore* & another. Indeed, there is one case where it was held that a treatise on hereditary right constituted a libel, though it contained no reflection upon the existing government. 2 Str. 789, *R.* v. *Bedford*, cited.

be spoken of a dead monarch (8). *A fortiori*, if they were to go the length of denying his right to the crown, even in common or unadvised discourse (9). And there is an old statute which punishes the tellers or publishers of false news or tales, "whereby discord, occasion of discord or slander, may grow between the king and his people, or the great men of the realm," with imprisonment until they shall bring into the court the first author of the tale (1). These principles, however, do not extend so far as to shut out fair criticism upon the measures or policy of a sovereign. It may be competent for a writer or speaker to allege that the king has taken an erroneous view of a question, whether foreign or domestic, provided there be a careful abstinence from insinuating that the mistake has proceeded from partial or corrupt views, or with an intention to pursue or oppress any individual or class of men. Where the defendants were charged with a libel in the *Morning Chronicle*, which contained some equivocal expressions, Lord Ellenborough thought it right to leave the matter to the jury in the light we have just mentioned, and they acquitted the defendants (2). In this case also, it was permitted to the defendants to read extracts from another part of the same paper, where the monarch was made the subject of absolute praise, seeing that these extracts would shew the intention and mind of the defendant with reference to the specific paragraphs presented to the jury (3). So again, the case of the seven bishops shews that a petition to the king, praying that he would not insist upon obedience to an order which parliament had frequently declared to be illegal (4), cannot be viewed in the light of a libel (5). A petition to either house of parliament, respectfully worded, comes within the same rule.

House of Commons.] Observations, again, calculated to bring the house of commons into contempt are libels, and "it seems," says Mr. Serjt. Russell, "rather to have been the inclination of parliament in modern times to direct prosecutions for such offences in the courts of common law, than to revive the exercise of their own extensive privileges" (6). Upon one occasion the jury acquitted the defendant who had written these words: "That the king's government might go on if the lords and commons were lopped off," on the ground of their being metaphorical expressions (7).

Government and Constitution.] The government and constitution are within the especial protection of the law, it being sur-

(8) 3 Salk. 198, *R.* v. *Tayler*. S. C. Ld. R. 879.

(9) East, P. C. 119.

(1) 3 Edw. 1, c. 34; 2 Ric. 2, stat. 1, c. 5; 12 Ric. 2, c. 11; See 12 Rep. 132; *Earl of Northampton's* C.

(2) 2 Campb. 398; *R.* v. *Lambert* & another.

(3) Id. 399, 400.

(4) The dispensing power.

(5) 12 St. Tr. 183; case of the seven bishops.

(6) 1 Russ. C. & M. 223. See also 2 Barnard, 293, *R.* v. *Rayner*; *R.* v. *Owen*; *R.* v. *Stockdale*; *R.* v. *Reeves*; cited in 1 Russ. 223, note (q).

(7) *R.* v. *Reeves*, 1 Russ. ut supra; S. C. Peake Add. Ca. 84.

mised, that any considerable revolution in the system so long recognized would highly endanger the public tranquillity. To endeavour to possess the people with an idea that the government is corruptly administered, as a government, is certainly a libellous attempt (8). So when Dr. Drake wrote that, "that the late revolution was the destruction of the laws of England," the court of king's bench held the publication to be a libel (9). So an address to the army may be so worded as to be of a pernicious character, and, in that light, a libel upon the government (1). So where the defendant uttered these words, "the government consists of three estates, and if a rebellion should happen in the kingdom, unless it be a rebellion against the three estates it is no rebellion," he was convicted upon an information and fined 1,000*l*., it being his intention to connect the death of Charles I., and the persons who had adjudged the sentence upon that monarch, with such his discourse (2). So where a person delivered a paper after the sermon to the minister, requiring him to take notice that offences might be perpetrated without the control of the civil magistrates, it was held, that he had published a libel, although no magistrate in particular was mentioned, and it was considered no objection to allege the want of an averment stating that the magistrates had knowingly suffered those vices (3). A general dissatisfaction towards the government is proposed as the groundwork of these writings and speeches, a proceeding entirely apart from fair criticism and the due canvassing of political measures, thus it is that such acts are deemed libellous. To use the language of Hawkins, such a libel has "a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition" (4). So upon the prosecution of a defendant for libelling the Irish administration, and animadverting upon the public conduct and character of certain high officers in that country, Lord Ellenborough observed that "if a publication be calculated to alienate the affections of the people by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law." And the lord chief justice cited Tuchin's case as removing all ambiguity from the question (5). So if the paper be calculated to excite tumult it is a libel (6). Whilst, on the other hand, if the act complained of, whether it be word or writing, be not, in any manner, of a seditious tendency, nor in any way calculated to excite sedition, but be

(8) See Holt's Cases, 424; case of Mr. *Tuchin*.

(9) 11 Mod. 95; *R.* v. *Drake*; S. C. Holt's Cases, 350; but judgment was given for the defendant upon another ground; S. P. 1 Russ. C. & M. 221; *R.* v. *Nutt*; Holt on Libel, 88. *R.* v. *Shebbeare*.

(1) See 2 Show. 488; *R.* v. *Johnson*.

(2) 1 Ventr. 324, 327; *Harrington's* C.; S. C. nom. *R.* v. *Harrison*; 3 Keb. 841.

(3) 4 Bac. Abr. Libel (a) 2, p. 451.

(4) 1 Hawk. P. C. C. 73, s. 7. See also to the same effect, 9 St. Tr. 255; *R.* v. *Francklin*; S. C. W. Kel. 76, 86.

(5) Holt on Libel, 114; *R.* v. *Cobbett*. There is a kind of legal quibble in 2 Ro. Abr. 78, where it is said, that it is not indictable to allege that the laws of the realm are not the laws of God, but otherwise to say that the laws of the realm are contrary to the laws of God.

(6) 9 C. & P. 456, *R.* v. *Collins*; Id. 462, *R.* v. *Lovett*.

merely a temperate and fair act, it cannot be called libellous (7). Fantastical prophecies upon arms for the purpose of creating insurrection are punishable, for a second offence, with imprisonment for life, and the forfeiture of all goods and chattels real and personal (8). And by s. 4, to publish the same by word or deed is made subject to a fine of 10*l.* and one year's imprisonment. And by 38 Geo. 3, c. 78, to print or publish in a newspaper any matter tending to excite hatred and contempt of the person of the sovereign and of the constitution, as having been previously printed or published in some foreign paper or print, which has not been previously so printed or published, is a misdemeanor punishable with imprisonment for any term not exceeding twelve nor less than six months, and the offender shall be liable moreover to such other punishment as may by law be inflicted in cases of high misdemeanors.

Administration of Justice.] We have already intimated that there may be a libel upon the government through the medium of an accusation of negligence in caring for the administration of justice. There may likewise be libels levelled against the proceedings of the laws as they are administered by its functionaries. An information was filed against the *Independent Whig* for arraigning the conduct of Le Blanc, J., and the jury, upon a trial for the murder of a seaman, which ended in the prisoner's acquittal. It was urged that every one had a right to canvass the proceedings of courts of justice, and that the article complained of was written in the exercise of that right. And Mr. Justice Grose, who tried the information, agreed that it was lawful with decency and candour to discuss the propriety of a verdict, or the decision of a judge, but he added that such an examination must be conducted with decency. Declamation and invective used, not with a view to elucidate the truth, but to injure the characters of individuals, and bring the administration of justice into hatred and contempt, could not be called fair criticism. The libel, so far from being thus carefully composed, was written in an abusive style, and the defendants were found guilty, and were sentenced to three years' imprisonment (9). This jealousy with regard to the proceedings of courts has gone so far as to include an order made by a corporation and entered in their books within the class of offences above-mentioned. So that where the corporation of Yarmouth made such an order and entry applauding one Watson, who had improperly prosecuted a person for perjury, and had in consequence been visited with heavy damages in an action, (which action had been subsequently approved of by the court of common pleas), the court held, that the defendants had thereby been guilty of a libel on the public justice of the kingdom, and made the rule for an information absolute. The facts of the corporation having sworn that they had no intention by their order to libel the person acquitted of perjury, and of the book being kept pri-

(7) Lofft. 776; 9 C. & P. 456; *R.* v. *Collins.*

(8) 5 Eliz. c. 15, s. 3.

(9) 1 Campb. 359, note, *R.* v. *White* & another.

vate as the property of the corporation, were deemed to make no difference (1).

Foreign Princes, Ambassadors, &c.] One more species of political libel presents itself here—that which has for its object the calumniation of foreign monarchs, or rulers, or their representatives, it being possible that a misunderstanding might arise between such potentates and our own sovereign in consequence of slanderous writings. Thus, an information was exhibited by the attorney-general against the defendant for libelling the French ambassador, the defendant having been himself plenipotentiary, and a conviction succeeded (2). So again, Peltier was tried and convicted for publishing a libel against Bonaparte, when first consul, the tendency of the writing being to suggest the propriety of assassinating him, and to interrupt the friendly relations between the two countries (3).

Judgment.] The judgment for these libels is fine and imprisonment at the discretion of the court, and all aiders and abettors are principals.

Disturbances and Seditious Meetings, how suppressed.] It is important, in concluding our observations concerning misdemeanors which affect the public safety, to dwell for a moment upon the mode of suppressing unlawful assemblies. And it is a good principle that where the meeting assumes such a character as may fairly be said to raise a foundation for apprehension that the public safety will be endangered, it is not only lawful for any person (whether in an official or private capacity), but it is likewise his duty to use the most prompt endeavours to suppress such an assembly. It would be natural and reasonable that, in the first instance, relief should be sought from the constituted authorities, and a private person might incur a legal hazard if he neglected to call in the officers of the law, where their aid could have been obtained without risking the main object of his exertions. But should there be no present help from the authorities, or should the occasion be urgent, there is no question but that a private individual of his own act and deed, ought to counteract a dangerous rising to the utmost of his power. Thus, it was held, that men may arm themselves to suppress riots, rebellions, or to resist enemies, and every justice of the peace, sheriff, and other minister, or *other subject of the king*, where such accident happens, may do it (4). Whence Hawkins argues that they may arm, and likewise may make use of arms towards the advancement of their loyal design (5). These remarks are more particularly referrible to cases of treasonable and seditious meetings accompanied by force or a well grounded alarm that disturbances are imminent. Such assemblies, of course, "savour of rebellion, for suppressing whereof no remedies can be too sharp or severe" (5). Therefore, when the pre-

(1) 2 T. R. 199; *R.* v. *Watson* & others. As to libels and slanders against inferior magistrates. See post, sect. vii.

(2) 1 Sir Wm. Bl. 510, 516; *R.* v. *D'Eon.*

(3) Holt on Libel, 78, *R.* v. *Peltier.* See post.

(4) Poph. 121, 122; case of *Armes*, Kel. 76.

(5) 1 Hawk. c. 65, s. 11.

tender was proclaimed in the country during some races, upon which the better affected inhabitants of the neighbourhood forthwith interposed, and a conflict ensued; an information against the supposed loyalist rioters was refused with costs, although some of their party had in reality committed unwarrantable excesses, for here the safety of the commonwealth had come in question (6). Again, it may very safely be laid down that when the unlawful meeting proceeds to an act of felony, it may be suppressed by a private person forthwith, and with every degree of force within his reach. As if a number of persons were seen in the act of demolishing a house, or committing a robbery, here it is the duty of each man to interpose, taking, in the first place, the assistance of the authorities; but, if the occasion be urgent, interfering in his own person to repress with reasonable force the illegal aggression (7). Nevertheless, it may be further alleged that there are grounds for supposing that a private person may quell a serious riot or affray if the matter be of a very aggravated character, but as we are speaking here of violent suppressions by force of arms, it seems more prudent for such an individual to forbear from any uncommon exertion (8), lest, "under the pretence of keeping the peace, [he] cause a more enormous breach of it" (9). But every citizen may use a moderate degree of energy towards the allaying of a breach of the peace.

Powers of Magistrates.] The powers of a magistrate or peace officer are larger than those of a private person (1), and these officers need no peculiar commission for the purpose of putting down a rebellion (2). And as their authority is more extensive, so also is their responsibility. Perhaps they are more heavily answerable in a case of excess of their jurisdiction than others, but they are certainly more open to censure and punishment, where they neglect their duty, than the private man. Thus the lord mayor of London was convicted of neglect of duty for not repelling the outrages of the rioters in 1780 (3). The mayor of Bristol was tried and acquitted upon an information charging him with having been guilty of a breach of duty by not suppressing the riots in that city (4). Indeed, if there be a reasonable ground for alarm the magistrate must disperse the multitude or he will be criminally answerable; and so much rests upon his discretion, that he may sometimes use force to break up an unlawful assembly, and the more especially if an immediate riot be reasonably expected to ensue (5). *A fortiori*, if the riot has com-

(6) 1 Sir Wm. Bl. 47; *R.* v. *Wigan Inhab.*

(7) See the observations of Heath, J., referring to the riots of 1780, 2 B. & P. 264.

(8) A private person may stay persons engaged in mischief from executing their purpose, or may stop others whom he sees coming to join them, 1 Hawk. c. 65, s. 11. But it seems that unless it be in a case of actual rebellion or violent outrage, ought not to use an extraordinary degree of force.

(9) 1 Hawk. c. 65, s. 11.

(1) Ibid.

(2) 2 And. 67.

(3) 5 C. & P. 282, n. *R.* v. *Kennett.*

(4) 3 B. & Adol. 947, *R.* v. *Pinney.*

(5) 9 C. & P. 431, *R.* v. *Neale* & others.

menced, the mode of proceeding is for the magistrates to assemble as quickly as possible for the purpose of learning whether there exist proper grounds for an unusual interposition (6). If, after a due investigation, such apprehension would appear to be verified, it becomes necessary that special constables should be sworn in under the provisions of the statute of 1 & 2 Will. 4, c. 41 (7). And if these guardians be insufficient, the aid of the military must be invoked, or, unquestionably, according to the discretion of the magistrate or magistrates, the military may be called in before the civil power (8). It seems to be prudent not to despise professional assistance, but the magistrate must not cling entirely to his legal adviser, for the best help of that kind will not be a defence against a criminal charge (9), nor will mere honesty of intention operate as an excuse (10). But the law, whilst it demands much at the hands of these officers, does not refuse them a full share of protection and even of allowance when the case presents on their part a decided and straightforward course of action. Therefore, if a party has done all which can be expected at the hands of a man of ordinary firmness, it is enough, and he becomes entitled to an acquittal, although his labours did not succeed in stemming the evil (11). And he is not bound to swear in special constables unless he is an eye-witness of the scene, or has information upon oath, upon which he may act (1), nor need he head the constables, nor go out with the soldiers (2), nor call out the posse comitatus (3), if he have given timely warning (4) to the king's subjects of an approaching tumult (5).

(6) See 3 Stark. 86.

(7) By sect. 1 of that act, two or more justices, being informed upon oath that any riot or felony has taken place, or may be reasonably apprehended, may appoint any number of persons (not exempt from being constables) to act as special constables.

By sect. 2, the secretary of state may order even exempt constables to be sworn, and they are then liable to serve for two calendar months.

By sect. 3, the secretary of state may direct the lord lieutenant to swear in special constables without exemption throughout the county; such persons not to act beyond three calendar months.

By sect. 4, justices may make regulations respecting these special constables, and may remove them for misconduct.

Sect. 5 gives them power throughout the justices' jurisdiction.

Sect. 6 extends their power to an adjoining county if two justices of such county make it appear that their presence is expedient there. But this must be done to the satisfaction of the justices who have appointed the special constables.

Sect. 7 imposes a penalty of 5*l.* for refusing to take the oath.

Sect. 8 imposes a like penalty for refusing to serve, or not obeying lawful orders.

Sect. 9 speaks of the discontinuance of such officers.

Sect. 10 relates to the giving up of arms by constables to their successors.

(8) See 14 East, 164, *Burdett* v. *Colman*. 3 Stark. 92.

(9) 3 B. & Adol. 947, *R.* v. *Pinney*.

(10) Ibid.

(11) Ibid.

(1) Ibid.

(2) Ibid.

(3) "By making an end of all the feudal tenures, we hardly know what the posse comitatus is, or how it is to be raised, supposing the sheriff wanted to raise it." 3 Stark. 105, per Holroyd, J.

(4) Timely warnings are—personal application to the inhabitants,—employing others to do the same,—sending notices to the church, requesting the people to meet the magistrates at a time and place fixed,—posting such notices

(5) 3 B. & Adol. ut supra.

It may be readily collected from the above suggestions that if death ensue by reason of the firing of the soldiers, or the necessary force of the civil power, both the slayers and the magistrates are justified by law.

This power of overruling disturbances is vested in the justices by the common law. Moreover, by 34 Edw. 3, c. 1, justices may arrest, take, and chastise rioters according to their trespass and offence. This may be done by a single justice, who may authorize an arrest by a parol command (8). And by 13 Hen. 4, c. 7, the justices and the sheriff, or under-sheriff may come with the power of the county against rioters, and having found them, may record a conviction against them in the same manner as is contained in the statute of forcible entries (9).

Sect. II.—*Of Misdemeanors against the Public Peace.*

We have already referred to the definition of riots, routs, and unlawful assemblies, which are very serious offences against the public peace, and we propose to enter more particularly into the consideration of such outrages in the present section. Assaults are likewise interruptions of the peace, but we have fully discussed these attacks in the chapter concerning misdemeanors against the person (1).

An affray is any public offence to the terror of the people (2).

And the affray differs so far from the riot, that the former may be committed by a single person, as if he should go about armed, and conduct himself violently; whereas there must be three or more persons in order to constitute a riot.

A challenge to fight is a very high offence, almost amounting to an affray, for it is calculated to terrify the party to whom it is sent; and this partakes in some measure of the definition above given: but as soon as the challenge is accepted, and the hostility commences, whether it be by duel, or prize fight, or other struggle in a public spot, so as to be visible to the people at large, it is an affray. *A fortiori*, where a number of persons meet together, and fall to blows amongst each other, it is such affray. And lastly, there is the misdemeanor of a forcible entry and detainer. These are the principal offences against the peace. We will begin with the consideration of riot.

Riot.] A riot, or overt act of an assembly met together for an illegal purpose, and done in pursuance of that purpose, is one of the most serious disturbances of the public peace (3). Three or more persons must be concerned in this outrage (4), amongst

(8) 1 Russ. C. M. 266.
(9) See post, Forcible Entry.
(1) Ante, chap. [illegible].
(2) 3 Inst. 158; 1 Hawk. c. 63, s. 1.
(3) As if an officer should send for his soldiers to rescue him out of the hands of justice. 1 Freem. 359, *Capt. Waters's* C.
(4) 2 Salk. 594; 1 Ld. Raym. 484; 12 Mod. 510.

whom the law will recognise women, but not infants under the age of discretion (1). After the age of fourteen years, however, infants may be convicted of riot as well as others (2).

It will be observed also, that one of the incidents of riot is, that its commencement may most generally be traced to some supposed private wrong. As where one armed himself and his friends, in order to prevent an unlawful entry into his close (3). So where inhabitants met tumultuously to redress their grievance in being shut out from an accustomed right of common (4), or way, or watercourse (5), or for the purpose of inflicting vengeance upon an obnoxious individual (6), or where bail forcibly enter a man's house, in order to render him; with other like causes of quarrel. And in furtherance of this illegal undertaking, some degree of violence must take place, either to the person of an individual, or to his possessions (7). So that if people think fit to ride about in an unusual manner, armed, for instance, with weapons, they may be guilty of assembling unlawfully, but not of riot, unless they commit some injury (8). So, if there be a meeting for a legal recreation, as at a fair, market, church ale, &c.; or for a lawful matter of business, as the election of a mayor (9), and a sudden dispute arise amongst themselves, which ends in a conflict, the parties may, indeed, be guilty of an affray (10),

(1) 1 Hawk. c. 65, s. 14.

(2) 1 Hale, 20; 2 Ld. Raym. 1284, *R.* v. *Tanner* & others.

(3) 1 Russ. C. & M. 255, *R.* v. *Bp. of Bangor.*

(4) 1 Hawk. c. 65, s. 6. As by pulling down fences erected by the lord of a manor; 5 Mod. 459; *Prynn's* C.; Holt's Ca. 635; S. C. Comb. 141, *R.* v. *Abraham* & others, or a cottage built on the waste; Com. Rep. 93, *R.* v. *Hallingby* & others.

(5) 3 Mod. 72, *R.* v. *Colson* & others; 7 Mod. 286, *R.* v. *Wyvill* & others.

(6) M. & M. 178, n. *R.* v. *Hughes* & others.

(7) 1 Hawk. c. 65, s. 4; 3 Inst. 176. Although it once appeared to Holt, C. J., that an assembly might meet together with such circumstances of terror as to be a riot. 2 Salk. 595. The chief justice called it a kind of assault upon the people. Ibid. And Mansfield, C. J., in *Clifford* v. *Brandon*, said, "it is not necessary to constitute this crime, that personal violence should have been committed, or that a house should have been pulled in pieces." "If people endeavour to effect an object by tumult and disorder, they are guilty of a riot." 2 Campb. 370. This opinion of Lord C. J. Mansfield seems to be rather at variance with all the definitions of riot in the text writers. In the disturbance at Covent Garden Theatre, upon which the action at issue was built, there were overt acts of violence to property, which certainly are riotous proceedings, as hunting in a park, or any other outrage upon a man's estate might be. Lord Coke says, "one may commit a force." 3 Inst. 176. And there may, perhaps, be a misdemeanor in *the nature of riot*, as the master who exposes his helpless servant to the inclemency of the weather, may be guilty of an offence in the *nature of an assault*. Perhaps the lord chief justice may be understood to say, that neither personal violence, nor utter destruction of property, would be necessary to constitute this crime. But the other position with regard to the endeavour to effect an object by tumult and disorder may be considered as open to some criticism. See also, 1 Russ. C. & M. 249.

(8) 1 Hawk. c. 65, s. 4; Holt's Ca. 635, *R.* v. *Pugh* & others.

(9) 2 Ld. Raym. 965, *Corporation of Grampound's* C.; see also, 2 Show. 236, *R.* v. *Sir R. Atkyns* & others; S. C. 3 Mod. 3.

(10) 1 Hawk. c. 65, s. 4; 2 Salk. 595; *R.* v. *Ellis.*

but not of riot, for here is an absence of any original intention, or of a subsequent agreement to disturb the peace; we say, a subsequent agreement, because it may happen, that upon such an occasion, the persons falling out have previously formed themselves into parties, and with promises of mutual assistance in case of quarrel, have engaged in a fray: here their acts become those of rioters, because by entering into the new confederacy to break the peace, they may be said to have assembled together for that purpose from the time of the confederacy, just as though they had originally come together with an unlawful design (1). And so, if some sudden proposal be started at an innocent meeting, to which the parties consent and proceed to execute it, as, for example, to attack a stranger (2), it is no defence in case of an indictment for riot, to allege that the first assembly was legal, if the subsequent design should turn out not to be so, and it be executed with violence (3). So if a person were at a particular place lawfully, and then joined an unlawful assembly just meeting on the same spot, it would not acquit him in an indictment for riot to say that he was not privy to the first design (4).

It has been said, indeed, that stage players may be indicted for a riot and illegal assembly (5), especially if they cause an extraordinary concourse of people to witness their tricks (6). And it is likewise on record, that in the year 1797, an indictment for riot was drawn by an eminent pleader against certain persons, for kicking about a foot-ball in the town of Kingston (6), and thereby causing a common nuisance (7). And, certainly, if the design of creating terror were entertained by a number of persons, and the purpose carried into execution in a violent manner, as by kicking the ball against passengers, and thus assaulting the inhabitants, the indictment for a riot was doubtless well conceived. In this respect it is like a premeditated prize fight. Otherwise, assemblies at wakes or festivals, or meetings for the exercise of common sports and diversions, as bull baiting (9), wrestling, or the like, are said not to be riotous (10). And it is difficult to see how stage players can be guilty, at least in modern times, of such acts as will amount to a riot. So far from this, it is laid down, that an assembly of persons met toge-

(1) 1 Hawk. c. 65, s. 3.

(2) 2 Salk. 595, *R.* v. *Ellis*; S. C. Holt's Ca. 636.

(3) 1 Hawk, c. 65, s. 3.

(4) 2 Ld. Raym. 995, *Corporation of Grampound's* C.; 1 Hawk. c. 65, s. 3; 6 Mod. 43, Anon.

(5) 1 Ro. Rep. 109, Sir *A. Ashley's* C.

(6) 19 Vin. Abr. Riot, A. 8 Marg.

(7) First count; second count for a nuisance. It was done for the purpose of suppressing an ancient custom of kicking about foot-balls on Shrove Tuesday. 1 Russ. C. & M. 248, note (g).

(8) 1 Russ. C. M. 248, note (g), citing 2 Ch. Cr. L. 494.

(9) But if the bull bait be only a colourable pretext for outrage, and violence be committed, it will amount to a riot. And if done under circumstances of terror to the public, it will be an affray. See 5 & 6 Will. 4, c. 59, s. 3. Thus it is, that a prize fight is a riot.

(10) 1 Hawk. c. 65, s. 5.

ther for the purpose of doing a thing prohibited by statute, is not riotous, if they carry their unlawful act into execution without force (1). And the same rule prevails with reference to an act which is forbidden by the common law; as if a party should gather together in order to carry off a piece of timber, to which "one of the company has a pretended right," and should take the wood without circumstances of terror or force (2). But these meetings may, nevertheless, be routs or unlawful assemblies, since no man has a right to gain his own by creating a disturbance, or congregating a multitude without the authority of law (3). To this, it needs hardly be added, that the officers of the law are not indictable for this offence, either in an attempt to preserve the peace, or to execute process. But in assembling a force to ensure the execution of process, they must be satisfied that there will be some resistance (4). Sheriffs, justices, and constables, and under some emergencies a private person may call together such an assemblage as will suppress a tumult, or hinder a breach of the peace (5). The act of a justice in raising the posse under a just apprehension of force in making an entry into, or in the detainer of lands, is cited by Hawkins as an example (6). And the acts of private men, if done in defence of their rights, and without excess, may likewise be said to rest upon legal authority. As where one erected a weir across a navigable river, upon which several assembled with spades, and dug a trench in the land of the man who had made the weir, in order to turn the water, and the better to remove it. It was held, that the parties thus engaged were neither guilty of a forcible entry nor a riot (7). So is the case of commoners who abate enclosures (8). And of electors who meet to assert their rights (9). And likewise of the owner of a house, who arms himself and his friends for the purpose of defending the possession (10). For the law permits and authorises individuals to abate a nuisance in an orderly manner, and with no greater force than may be necessary, and likewise allows them a fair latitude to defend their privileges. So it is again, if one has a right to corn, and he cuts it down without tumult (11).

(1) 1 Hawk. c. 65, s. 5.

(2) Ibid. 6 Mod. 141, Per Cur. S. P. 12 Mod. 648, Anon. But as soon as as terror or undue force is imported into the transaction, the offence of riot accrues, and in this sense the case in Godbolt must be understood. Godb. 438, and see post.

(3) Hob. 92; 2 Show. 150, *R.* v. *Stroude*; Holt's Ca. 353, cutting down trees, *R.* v. *Harris*; 1 Wils. 325, *R.* v. *Johnson* & others.

(4) 1 Hawk. c. 65, s. 2.

(5) Ibid.

(6) 1 Hawk. c. 65, s. 2.

(7) 1 Russ. C. M. 249; citing Dalt. 137, 5 Burn, Riot, s. 1. And it is said to be better to send one or two persons only to abate a nuisance, and only with proper tools. For any threatening words, (accompanied with action,) as, they will do it though they die for it, may give the transaction the colour of riot. Id. ib. citing the same books. Words, signs, or gestures, will give a new feature to the case. A fortiori, a badge, or ensign, for that would be evidence so far of a premeditated plan. 2 Campb. 370.

(8) 11 Mod. 117; 1 Hawk. c. 65, s. 8.

(9) 11 Mod. 117.

(10) 1 Russ. C. M. 255, *R.* v. *Bishop of Bangor* & others.

(11) Godb. 438, *Huet* & *Overie's* C.

It is likewise a misdemeanor to incite persons to commit a riot.

The mode of suppressing riots has already been fully considered in the last section (1).

Indictment (2).] The indictment for a riot and assault usually states that A. B. & C., together with other evil disposed persons (3) unknown to the jurors, unlawfully and riotously assembled to disturb the peace; and it then goes on to describe the particular outrage complained of, as for instance, an assault upon D. in the prosecution of the riot. And it usually concludes with the allegation that the defendants then and there did other wrongs against the peace, &c. An allegation of a riotous assembling, as to hinder the election of a mayor, without adding any mention of an unlawful purpose or act, is insufficient (4). If it be intended to charge the defendants with a tumultuous riot, after stating the assembly, it is customary to add, that they made a great noise and disturbance, and continued to do so for an hour, to the great terror of all the king's subjects, &c. The latter words, or expressions denoting that the people were alarmed at the disturbance (5), are indispensable to support this last indictment for a tumult. Twelve persons and upwards were indicted for a riot, but the count omitted to say that it took place under circumstances of terror to the king's liege subjects, and, on that account, it was held that the charge could not be sustained (6). So, where the defendant had cut down hedges in prosecution of a private claim, it was held, that they could not be convicted of riot for want of these words. But the charge against them for an unlawful assembly was deemed sufficient (7).

It is, moreover, not advisable to leave out the word "riotously." It supplies, indeed, the place of "with force and arms" (8). It will be remarked, that if the indictment were to state that the defendants had assembled to do a certain unlawful act, and instead of alleging that they came to disturb the peace, and actually did make a noise, &c., were to omit any explanation of the unlawful act, the charge would be insufficient for uncertainty (9). And the fact of their having cut down an oak riotously, although

(1) Ante. And as to a conspiracy of rioters, see ante, chap. 2, and post, sections 4, et. seq., and generally of riots, 19 Vin. Ab. under that title.

(2) Where several were indicted for a riot, it was allowed by the court that the greater number might enter into a rule to confess judgment, if their fellows were convicted, and so plead not guilty with that understanding, in order to save expense. The prosecutor would then try his indictment against two or three whom he could name. 3 Salk. 117, Anon.; 6 Mod. 212, *R.* v. *Middlemore*; where three or four are mentioned instead of two or three. But this is quite immaterial, because if two only were found guilty, the others who had entered into the rule would be included.

(3) See Holt's Ca. 635.

(4) 11 Mod. 100, *R.* v. *Solely* & others; 2 Ld. R. 1210, *R.* v. *Gulston* & others; 1 Str. 140, *R.* v. *North* & others.

(5) *In terrorem populi.* See 1 Keb. 623.

(6) 4 C. P. 373, *R.* v. *Hughes.*

(7) Id. 538, *R.* v. *Cox* & others.

(8) 19 Vin. Ab. Riot. (D. 11,) *R.* v. *Myne* & others.

(9) 2 Ld. Raym. *R.* v. *Gulston* & others.

mentioned in the indictment, was held not to aid this omission, for this did not cure the defect with reference to the intention (1). So, if there be a charge against persons for a riot in endeavouring to gain possession of a house, the property of that house must clearly appear in the count. For otherwise it could not be known whether it belonged to the defendants themselves or not. And if they succeeded, they would not be guilty of an attempt to repossess themselves of their own, if they had carefully abstained from excess (2).

The words, "with divers other persons to the jurors unknown," may become very material, because in charging A. B. & C. with a riot, if these words be left out, and C. be acquitted, two only remain responsible for an offence which requires the presence of three, and no judgment can be given against the two (3). Vi et armis may be said to be implied in an indictment for a riot (4).

Verdict.] A verdict therefore, of not guilty, against all excepting two, negatives the charge (5). But where six persons had been indicted for a riot, and two were dead before the trial, and then the jury convicted two and acquitted two, the objection would not hold (6), for by Lord Mansfield, they must have been guilty together with those who had never been tried (7), and the jury must be presumed to have taken that matter into their consideration.

It is, moreover, worthy of consideration, that an acquittal of the riot is an acquittal of an assault and battery, if the latter be laid to have been done riotously (8). The more ordinary course is to add a second count for a common assault. And, clearly, if one be acquitted of riot, and erroneously found guilty of doing that which is a mere private injury, as breaking down a bank, the judgment must be arrested (9). However, where the indictment states that the defendants were riotously and routously assembled, it seems, that although there should be an acquittal of the riot for want of the words, "terror to the people," there may, nevertheless, be a conviction for an unlawful assembly (10).

Judgment.] The judgment for a riot at common law is fine and imprisonment, with (11) sureties of the peace if the court should

(1) Ibid.

(2) 2 Salk. 594, *R.* v. *Soley* & others; see likewise, id. 593, *R.* v. *Soley* & others; S. C. 11 Mod. 116.

(3) 1 Ld. Raym. 484, *R.* v. *Sadbury* & others; S. C. 12 Mod. 262.

(4) *R.* v. *Myne* & others, 19 Vin. Ab. Riot, ut supra.

(5) 1 Ld. Raym. 484; 12 Mod. 510; 2 Salk. 593; Poph. 202.

(6) 3 Burr. 1262, *R.* v. *Scott* & another; S. C. 2 Sir Wm. Bl. 291, 350; 2 Hawk. c. 47, s. 8.

(7) Id. 1364.

(8) 2 Salk. 593, *R.* v. *Heaps*; S. C. 1 Ld. Raym, 484; see 2 Sess. Ca. 99, *R.* v. *Hays* & others.

(9) 3 Mod. 72, *R.* v. *Colson* & others.

(10) 4 C. P. 538, *R.* v. *Cox* & others.

(11) Note, that where a great number of persons is indicted, the prosecutor should name three or four of them, and try the case against them only, the rest entering into a rule to plead guilty if the others are found guilty, to save expense. Holt's Ca. 635; see Lofft. 44. All

think fit (1). And it would be a breach of the articles of the peace, and forfeiture of the recognizance, to make one of an assembly, which, by reason of numbers, the constable could not suppress (2). A distinction, however, was made by some old statutes between heinous and petty riots with reference to the punishment. Thus, by 2 Hen. 5, st. 1, c. 8, rioters attainted of great and heinous riots, shall have one whole year's imprisonment at the least, without bail or mainprize. And petty rioters (3) shall have imprisonment, as best shall seem to the king or to his council. But the usual proceeding at common law is adopted at the present day, although the 3 Geo. 4, c. 114, which imposes hard labour, extends likewise to the riots mentioned by statute.

Information.] There are also proceedings in cases of riot, by information (4), and in cases affecting the administration of justice, or upon the election of members of parliament, informations for riots will be granted (5). And, although now disused, inquisitions were permitted to be made by justices of the peace, and the sheriff or under-sheriff under 13 Hen. 4, c. 7, and trespassers and offenders were to be "convict in the same manner and form as is contained in the statute of forcible entries." Error lay from this jurisdiction to the court of king's bench (6).

1. *Riots by Seamen, &c.*] By 33 Geo. 3, c. 67, s. 1, If any seamen, keelmen, &c. casters, shipcarpenters or other persons riotously assembled together to the number of three or more, shall unlawfully and with force prevent, hinder, or obstruct the loading or unloading, or the sailing or navigating of any ship, keel or other vessel, or shall unlawfully and with force board any ship, &c. with intent to prevent, hinder or obstruct the loading or unloading, or the sailing or navigating of such ship, keel or other vessel, every seaman, keelman, caster, shipcarpenter and other person, (being lawfully convicted of any of the offences aforesaid upon any indictment found in any court of oyer and terminer, or general or quarter sessions of the peace for the county, division, district, &c. wherein the offence was committed,) shall be committed either to the common gaol or to the house of correction for the same county, and there continue and be kept to hard labour

persons aiding and abetting in a riot, as by hallooing, &c. are principals. 12 Mod. 510.

(1) The court of queen's bench will not interfere to reduce the amount of security which magistrates may have required for keeping the peace. 2 D. P. C. 525, *R.* v. *Holloway*; S. P. 2 Nev. & M. 379, *R.* v. *Tregarthan*.

(2) 1 Mod. 18, *R.* v. *Blisset* & another.

(3) See 17 Ric. 2, c. 8.

(4) See 2 Salk. 594; 1 Show. 106, *R.* v. *Berchet* & others, et passim.

(5) 2 Barnard. 378, *R.* v. *Kynaston* & others; 1 Ld. Keny. 108, *R.* v. *Hunt* & others.

(6) See 2 Salk. 593, *R.* v. *Ingram* & others. Where the rioters had dispersed, the justices might act without the sheriff, who needed only be a party when the rioters were convicted upon view. S. C. Carth. 383; Tho. Raym. 386, *R.* v. *Tempest* & others; 6 Mod. 140, *R.* v. *Pugh* & others.

for any term not exceeding twelve calendar months, nor less than six calendar months.

Sect. 7. provides for the admiralty jurisdiction.

There is a proviso, that no act done in the service of his majesty shall make the person doing it a rioter within these provisions (7); and by sect. 8. the prosecution must be commenced within twelve calendar months next after the commission of the offence (8).

2. *Routs and unlawful Assemblies.*] The law of unlawful assemblies has already been fully treated of (9), and, with respect to routs, we have not much to say, for although there is a distinction between the rout and the riot, as we have pointed out in the section concerning public safety (1), the offence is most generally combined with riot, and is rarely heard of at the present day as a separate misdemeanor. If persons, however, assemble tumultuously, and then proceed, ride, or go forth, or move by instigation of one or several—this is a rout, inasmuch as they move and proceed in rout (2) and number (3). But where one or two alone create terror, they may be affrayers, but cannot be guilty of a rout. And this brings us to the subject of affrays.

Judgment.] The judgment for a routous assembly at common law is fine and imprisonment, and surety of the peace may likewise be required from the defendants. All parties engaged are principals.

3. *Affrays.*] An affray may be said to be a public assault, as a private assault is one committed out of the hearing or seeing of any except the parties concerned (4); and, therefore, as in order to satisfy the meaning of a private assault no blow need be actually inflicted, so a violent and menacing attitude may be, especially if accompanied by threatening words, an outrage upon the public, and so an affray. For no one knows how soon he may become the victim of such an illegal demonstration. And thus an affray may be the act of one individual, although the term is usually applied to the offence which two persons or parties of men commit by fighting in a public place (5). Sir John Knight was charged with walking about the street armed with guns, &c. and although he was acquitted upon the information exhibited under the stat. 2 Edw. 3, c. 3, for going about armed, the chief justice said, that this was a great offence at the common law, and on the motion of the attorney-general, the defendant was bound to his good behaviour (6).

This statute of 2 Edw. 3, c. 3, although not much heard of at the present day, is nevertheless still in force. It is commonly

(7) Sect. 4.
(8) Made perpetual by 41 Geo. 3, U. K., c. 19, s. 4.
(9) Ante.
(1) Ante, Sect. 1.
(2) En route.
(3) 19 Vin. Ab. Riots (A. 2.); and see 2 Hawk. c. 65, s. 8.
(4) 1 Hawk. c. 63, s. 1.
(5) See 1 Russ. C. M. 270.
(6) 3 Mod. 168, *Sir John Knight's C.*

called the Statute of Northampton, and prohibits all persons except the king's servants in his presence, and persons executing his precepts, or themselves endeavouring to maintain the peace, from going armed, neither in fairs and markets, nor before the king's justices, &c. nor elsewhere, upon pain of forfeiting their armour, and of imprisonment at the king's pleasure (7). Various officers are then mentioned as having jurisdiction over this misdemeanour. Mr. Serjeant Hawkins observes upon this act, that a justice of the peace or other person empowered to act, may either do so ex officio or by virtue of a writ out of chancery. He may then seize the arms and commit the offender, and certify his conduct into the chancery, or where he proceeds ex officio, into the exchequer (8). Secondly, he may not only imprison those who he may happen to find offending within his own view, but also such as may be found by an inquest taken to have offended in his absence. And Hawkins is of opinion, that he may so act either ex officio or when he proceeds by writ (9). Thirdly, the under-sheriff may execute the writ although it be directed to the sheriff, unless the sheriff be commanded to act in his own proper person (1). Fourthly, a man cannot justify the wearing of arms in defence of his person, but he may assemble his friends and neighbours in his house against any who threatens to do him violence therein, because a man's house is as his castle (2). Fifthly, the prohibition does not extend to privy coats of mail, nor to the use of common weapons, as swords, nor to the usual number of attendants for ornament or defences, provided that nothing be done in terrorem populi (3). And, sixthly, no one is within the prohibition who arms himself to suppress dangerous rioters, rebels or enemies, or who endeavours to suppress or resist disturbers of the peace (4).

An affray, therefore, may, by law, be committed by one person. It is, however, commonly the offence of two who fight together in a public spot, and is frequently a misdemeanor done by several wherein the absence of evil intention distinguishes it from a riot. Prize fights, consequently, are affrays. And all present at them are principal offenders (5). And, indeed, where the parties, as is very often the case, are the original promoters of the fight, they are guilty of riot, as well as an affray (6). And not only are the combatants guilty, together with their seconds, of the riot, but all persons countenancing and abetting the proceeding with a

(7) To which is added by 20 Ric. 2, c. 1, fine and ransom in like manner; and see also 7 Ric. 2, c. 13, which confirms this statute of Edw. 3.

(8) 1 Hawk. c. 63, s. 5.

(9) 1 Hawk. c. 63, s. 6. See Cro. El. 294.

(1) 1 Hawk. c. 63, s. 7.

(2) Id. s. 8.

(3) Id. s. 9.

(4) Id. s. 10. Especially if there be a cry made for arms to keep the peace. See the statute of Edw. 3. But it is said to be more discreet to be aiding and assisting the justices, sheriffs, or other the king's ministers. Poph. 121, Case of Armes.

(5) 4 C. & P. 537, *R.* v. *Perkins* & others.

(6) 2 C. & P. 234, *R.* v. *Billingham* & others.

knowledge of the transaction must be taken to participate in the original design. Otherwise they would merely be guilty as principals in an affray, for every riot is a fray, although the converse is not the case.

Duels, likewise, are affrays, at all events, when they happen in a place of public resort, for they are in direct breach of the peace, and operate to the terror of the people, inasmuch as no one can clearly foresee to what result so illegal a demonstration may lead; and it can be no defence to allege a satisfaction of a private wrong in answer to the charge. But words alone will not amount to an affray (1), although they very frequently furnish material evidence as to the character of a particular transaction. And a mere trespass can never be interpreted in such a light, unless such a degree of force be used as will swell it into a public offence; and then although the goods belong to the party taking them, he will be guilty of a breach of the peace (2); and, perhaps, of a forcible entry, according to the circumstances.

Place.] An affray may be aggravated in consequence of the dignity of the place where it is committed. As where it happens in the palace yard near the courts of Westminster (3), or in the presence of any of the superior courts of justice (4). And, formerly, very severe penalties were enacted against such as should strike or even draw a weapon in any church or church-yard (5), but that statute is now no longer in force (6).

Suppression of Frays.] The suppression of affrays has already been incidentally considered (7). We may, therefore, shortly mention with reference to this point, that, independently of the cry for arms in order to control a tumult, which the statute of 2 Edw. 3. warrants (8), a private person, a constable, and a magistrate may interfere for a similar purpose. The private person may seize the affrayers and those who are coming to aid the disturbance upon his view, and may deliver them to the constable. And if this cannot be done without hurting the affrayer, the person, nevertheless, who interferes is justified in his violence (9); and if one of the parties engaged in a fray, or, *à fortiori*, if a stander-by be dangerously wounded, the private man may justify a wounding in order to capture the assailant (10); and, indeed, he is punishable, if, being a looker on, he do not interfere, and the more especially if death should ensue (11).

A constable, likewise, upon view, may take the affrayers into custody (12), and it is said, that he may receive offenders charged

(1) 1 Hawk. c. 63, s. 2.
(2) 3 Salk. 187, Anon.
(3) 1 Hawk. c. 21, s. 6.
(4) Id. s. 10.
(5) 5 & 6 Edw. 6, c. 4, s. 3.
(6) Repealed by 9 Geo. 4, c. 31.
(7) Ante.
(8) Ante.
(9) 1 Hawk. c. 63, s. 11.
(10) Id. s. 12.
(11) Noy. Rep. 50, by Popham, C. J., *Wilburn's* C.
(12) 1 Hawk. c. 63, s. 14, 15.

by others with a fray and arrested by them (1). And he is bound, at his peril, to do this; and he may even break open doors to preserve the peace, or, upon fresh suit, to take affrayers who have fled into a house in order to escape justice (2).

Thirdly, a justice of the peace may actively interfere to put down an affray within his view, but he cannot authorize the arrest of any one without a warrant for such an offence committed out of his view. As soon as the offender is brought before him, he can compel him to find sureties to keep the peace (3). And if a dangerous wound be inflicted, it is customary for the justice to remand the accused until the fate of the wounded person be known.

Indictment.] The indictment for an affray states, that the defendant or defendants, being unlawfully assembled and arrayed in a warlike manner, did make an affray in a public street to the great terror and disturbance of the king's subjects; and in contempt of, and against the peace of the king, &c.

Judgment.] The judgment is fine and imprisonment for an affray at common law, and the defendant may be called upon to find security for keeping the peace. It may be added, that the aggravated misdemeanor of making an affray in the palace yard, or in an inferior court of justice, is punishable with fine and imprisonment (4); but not with the loss of the right-hand (5).

4. *Challenges, and Provocations to Challenge.*] Although not amounting to an affray, a challenge to fight, or a provocation to send such a message, is a very high misdemeanor; and persons who were found guilty of this offence have always been severely punished—as, by a fine of 100*l.*; a month's imprisonment, and the finding surety of the peace for seven years, together with a public recantation of their act (6).

So, by a fine of 100*l.*, imprisonment for a calendar month, and security to keep the peace for three years (7); and the latter was contemplated by the court as a lenient sentence, in consequence of much provocation which the defendant had encountered. For it should be noticed, that circumstances of provocation, although proper topics for a mitigation of punishment, yet afford no defence to an information, as, in case of death, they would be quite inoperative as an answer to an indictment for murder (8). Even the threat of being posted for a coward, however irritating, will make no difference (9).

The challenge may be by words or by letter, or by dispersing letters or papers containing reflections upon character, and espe-

(1) Id. s. 17.
(2) Id. s. 16.
(3) Id. s. 18; see also s. 19.
(4) In the first case, the imprisonment to be at the king's pleasure. 1 Hawk. c. 21, s. 6.
(5) Ibid.
(6) 1 Sid. 186, *R.* v. *Darcy* & another; S. C. 1 Keb. 694.
(7) 3 East, 581, *R.* v. *Rice.*
(8) See S. C.
(9) 1 Ro. Rep. 360, *Taverner's* C.; 3 Bulst. 171; S. C. 1 Hale, P. C. 452. See also Fost. 297.

cially if they insinuate a desire to fight (1). These last publications are libellous letters, and the indictment may be for sending such a letter with intent to provoke a challenge (2).

But it is said, that words of abuse will not amount to a challenge (3), although, of course, if the words themselves import such a provocation to a breach of the peace, the case will be different. And where the words are put in writing (4), accompanied with an intimation that further proceedings are expected, the court will conclude that a breach of the peace was intended. For an endeavour to provoke a challenge is as much a misdemeanor as the sending of the challenge. The defendant, speaking of an election business, wrote to the prosecutor and used these terms, "that he had behaved like a blackguard;" "I expect to hear from you on this subject," he continued, "and will punctually attend to any appointment you may think proper to make." Upon this an indictment was preferred, the first count of which stated, that the defendant, intending to provoke the prosecutor to fight a duel, sent him a challenge contained in a letter. The second count alleged a like intention, by writing a letter containing malicious and provoking matter. The third count alleged generally a provocation to challenge, without stating the letter. The fourth count alleged the endeavour to stir up a duel as before, and set forth the letter. The verdict was guilty on the fourth count only, and it was moved to arrest the judgment, because the last count did not charge the commission of any misdemeanor, but only an ineffectual provocation to another to commit one, being at most an endeavour only to do that which tended to a breach of the peace. But the court discharged the rule which had been obtained for this purpose, observing, that whether the letter in question were considered as an attempt to procure another to commit a misdemeanor, by a provocation intentionally addressed to that immediate purpose, or as a direct provocation to a challenge, it was in either of these points of view a competent subject of criminal prosecution, so as to sustain the indictment founded thereupon. And the act of sending a challenge being in itself unlawful, the law infers the evil intent, and the allegation of intent need not be further proved by the prosecutor than through the medium of the letter carrying the challenge. (5)

Proceedings.] The proceedings against a defendant for this offence may be by indicting him. But informations are often resorted to upon these occesions, and the court of king's bench is not backward to grant them upon proper affidavits. Still, that

(1) 1 Hawk. c. 63, s. 3; Hob. 120, *Lord Darcy* v. *Markham*; Id. 215, *Hicks's* C.

(2) 2 Campb. 506, *R.* v. *Williams*. The defendant put the letter into the post in Westminster, addressed to a person in the city of London, and it was held that he might well be indicted in Middlesex.

(3) 3 Inst. 180, *King's* C.; 6 Mod. 125, *R.* v. *Langley*; S. C. 2 Lord Raym. 1029; S. C. 2 Salk. 697.

(4) 2 Salk. 697; 2 Lord Raym. 1031, per Powell, J.

(5) 6 East, 464, *R.* v. *Philipps*; S. C. 2 Smith, 550.

court will not be anxious to assist the original sender of the challenge who turns round upon his antagonist, and applies for an information against him for accepting the challenge. Letters having passed between two persons, the one made an application to the court for an information, but upon hearing the affidavits, it was the opinion of the judges, that the applicant himself had been the first challenger, and they said they would have granted cross informations upon such letters as were produced, but, on the whole, they would not give the extraordinary remedy of an information to a man who was evidently the aggressor (6). Lord Ellenborough mentions a possible contingency, wherein the sending of a provocatory letter may be innocent and even meritorious —as to incite a person known to harbour latent purposes of a malicious and dangerous kind against the writer to send a challenge. Here the object would be to obtain surety of the peace against the dreaded individual; and the noble judge considered that the end could have been justified (7). But it would lie on the prosecutor clearly to make out his surmises (8).

The court exercise some jealousy respecting informations, notwithstanding their readiness to grant them when the case is properly made out. They consider themselves in the light of a grand jury upon the hearing of an application of this kind. So that where P. applied for such a proceeding against a defendant, supported by an affidavit that the challenge was delivered to the prosecutor by one H. the defendant's acting clerk; the court denied the rule, for the clerk had refused to make his affidavit, and thus a link was wanting to connect the defendant with the transaction. But, they added, that the prosecutor might prefer a bill of indictment against the defendant, and thus procure a subpœna to take H. before the grand jury in order to get his evidence, which would be to the effect of the defendant having desired him to deliver the hostile message (9). Again, it was stated upon affidavit, that A. had intimated his intention, after the settlement of accounts between himself and the prosecutor, to require an apology or the satisfaction usual amongst gentlemen from the latter, for certain offensive expressions contained in a letter from the prosecutor to A. C. a relation of A., settled the account; and having said that he had come in consequence of the letter in his hand, delivered a hostile message from A. The court granted the rule upon this against C., but refused it against A., the affidavit being deemed insufficient to connect A. with the challenge (1). In setting forth the charge, if a statute be mis-recited, the variance will be fatal, although the challenging is an offence at common law (2).

Judgment:] The judgment for these offences of challenging or endeavouring to provoke a hostile meeting, or accepting a chal-

(6) 1 Burr. 316, *R.* v. *Hankey.* Upon one occasion the court granted an information upon the production of copies only of the letters containing the challenge, such copies being verified. 1 Burr. 402, *R.* v. *Chappel.*

(7) 6 East, 475.

(8) Id. Ibid.

(9) 6 T. R. 294, *R.* v. *Willett.*

(1) 4 Nev. & M. 850, *R.* v. *Younghusband.*

(2) Comb. 477, *R.* v. *Dove.*

lenge, is fine and imprisonment, and surety of the peace, if the court should think fit (3).

Challenges by reason of Money won at Play.] By 9 Ann. c. 14, s. 8, if any person shall challenge or provoke to fight any other person upon account of any money won at play (4), he shall, being convicted, upon an indictment or information, forfeit all his goods, chattels, and personal estate to the crown, and shall suffer imprisonment, without bail, for two years.

5. *Forcible entry and Detainer.*] A forcible entry is where a man, considering that he has a title to lands, tenements, or goods, strives to repossess himself of them with force by entering upon the place which he looks upon as his own property, or the house where he expects to find his goods. And a forcible detainer is the case of a man who, having obtained such possession peaceably, employs an illegal force to retain the hold he has acquired. Care, however must be taken to distinguish between a trespass and a forcible outrage. And much stress has been laid upon the circumstance of making the attack upon a dwelling-house, in which case the court will conclude in favour of the prosecutor, because a man's house is his castle. But where the case amounts to a civil injury only, as where trespass or trover can be maintained in respect of it, and there are no aggravating incidents of force, no indictment for such an entry can be maintained. As where the defendant was charged with unlawfully entering a yard, digging the ground, and erecting a shed, and expelling the owner; the court, after much argument, quashed the indictment, being of opinion that the fact did not appear upon the face of the count to be an offence (5). And several cases (6) were mentioned in the course of the discussion which served to confirm the distinction taken by the judges. On the next day after the determination in *R.* v. *Storr*, an indictment for pulling off the thatch of a dwelling-house was quashed, for—*per cur.*—this is only pulling off the thatch (7). So for entering a close (8). So where the indictment charged the defendant with having with force and arms unlawfully, forcibly, and injuriously seized, taken, and carried away a paper writing, purporting to be a warrant to apprehend the defendant for forgery, Perryn, B., held, that the conviction could not be supported, being only a private trespass, in which neither the king nor the public appeared to have any interest (9).

Having thus pointed out the difference which exists between a civil and criminal proceeding where an entry is made upon pro-

(3) Comb. 10, *R.* v. *Newdigate*, fined 1000 marks, and to find surety for the good behaviour for three years.

(4) Cards, dice, tables, tennis, bowls, or other game or games whatsoever. 9 Ann. c. 14, s. 1.

(5) 3 Burr. 1699, *R.* v. *Storr*.

(6) As *R.* v. *Wightwick*, *R.* v. *Fry*, shortly mentioned, Id. 1703. See also Id. 1702. The case of *R.* v. *Dyer*, 6 Mod. 96, seems to be overruled by these cases. See 8 T. R. 360.

(7) 3 Burr. 1706. *R.* v. *Atkins*, S. P. Id. 1707, *R.* v. *Gillet*.

(8) 3 Burr. 1731, *R.* v. *Blake* and fifteen others.

(9) 1 Russ. C. M. 51, *R.* v. *Gardiner*, at Sarum, 1780.

perty, it may be remarked, that the remedies for a forcible entry and detainer rest upon the common law, and upon various statutes. The evils incident to these misdemeanors are, the force, the entry, the expulsion, and the maintenance of illegal possession to the exclusion of the prosecutor. And the objects of a proceeding by indictment are, to punish the offender for his violence, and to gain restitution of the property thus wrested by wrong, besides damages and costs for the injury received. At common law, a person who had no right to lands nor goods was answerable for a breach of the peace in attempting to possess himself of that which was not his own; and if he made an entry into a house for that purpose, he was clearly guilty of a forcible entry. But if one had a right to lands or to goods, and then with violence dispossessed the wrong doer, it seems that he was guiltless at common law of the offence now under our consideration (1). Nevertheless there are precedents at common law of indictments for a forcible entry (2); and as it must be presumed that they were in respect of attempts to obtain possession of property wrongfully withheld; either the authorities of old writers are not entirely to be relied on with regard to this point, or there must be some distinction which has governed the cases in question, and which, if rightly attended to, would prevent any discrepancy. This distinction might be very well supported by restraining the prohibition of the common law to entries into a dwelling-house (3), which has always been considered highly illegal. But it may also be worthy of notice in a more general point of view, that is to say, with reference to the degree of force employed. And thus any degree of force would suffice to establish the case at common law as to the dwelling-house, but in closes, or upon the re-possession of goods, it might have been necessary to show some circumstances of terror, or, at all events, an excess of force beyond that which the occasion would seem to call for. Thus, Jopson and others were charged with unlawfully assembling to disturb the peace of the king, and being so assembled, with force and arms unlawfully breaking and entering a mine of lead, and unlawfully taking away 60 lbs. weight of that material; and the court refused to quash this indictment, observing that it appeared to be good (4); not, perhaps, entirely because an unlawful assembly was partly charged in the count (5), but likewise because there was a far greater manifestation of power than could be necessary in order to redress the wrong which had been done, supposing the object of the defendants to have been lawful. Indeed, it is said in Wilson, that the court conceived the case to have been one which would have justified the introduction of the word "riot" into the indictment (6). Whence it may be concluded, that at common law, if there were no excess, an entry to recover goods, or into land, might be justified if such entry were helped by a lawful title,

(1) 1 Hawk. c. 64.
(2) See 3 Burr. 1700, 1732, and the opinion of Wilmot, J., Id. 1732.
(3) Say. Rep. 225, *R.* v. *Bathurst*, 2 T. R. 358.
(4) Say. Rep. 27, *R.* v. *Jopson* and others; S. C. 1 Wils. 325.
(5) See Say. Rep. 27, by Lee, C. J.
(6) 1 Wils. 325.

but not into a dwelling-house, whatever the amount of force might be. And it is also added by Hawkins, that even now, notwithstanding the statutes, such an entry may take place with reference to *goods* (7), a proposition to which we will take leave to apply likewise the distinction just above suggested as to excessive force. And in confirmation of this principle as to the dwelling-house, a very late decision appears to have recognized the position that the premises need not consist of a *dwelling-house* in order to warrant an indictment for a forcible entry at common law, if the entry be made "with force and arms, and with a strong hand (8)."

The forbearance of the common law, however, led to frequent dispossessions of property by means of feigned titles, so that it became expedient for the legislature to interfere, and forbid all forcible proceedings to recover lands in respect of which parties might assume a right, whether they should be, in reality, the rightful owners or otherwise; and thus, in effect, to carry out the principle mentioned by Lord Kenyon, that "no one shall with force and violence assert his own title" (9).

The first statute is 5 Ric. 2, c. 8. And also the king defendeth that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will.

This act of 5 Ric. 2, was sufficient to repress the entry *cum manu forti*, but it gave the injured party neither damages nor costs, nor even restitution of his property, nor did it provide for the case of one who forcibly detained after having violently entered. The indictment or action was the whole remedy open to the disseised person (10). The statute 15 Ric. 2, c. 2, then passed, giving certain powers to justices of the peace respecting forcible entries. By that act, at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of peace, or to any of them, the same justices or justice shall take sufficient power of the country and go to the place where such force is made, and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice until they have made fine and ransom to the king, and all the people of the county, as well the sheriffs as other, shall be attendant upon the same justices to go and assist the same justices to arrest such offenders, upon pain of imprisonment and to make fine to the king, and in the same manner it shall be done of them that make such forcible entries in the benefices or offices of holy church.

(7) 1 Hawk. c. 64, s. 1; and as to an action for forcible entry it is said, that if the defendant make a title which is found for him, he shall be dismissed without any inquiry as to the force. Id. s. 3. But the doctrine of Hawkins was referred to by Lord Kenyon, in *R.* v. *Wilson*, with some degree of doubt.

(8) 4 Jur. 322, *R.* v. *Newlands*.

(9) 8 T. R. 361. See 13 Vin. Ab. (A. 1.)

(10) 1 Hawk. c. 64, s. 7.

The next act is 4 Hen. 4, c. 8, and by that it appears that forcible entries still continued, especially by the powerful, who disseised their weaker neighbours; and, accordingly, a special assize was given for tenements of any value, without suing to the king. But if the disseisor were attainted of a disseisin, he should then have one year's imprisonment, and yield to the party grieved his double damages, and if convicted of carrying away goods and chattels, should pay damages to the party grieved. Nevertheless, Mr. Serjeant Hawkins points out several defects which still existed. If the entry were peaceful, and the detainer wrongful, the statute, which only extended to a forcible entry and forcible detainer, did not apply; and, secondly, if the offenders were removed before the coming of the justices, the justices had no jurisdiction. Thirdly, no power of restitution was as yet awarded; and fourthly, if the sheriff did not obey the precept of the justices, he was not liable to any forfeiture. (1) Therefore, by 8 Hen. 6, c. 9, reciting 15 Ric. 2, c. 2, and that it did not extend to entries in tenements in peaceable manner, and after holden with force, nor to cases of departure before the arrival of the justices, &c., it was ordained, that from henceforth, where any doth make any forcible entry in lands and tenements, or other possessions, or them hold forcibly (2) after complaint thereof made within the same county where such entry is made to the justices of peace, or to one of them, by the party grieved, the justices or justice so warned within a convenient time shall cause, or one of them shall cause, the said statute duly to be executed, and that at the costs of the party so grieved.

The act then goes on to establish the jurisdiction of the justices, notwithstanding the previous departure of the trespassers, and enables them to make restitution of the premises, and it then imposes a penalty on the sheriff for neglect of duty. By sect. 6, writs of assize and actions are given to the injured parties, and the jurisdiction of justices is extended to mayors and magistrates of cities, &c., having franchise (3).

Provided by sect. 7, that they which keep their possessions with force in any lands and tenements whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute.

This proviso by 31 Eliz. c. 11, may be alleged for stay of restitution until that be tried, if the other will deny or traverse the same, and if the verdict be unfavourable to the persons indicted, they shall pay costs and damages to the party disseised.

(1) 1 Hawk. c. 64, s. 9.

(2) Both entry and detainer are punishable, although the statute be in the disjunctive. Mar. 8, pl. 12.

(3) The act gives treble damages, but as it only applies to persons having the freehold, termors who sue under the statute of James I. cannot have treble damages and treble costs. 8 B. & C. 409, *Cole & ux.* v. *Eagle* & others. But in matters connected with the freehold, not only the costs assessed by the jury, but those de incremento likewise, shall be trebled, and the party may be fined, though fined before upon an indictment for the same offence. 1 Leon. 282, *Rollston* v. *Chambers*.

We have, therefore, now disclosed the statutable remedies both for the entry and detainer, and restitution, with damages and costs, is likewise a part of these latter enactments.

Entry.—Nature of the Force.] Several questions have arisen in order to the due exposition of these acts. But many of the decisions are equally applicable to indictments at common law and by statute, and it may, therefore, be not inconvenient to blend them together, taking care to specify particularly those which rest upon the legislative provisions alone. The nature of the force, whether towards the entry or upon the detainer, is a very material question. At common law, the evidence must be such as to create a public breach of the peace, at least where any property except a dwelling-house is invaded. But it would seem, that a less amount of force would satisfy the statutes, although Lord Kenyon has observed that the point has not been any where decided (4). The probability is, that circumstances of terror are necessary to support the indictment at common law, and of such a public nature as would support a charge of riot, but that under the statutes it would merely suffice to prove such force as might require an individual to find surety of the peace. Therefore, if a man be beaten in order to gain his expulsion from the lands, the force is evidently sufficient (5). So if the doors of a house be broken, or other violence committed, it will be an entry within the statutes (6). And it would be no defence for A. to affirm that he did nothing more than break the door, for that two or three hours afterwards the actual entry into the house was made by B., his companion, peaceably, and without a weapon (7). And by Yelverton, J., the putting back of the bolt with his hand, or drawing up of the latch, is such an entry, to which the court agreed (8). However, this latter opinion must be understood of an entry accompanied by terror, as with a strong hand, a multitude of people, &c., and not as of itself, without further violence or alarm. It would be a mere trespass (9). And it has been holden that to enter by the window, or to open a door with a key, without more, would not be forcible (1). And it is particularly to be remarked that these acts of breaking, &c., are not in any manner qualified by the absence of the party from his house, and so it was held where armed men introduced themselves into a dwelling at a time when no one was there (2). Although if a man were entirely to abandon his possession of land, taking with him his children and servants, and merely leaving his cattle, an entry under such circumstances would hardly be deemed forcible (3).

(4) 8 T. R. 360.
(5) 1 Hawk. c. 64, s. 26.
(6) Ibid.
(7) Noy. 136, *Beade* v. *Orme*.
(8) Id. 137; S. P. Mo. 656.
(9) See 1 Hawk. c. 64, s. 25, 26.
(1) 2 Ro. Rep. 2. So breaking a pane of glass and entering. 1 M. & Rob. 155, *R.* v. *Smyth* & others.
(2) Mo. 656, *Pollard* v. *Moreton*.
(3) 3 Bac. Ab. Forcible Entry, B. This means a total, not a temporary abandonment, such, probably as would negative a charge of burglary in a dwelling house.

These cases of assault and violence to the premises are instances of actual force. And not much unlike them is the entry mentioned by Hawkins, where one laid hold of the proprietor when he was from home, and then sent persons to take quiet possession of the dwelling. This was held not to be a forcible entry, but the learned serjeant is of opinion that it clearly was, for the act was done with an immediate intent to enter, and whether the force be upon or off the land, it seems equally within the statute (1). But there are many circumstances which operate upon the mind so as to induce an individual to give up his possession. These may amount to forcible entries without striking a blow or breaking a lock. As if a man should use considerable menace, either by speech or behaviour, and especially if he be weaponed (2), or accompanied by a number of attendants, or should threaten to kill, maim, or beat the person in possession, or say that he will keep his hold of the property in spite of all men (3).

This is a shew of force which compels the proprietor to withdraw his men from his close, in order to avert the apparent consequences (4). And it would not serve as a defence to an indictment upon 5 Ric. 2, c. 8, or 15 Ric. 2, c. 2, to say that the party never quitted his possession (5), if the claim were made with the violence above mentioned, because those acts treat the forcible entry itself as a misdemeanor. And if after a peaceable entry, the aggressor were forcibly to carry off a man's goods, this also might be a forcible act against the statutes, though not at common law (6). And so if one entered peaceably into a close, and then terrified the owner by threats so as to effect his expulsion, the entry would be construed to be forcible (7). But a mere threat to spoil goods, or destroy cattle, or do any damage which is not personal, is not a force at common law, nor under the statutes (8).

So if A. under a colour of a title, go over the land attended, or without attendants, armed or unarmed, in his way to church or market, but without making any claim, he is not within these provisions of the law.

Detainer—Nature of the Force.] The landlord is, in the eye of the law, the legal possessor of the property withheld; and, therefore, it is not surprising to find, that a termor who holds his premises with weapons and force against his landlord, is guilty of a detainer. As where a tenant kept possession of land, against Sir George Snigge (9), his landlord, with a drum, guns, and halberts. Here he was deemed to have the possession of his lessor, the term being expired, and was fined 500*l.* in the star chamber for the offence (10).

(1) 1 Hawk. c. 64, s. 26.
(2) And the weapons may be seized for the king's use, and the party imprisoned for that alone, 2 Edw. 3, c. 3; 1 Hawk. c. 64, s. 5.
(3) 1 Hawk. c. 64, s. 27.
(4) 2 C. & P. 17, *Milner* v. *Maclean.*
(5) 1 Hawk. c. 64, s. 21.
(6) 1 Hawk. c. 64, s. 26.
(7) See Bac. Abr. For. En. B. Lamb. Eir. 134.
(8) 1 Hawk. c. 64, s. 28.
(9) A baron of the exchequer.
(10) Cro. Jac. 199, *Snigge* v. *Shirton.*

It may, indeed, be assumed as a general principle, that the "same circumstances of violence and terror, which will make an entry forcible, will make a detainer forcible also" (1). So that if one should keep an unusual number of people in his house, or unusual weapons, or threaten to do some bodily hurt to the former possessor if he dare return, the person so conducting himself is certainly guilty of a forcible detainer (2). So it is, if one should place men at a distance from the house, in order to assault any one who might attempt to re-enter, or forestall the way of the disseisee with force so that he dares not enter, or should shut his doors against a justice coming to view the force, and distinctly refuse to let him come in (3). So if a lessee should keep arms in his house to oppose the lessor in re-entering, though no entry be attempted, or if a lessee at will should employ a force to detain, or a mortgagor after forfeiture of the mortgage; or a lessee should forcibly resist a distress for rent, or forestall or refuse it, the same law will prevail (4). But a bare refusal to leave a house, or continuing therein in spite of the owner, without circumstances of terror, can hardly be called a detainer of this description, for want of sufficient force (5).

Other Entries, not forcible.] There are some few circumstances, however, connected with this subject. which do not so much refer to the amount of force as to the lawfulness of the entry itself. As if one went to distrain for rent, and expecting resistance, should take others with him for the sake, not of violence, but of protection. Here an act which might, under some circumstances, be deemed a forcible entry, would be justified, perhaps by the occasion. But an excess of authority, or even making the distress forcibly, would create the misdemeanor (6). So if a landlord should break the door of his late tenant, after the expiration of the term, when no one is within, and thus resume possession, this is not a forcible entry (7); but he may not, under such circumstances, dispossess the tenant by force, whilst the latter is in the house, or on the premises (8).

Other Detainers, not forcible.] So upon the subject of detainers, we have seen, that a bare refusal to leave the premises, or even a dwelling-house, cannot be called a forcible detainer, for the principal ingredient is wanting (9). So, we have likewise set out in a former page (10), the proviso in 8 Hen. 6, c. 9, which averts the penalty due for a forcible detainer, if the disseisor remain in possesion for three years (11). So a mere denial of possession, even by tenant at will, is no such detainer; nor is the act of shutting the door against the re-entry such a force as will amount

(1) 1 Hawk. c. 64, s. 30.
(2) Ibid. "though no attempt be made to re-enter."
(3) Ibid. Lamb. 136, 137.
(4) 4 Com. Dig. F. Det. (B. 1.)
(5) 1 Hawk. c. 64. s. 30.
(6) 3 Bac. Ab. F. En. (B.)
(7) 1 Bing. 158, *Turner* v. *Meymott*; S. C. 7 Moore, 574; Acc. 7 T. R. 431, *Taunton* v. *Costar*.
(8) 7 T. R. 432, by Lord Kenyon.
(9) Supra.
(10) Ante, p. 230.
(11) See 11 Mod. 43; 7 Mod. 138.

to that offence (1). So if the entry were not merely peaceful, but lawful, the detainer cannot be forcible (2).

Who may be guilty of these Offences.] Two questions present themselves to us after the discussion of the point of force—first, as to the parties who may be guilty of these offences, and next, the kind of property, as well as the nature of the possession, which may be the subjects of them. And this first head is not offered for the purpose of mentioning the ordinary cases of infancy or insanity, although an infant arrived at years of discretion, may certainly be convicted of a forcible entry, nor with reference to principal and accessory, but in respect of several relations which persons bear to each other, and to the public, as baron and feme, joint-tenant, the real owner of the inheritance, &c. And as to the owner, it is quite agreed that if A. give the bare custody of his house to B., he cannot be called a forcible disseisor if he eject B. upon his refusal to surrender possession, let the force needful for that object, be never so great (3). So A. cannot be guilty of a forcible entry or detainer, by keeping out a commoner from A.'s own land (4).

But it is not so well settled, that tenant at will can be so far identified with tenant by sufferance in these respects, as to make him liable to be so amoved by the landlord with impunity (5). But if the possession be once "clearly and absolutely" gained by the intruder, the landlord himself must then forbear, according to law, to enter by force, even although he might have held the property in question for twenty years (6). Whilst the disseisor, in his turn, if he should remain for twenty years in possession, would still be affected by a defeasible title, and his continuing in possession, would amount in judgment of law to a new entry (7).

Joint Tenant.] Secondly, a joint tenant may be said to offend against the purport of these statutes, when he ejects his companion. For notwithstanding his being seised *per my et per tout*, so that, he cannot be punished by an action of trespass at common law, yet it is said that such his lawfulness of entry by no means excuses the violence, or lessens the injury done to his companion (8). He thus comes within the equity of these provisions, and is guilty, not only of a forcible detainer if he hold possession, but of the entry itself. And thus Jones, J., held, upon an exception to an indictment, that if a man were tenant in common with the king, a stranger could enter *vi et armis* into a moiety (9). And, although upon another occasion, the same judge doubted as to parceners, Doderidge, J., put the case of

(1) 4 Com. Dig. F. Det. (B.)
(2) 1 Nev. & M. 58, *R.* v. *Oakley*; S. C. 4 B. & Adol. 307; S. P. 5 Nev. & M. 164. *R.* v. *Wilson.*
(3) 1 Hawk. c. 64, s. 32; Mo. 786, *Dame Russell* v. *Countee de Nottingham*, indictment for a riot.
(4) Cro. Car. 486, *Sydnam & Parr's* C.
(5) See post in this section.
(6) Dy. 141.
(7) 1 Hawk. c. 64, s. 23, 34, 53, *Delaber* v. *Lyster*. He must apply to a justice who will remove the force, and commit the offender; 1 Hawk. c. 64, s. 17, 18.
(8) 1 Hawk. c. 64. s. 33.
(9) Palm. 419.

the half before division as being in effect of one thing only, and not separated from the whole as after a division, and he mentioned joint tenants, and tenants in common as examples. And the court held generally, that there might well be an entry into the moiety of a manor (1). And upon a more modern occasion, it was held for clear law, that one joint tenant might indict his fellow for a forcible entry (2).

Feme Covert.] A feme covert may be guilty within the intention of the statutes, in respect of such violence as may be done by herself, but not of others by her command, inasmuch as she is deemed by law incompetent to enforce such command, and it is therefore void (3).

Infant.] And the like observations will apply to an infant arrived at years of discretion (4). And the feme covert may suffer imprisoment for such her offence, but not so the infant by virtue of the statutes, because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named (5).

But at common law both feme and infant may be guilty of a forcible entry and detainer, as it should seem, and the infant be punished with imprisonment as well as the wife. Ann Smyth and others, were charged with a forcible entry into a dwelling-house, which was her husband's. There was a count on the statute and one at common law; and by Lord Tenterden, "although a wife certainly cannot commit a trespass on the property of her husband, I am by no means satisfied, that if she comes with strong hand, she may not be indictable for a forcible entry, which proceeds on a breach of the public peace." "There must be actual force, or such show of force as may prevent resistance." The defendants were acquitted (6).

One Individual.] A riot must be by three, and as affray is commonly understood to be with two (7), but a forcible entry may well be by one. As if A. should arm himself, and invade the dwelling of a lone woman, and so eject her under circumstances of terror; for here is a combination of violence and a breach of the peace. And so likewise might be the detainer. The misdemeanors, to use the words of Hawkins, "may be committed by a single person, as well as by twenty (8).

Nature of the property, and possession, which may respec-

(1) Latch. 224, *Beverly's* C.
(2) Ca. Temp. H. 174, *R.* v. *Marrow.*
(3) 1 Hawk. c. 64, s. 35; see also Co. Litt. 357 (b.)
(4) 1 Hawk. ut supra.
(5) See 1 Hale, 21; 1 Hawk. ut supra.
(6) 1 Moo. & Rob. 155, *R.* v. *Smyth* & others; S. C. 5 C. & P. 203. As to the count at common law, see 8 T. R. 364, by Lord Kenyon; and note of the editors, 1 M. & Rob. 159.
(7) Although one only may commit the offence, ante, p. 221.
(8) 1 Hawk. c. 64. s. 29.

tively be the subjects of these offences.] Secondly, we have to advert for a moment to the nature of the property which may be the subject of these misdemeanors, and likewise to the quality of estate which may be affected by them. And first, as under 15 Ric. 2, the justices may convict upon view, it follows that there cannot be a forcible detainer of any tenement, wherein there cannot be a precedent forcible entry, for the justices have no power over any detainer which does not follow the entry (1).

Property.] Hence it is, that a way is not the subject of an offence within these statutes; for a way is but an easement (2), and as there can be no entry, there cannot be a detainer. But it might be a forcible entry as against the lord of the manor, or other individual in whom the freehold reposes during the servitude of the road, for the owner of the property need not be present at the time of the disseisin. So in the case of a common, which is not an easement but a profit *à prendre in alieno solo*, there might, by possibility, be a forcible entry as regards the lord of the manor, but not so in respect of the commoner, for he has no interest in the soil beyond the depasturing or turves (3). And if it be said, that the disseisin of a common is punishable, this must be understood of a detainer at common law which is cognizable by the assizes as a public breach of the peace and without restitution (4). So an office seems not to be within these laws as to the entry, though it may be as to the detainer at common law (5). But tithes and rent rest upon a different foundation. They issue out of the realty, and so savour thereof, as to be in this respect of the nature of land. And thus an indictment lies both at common law and by the statutes, for a forcible disturbance of rent, and likewise, under the statutes, with reference to tithes (6).

The words "offices of the church," are to be found in 15 Ric. 2. Hence churches and vicarage houses, are within the laws of forcible entry (7). There may be a forcible entry into a close (8).

Possession.] Clearly he who is seised of the freehold, is within the protection of these statutes, and of the common law. And so is a tenant for years. And a copyhold tenant. But these last-mentioned tenants for years, and by copy, were not within the acts we have hitherto set out, as to the restitution of their possession (9). It is true, that if their lord or lessor were disseised, as well as themselves (10), the court would award them restitution,

(1) Id. s. 31.
(2) 1 Mod. 73, *R.* v. *Holmes*; S. C. 2 Keb. 709.
(3) See 1 Hawk. c. 64. s. 31.
(4) See Cro. Car. 486; 1 Hawk. ut supra.
(5) See Cro. Jac. 18, *Lady Russell's* C.; 1 Hawk. ut supra.
(6) See 1 Hawk. c. 64, s. 31; Cro. Car. 201; Anon. 13 Vin. Ab. For. En. c. 4.
(7) 1 Sid. 101, *R.* v. *March* & others; S. C. 1 Lev. 90, nom. *R.* v. *Larking* & others; S. C. 1 Keb. 438, as to the church; Cro. Jac. 41, *Baude's* C., as to the vicarage house.
(8) 2 Ld. Ken. 512, *R.* v. *Nicholls.*
(9) 13 Vin. Ab. F. En. (D. 1.) Sav. 68.
(10) As where A. caused himself to be disseised, in order to rid him-

but not so, if they were put out by their own landlord (1), or, indeed any other, for such a tenant had no freehold (2). Therefore, by 21 Jac. 1, c. 15, tenants for years, and by copy of court roll, guardians by knight's service, tenants by elegit (3), statute merchant and staple—of lands or tenements, were included within the provisions of those statutes, which enabled judges and justices to award restitution, and accordingly, copyholders were recognized without further scruple (4).

But tenant by the verge, tenant at will, and tenant by sufferance, are not mentioned in this act of James. And although Hawkins points out that tenant by the verge would be within the meaning, if not the words of the statute, seeing that he has no other evidence of his title than the copy of court roll (5); yet Jones, and Whitlock, Js., had previously holden, that tenant by the verge was not within 21 Jac. 1, c. 15, and they would not allow the act to be taken in an equitable view (6). The judges above mentioned, indeed, looked upon this tenant as a tenant at will, and it is not settled whether such a person would be considered to be within the equity of these acts. However, the justices may remove the force, and commit the offender in the case of tenant by the verge (7).

With regard to tenant at will, Morton, J., in the reign of Car. 2, cited an opinion, that both he and tenant at sufferance were within the law of these misdemeanors (8). But the court denied that, and Kelyng, C. J., had previously remarked, that no force could be on a tenant at will, but "it must be for years, or a freehold" (9). Hawkins, however, subjoins a quære to this with respect to the landlord (10), and, possibly, the courts, which of late years have preferred to liken the tenant at will more to a yearly tenant than one at sufferance, might be disposed to extend the protection of the statutes as far as they could, without breaking in upon the statute of James, or the rules of the common law. But tenant at sufferance is universally excluded from these considerations. It is said to have been frequently so adjudged (11). So where the objection was that the estate did not appear, it was added, that if the party were tenant at sufferance, the indictment would not lie (12).

Proceedings.—Restitution—Re-restitution.] We have now discussed the questions of entry and detainer, and the nature of the

self of B. his customary tenant, who had committed a forfeiture. Restitution was awarded to B., for there was an expulsion in this case, Yelv. 81, *Sir A. Nowell's* C.

(1) 1 Hawk. c. 64, s. 15.

(2) Ibid.

(3) See Sav. 68.

(4) Poph. 205, *R.* v. *Plowden* & others; Tho. Raym. 67, *R.* v. *Hardy*.

(5) 1 Hawk. c. 64, s. 17.

(6) Latch. 182, *Stacey's* C.

(7) 1 Hawk. c. 64, s. 18.

(8) 2 Keb. 495, *R.* v. *Westly* & another.

(9) Ibid. see also 1 Salk. 260, *R.* v. *Dorny*.

(10) 1 Hawk. c. 64, s. 32.

(11) 11 Mod. 273, *R.* v. *Depuke*.

(12) 12 Mod. 417, *R.* v. *Dorny*; see also 1 Hawk. c. 64, s. 34. See generally upon forcible entry and detainer, 1 Russ. C. M. 283-295; Bac. Ab. Tit. Forcible Entry, 13 Vin. Ab. 379-410.

force required; we have mentioned the persons who may commit the misdemeanors under consideration, and the property as well as the possession in respect of which they may happen, and we now proceed to the method which the common law and statutes have ordained for the punishment and redress of the grievances. In other words, the remedies by view or inquisition, by indictment or information, by action, and subsequently, by restitution, are the next subjects to which we direct the reader's attention.

View.—Judgment.] The most limited of these remedies, is that by record of view.

By 15 Ric. 2, c. 2, justices, or one justice (1), upon complaint made of a forcible entry, may take sufficient power of the county, and go to the place where the force is, and having found the offenders in the act of a forcible detainer, may commit (2) them to the next gaol, *convict by the record* (3) of the same justices or justice, until they make fine and ransom, and the people of the county and the sheriff shall assist, on pain of imprisonment and fine.

The fine, however, must be set by the justices.

Where parties were committed until they should pay their fine, but no sum was fixed, the conviction was, of course, quashed (4). Whilst, on the other hand, if a fine be set, the judgment must be, that the defendant be committed till the fine be paid (5). The like remedy was ordained by the same statute against forcible entries into benefices, or offices of holy church.

The subsequent statutes 8 Hen. 6, c. 9, and 21 Jac. 1, c. 15, although they give more extensive remedies, do not take away, or abridge the proceeding by view; yet considerable care should be taken by magistrates before they pronounce their judgment in a case of this nature. If they were to see, as it were, inopinate, a forcible entry into premises, they might convict at once, perhaps, at the instance of the complainant, without further evidence. But such a singular occurrence of events is almost impossible, and it therefore becomes the duty of justices to hear evidence. For otherwise it is very truly questioned how, in the case of a forcible detainer, to which their conviction upon view must alone relate, for the reason above given, they can come to a right conclusion, unless they have testimony to satisfy them that the entry was unlawful. And thus it was, that a conviction under 8 Hen. 6, stating an information and complaint of an unlawful ejection, and forcible detainer, where the justices recorded their view of the forcible detainer was held invalid, inasmuch as there was no evi-

(1) 4 Hawk. c. 64, s. 8.

(2) This means "must," and it should be done *eo instante*. 11 Mod. 52; anon. and if they neglect, neither the sessions nor the court of queen's bench can do so, Mo. 848.

(3) Which is not traversable on view. And justices have no concern with the possession, 12 Mod. 516, *R.* v. *Brown*; 1 Hawk. c. 64, s. 8.

(4) 2 Ld. Raym. 1514; 3 Ld. Raym. 360, *R.* v. *Elwell* & others; S. C. Str. 794; 1 Salk. 450, *R.* v. *Layton*; Fort. 173. See 1 Salk, 353, *R.* v. *Layton*.

(5) Say. 176; *R.* v. *Hord*, conviction quashed; see also 12 Mod. 495.

dence that the entry had been unlawful (6). For there cannot be a forcible detainer without such an illegal entry (7). The conviction, however, ought to shew, as it seems, that the defendant was summoned, or that he had an opportunity of defending himself (8). And although it may not be necessary to set forth the particular facts presented to the view of the justices (9), such facts as will warrant the conviction, or the unlawful detainer, ought probably to appear (1).

Should the defendant upon a conviction upon view, be disposed to make a defence to the charge, he is allowed a traverse in the nature of an appeal, and the matter is then tried.

Inquisition.—Judgment.] Another remedy is provided by 8 Hen. 6, c. 9. For the same justice or justices who might take the view may, by that act, have authority to inquire, by the people of the same county (2), of such as make forcible entries, and also of those who hold the same with force. This inquiry may take place in some good town next to the tenements so entered, or in some other convenient place, at the discretion of the justices. "And if it be found, that any doth contrary to this statute, then the justices or justice shall cause to reseise the lands and tenements, and shall put the party in full possession as before."

Thus, under 8 Hen. 6, although the entry were peaceable, the justices are empowered to inquire concerning the forcible detainer. And the act, moreover, enables them to take an inquisition whether the intruders be "present, or else departed before the coming of the justices or justice;" and the power of restitution is added, with enactments making it compulsory on the sheriff to obey the precepts of the justices (3).

Much care is necessary in taking an inquisition, and it should be observed, that if a conviction be held invalid, an inquisition founded upon it will likewise fail. But the court will not quash an inquisition, because of the illegality of a conviction, without hearing the objections respectively applicable to each, for the one might be dependent on the other (4). An inquisition, however, which stated an unlawful entry and detainer, but omitted to add that any complaint had been made by the prosecutor, or by what authority the jury had been summoned, was held, of itself, to be void (5). In this case, a traverse had been tendered to the magistrates upon conviction, and they had summoned a jury to try the alleged force, who pronounced a verdict of guilty, and the justices then ordered restitution. A return was made of the conviction and inquisition

(6) 5 Nev. & M. 164, *R.* v. *Wilson.*
(7) 1 Nev. & M. 58, *R.* v. *Oakley*; S. C. 4 B. & Adol. 307.
(8) Semble per Lord Denman, C. J., 3 Ad. & El. 826. 1 Hawk. c. 64, s. 60; 11 Mod. 42.
(9) 3 Nev. & M. 753, *R.* v. *Wilson.*

(1) 3 Ad. & El. 625, per Lord Denman.
(2) The jury should come from the neighbourhood, 2 Ld. R. 926, *R.* v. *Crofts.*
(3) See 1 Russ. C. M. 284.
(4) 3 Ad. & El. 817, *R.* v. *Wilson*; S. C. 6 Nev. & M. 635, 852.
(5) Ibid.

into the court of king's bench, when both were quashed. So again, an inquisition was quashed, for want of stating the nature of the estate possessed by the party deforced (6).

So where no mention was made of the place from whence the jury had come, and it was not even stated that they were of the county, the inquisition was quashed (7); but not where the inquisition omitted to say, that they were "then and there" sworn (8). It needs scarcely be added, that no restitution will be made till the traverse be tried (9), and that the defendant ought to have an opportunity of answering the charge, so that an award of restitution can be legally made in his absence (1).

But this proceeding by inquisition, like that upon view, is not of common occurrence, so that it may pass on to the most ordinary course of redress under these circumstances,—by indictment at the sessions.

The most usual remedy, then, which is adopted with regard to this class of misdemeanors, is by indictment; and this may be either at common law (2), or by statute. At common law, however, such a measure of violence must appear upon the face of the record as will amount to a public breach of the peace, so that where no such breach was alleged, nor riot, nor unlawful assembly, it was held that the charge could not be sustained, that the number of the defendants said to have been engaged in the transaction made no difference, and that the words "force and arms," were insufficient to denote the evidence presumed by the law. (3)

A forcible detainer after a quiet entry, would likewise seem to be a misdemeanor at common law, if it be such as to cause a public breach of the peace (4).

Judgment at common law.] The judgment for these misdemeanors at common law is fine and imprisonment.

The statutes, however, are for the most part resorted to when it is proposed to indict for these respective offences, because a writ of restitution is given by one of them—the 8 Hen. 6, c. 9. And although the stat. 5 Ric. 2, c. 8, has no mention of this restitution or reseisin, an indictment may still be framed upon its provisions, because the stat. 8 Hen. 6 will provide for the subsequent restitution, if the expulsion be duly alleged. If it were desired to proceed for a forcible entry and detainer, the stat. 15 Ric. 2, c. 2, would certainly apply; but the latter act yields in usefulness to the 8 Hen. 6, c. 9, which embraces a detainer after a peaceful entry. If, therefore, the entry be forcible, and the possession withheld, the indictment would probably be drawn under 5 Ric. 2, c. 8, and if the entry were not forcible, but there

(6) 8 Dowl. P. C. 128, *R.* v. *Bowser*.

(7) 2 Lord Raym. 926, *R.* v. *Crofts*.

(8) 4 Mod. 248, *R.* v. *Waite*. A jurat saying "sworn and charged upon oath," without the words "*to inquire* for the body in the county," has been held good, 6 Mod. 93, *R.* v. *Watton*; S. P. 1 Show. 272, *R.* v. *Hayes*.

(9) 1 Hawk. c. 64, s. 58.

(1) Id. s. 60.

(2) Say. Rep. 225, *R.* v. *Bathurst*; 3 Burr. 1731, *R.* v. *Blake* and others; Id. 1732, per Wilmot, J., 8 T. R. 357, *R.* v. *Wilson* & others.

(3) 3 Burr. 1732, *R.* v. *Blake* and others.

(4) See as to to the count at common law, post.

should, nevertheless, be a detainer, the count would rest upon 8 Hen. 6, c. 9. It will be remembered also, that if the forcible entry or detainer be made by three or more, an indictment for a riot may be sustained against the offenders. But it may be remarked, that an indictment for forcible entry quashed will not survive as an indictment for riot (5).

An indictment at common law for the misdemeanor under consideration commonly states that A. and B., with others, with force and arms, and with a strong hand, unlawfully did enter (6) into the premises in question, which premises were at the time (7) in the peaceable possession of C., and that the same persons in a like violent manner expelled and put out C. from his possession, and that C. has been kept out of possession by the defendants, and still is so kept out, to the great damage of C., &c.

An indictment on 5 Ric. 2 is not dissimilar from that at common law, but it seems that a less amount of violence than an actual breach of the peace will be sufficient to maintain it, and the conclusion is, of course, against the form of the statute (8). But the count, upon 8 Hen. 6, c. 9 (9), which is the most to be recommended, affirms that the defendants unlawfully, with a strong hand, and *without judgment recovered*, did disseise the owner of the premises, and did keep him out (10), until the taking of the inquisition, &c. And if it be intended to charge a forcible detainer only, the unlawful entry should be alleged, together with the expulsion, and afterwards, that the defendants, with force and arms, and with a strong hand, did keep out C., &c. And lastly, if the provisions of 21 Jac. 1, c. 15, regarding lessees for years or copyholders ousted by their lessor or lord be made available, care must be taken to insert a proper description of the premises. In taking up the several phrases of these indictments as they meet the eye, it may be remarked, that although at common law such a force ought to be shewn as will amount to a breach of the peace, the words "with a strong hand" will be sufficient to make out a charge, either at common law, or upon the statutes. Thus where the defendants were indicted for entering into a certain mill, "with force and arms, unlawfully, and with a strong hand," a demurrer was put in on the ground that a private trespass, and not a public breach of the peace had been alleged, but the court were clearly of opinion that the words "*manu forti*" meant a higher degree of force than "*vi et armis*;" that they imported something criminal, and that a breach of the peace was manifestly

(5) Cro. El. 697, *Eden's* C.

(6) Restitution was awarded by the opinion of three judges against Doderidge J., where the detainer was stated to be forcible, but the entry was alleged singly, without saying whether forcible or otherwise. Palm. 194, *Earl of Salisbury* v. *Sir A. Ashley*.

(7) See Hetl. 73, *Hobson's* C.

(8) It need not be shewn that the justices before whom the indictment was taken had authority to hear felonies and trespasses. Palm. 277: 1 Hawk. c. 64, s. 36. See also Al. 49, *R.* v. *Simmons* & others.

(9) It is better not to recite the statute. See 2 Leon. 186, *Farnam's* C.

(10) See Jenk. 118.

implied by them. Judgment for the crown was accordingly given upon those counts which contained such words, and for the defendants upon two counts, where "manu forti" did not appear (1). And the same words will, of course, be enough to satisfy a count upon the statutes which contemplate a less degree of force than an actual violation of the peace. But the omission of manu forti would be highly unsafe in an indictment upon the statutes, even though other words of strong import should be used to express the same meaning. For if a prosecutor be content with alleging force and arms without more, he does no more than complain of a civil trespass, and his count will be quashed (2). And the only exception to the rule is the case of forcible entry into a dwelling house, "for a dwelling house is of great regard in the eye of the common law." So that where the defendant was indicted for that he unlawfully and injuriously, with force and arms, did enter into the dwelling house of the prosecutor, the count was held good, and judgment was given for the king (3). And this case has been adverted to as recognizing a sound distinction (4). The place where the force happened must be described with certainty (5).

The next matter worthy of importance is the statement of the premises in question (6), and of the possession which has been interrupted. The prosecutor, therefore, alleges that he was seised (7) in his demesne as of fee, or of a freehold then being in the tenure and occupation of one C., or of a certain messuage for a certain term of years (8), whereof —— years were then to come, and are still unexpired (9), &c. For want of setting forth the nature of the estate, indictments have been frequently quashed (10), and the reasons assigned are, that the defendant may know the special charge against him, and that the court may know whether any one of the statutes relative to forcible entries extends to the estate from which the expulsion was (11). And

(1) 8 T. Rep. 357, *R.* v. *Wilson* & others. See *Baude's* C. Cro. Jac. 41, which was referred to by Lawrence, J. in *R.* v. *Wilson*, 8 T. R. 362, for the purpose of shewing that "manu forti" was sufficient in an indictment upon 8 Hen. 6, c. 9, because numerous objections were made to the indictment upon that occasion, and yet not one as to the degree of force.

(2) 3 Burr. 1698, *R.* v. *Storr*; S. P. *R.* v. *Atkins*, Id. 1703; *R.* v. *Gillet*, ibid.; *R.* v. *Blake*, Id. 1731; 1 Freem. 523, *Lock's* C.; Ry. & Moo. N. P. C. 27, *R.* v. *Deacon* & others. See also Sty. 135; 11 Mod. 113, *R.* v. *Harris*, Id. 135, *R.* v. *Baker* & others; 1 Hawk. c. 64, s. 44. From whence it seems that *R.* v. *Dyer*, 6 Mod. 96, where the court refused to quash an indictment upon 5 Ric. 2, which wanted these words, is of doubtful authority.

(3) Say. Rep. 225, *R.* v. *Bathurst*.

(4) 3 Burr. 1732; 8 T. R. 362.

(5) 1 Sess. Ca. 357, *R.* v. *Banks*.

(6) See 2 Leon. 186, *Farnam's* C.

(7) Seised *or* possessed where not fatal to the charge, Cro. Jac. 634, *Ellis's* C.

(8) The words "of years" should be carefully preserved, 1 Freem. 524, *R.* v. *Johnson*.

(9) Or of a copyhold, describing it. The term must be described as still enduring, 3 Keb. 901, *R.* v. *Benson* & others.

(10) See several authorities to this effect in 1 Hawk. c. 64, s. 37; 3 Bulst. 71.

(11) 2 Ventr. 89; Anon. Id. 306. Say. Rep. 142, *R.* v. *Wannop*; 1 Hawk. c. 64, s. 38.

thus "tenement" is too uncertain (1). And again, the prosecutor might be but tenant at will, and so not within the acts (2). And although an indictment upon 8 Hen. 6 was once held good by Doderidge and Chamberlain, Js., which did not express the nature of the property (3), yet it may be said upon that, that the words of the charge were that the owner was seised and possessed until the parties indicted disseised him, and the court said, that these terms implied a frank tenement (4). And à fortiori where mention of seisin was altogether left out, the indictment was held bad (5). But where the nature of the premises appears on the record, together with an averment of seisin, the court will award restitution, although the seisin be not very technically expressed. As where the defendants were charged with entering into a messuage of W. P., he the said W. P., being then and there also seised thereof, the court in this case awarded restitution, notwithstanding the objection that W. P. might have been seised *pur auter vie*, and that he ought to have been mentioned as being seised *as of fee* or *of freehold*. For the rule of law is that a life in being shall be presumed to continue until the contrary be shewn, and as no averment could have been placed on the record which would shew the existence of *cestui que vie* when the writ was prayed, the general statement of seisin must, of course, embrace all circumstances (6). However, as a description of the premises is essential for the purpose of obtaining restitution (7), it may be doubted whether the authority of the case in Palmer can go, at all events, further than to warrant the mere conviction of the parties for the forcible entry, without the restoring remedy. But seisin, or possession being duly alleged, the particular estate or title need not be set out (8), and it is not necessary to add, that the prosecutor continued seised (9). And the number of acres, or whether they were arable, meadow, or pasture, need not be stated (10).

So, under 21 Jac. 1, c. 15, accuracy is required in describing the estate. For where the lease was for so many years, if J. S. should so long live, and the indictment omitted to aver the ex-

(1) 2 Ro. Rep. 46. So a "rood of land," 1 Bulst. 201.

(2) 1 Sid. 101, *R.* v. *March* & others; 3 Salk. 169, *R.* v. *Griffith* & others; 11 Mod. 273, *R.* v. *Depuke*; 1 Salk. 260, *R.* v. *Dorny*; S. C. 1 Lord Raym. 610.

(3) Palm. 277, *R.* v. *Emmet* & others.

(4) Ibid.

(5) 7 Mod. 123, *R.* v. *Taylor*. It does not seem absolutely necessary to raise seisin if possession of the freehold be stated, because the injury is to the possession; but in *R.* v. *Taylor*, neither seisin nor possession was alleged. See Stark. Cr. Pl. 445, note (z).

(6) 6 M. & S. 266, *R.* v. *Hoare* & others. See likewise Caldec. 415, *R.* v. *Lloyd* & others, to the same effect, where freehold was alleged, but not proved; yet upon the proof of force and possession, the judgment was sustained, 1 Hawk. c. 64, s. 38.

(7) Stark. Cr. Pl. 445, note (u.)

(8) 1 Hawk. c. 64, s. 38. See Sty. 147.

(9) 2 Ch. Rep. 514, *R.* v. *Dillon* & others.

(10) 2 Leon. 184, *Ashpernon's* C. It was also objected, that the time of the unlawful assembly only, and not that of the entry was alleged, but the court said they would intend that both happened at the same time.

istence of the life, Roll, C. J. ordered that it should be quashed for that error (1). So to say—possessed of a certain term, without adding—of years (2); or to say, "disseised," for that cannot be of a term or a copyhold (3). The course is to say, that the tenant of the freehold was ousted, and then that the lessee for years was expelled (4). It is, moreover, proper to shew that the place was the freehold of the party ejected at the time of the force, so that the word "then" must be made use of, and "being the freehold of E. F.," without more, is insufficient (5). Although to allege that the l. i. q. was "then and yet" the freehold of E. F. cannot be permitted, inasmuch as it would be inconsistent with that part of the count which states that the wrongdoer still keeps the party out (6).

Having sufficiently asserted the entry (7), and the nature of the possession invaded, it is indispensable to mention the expulsion (8). There must, in other words, be an allegation of seisin and disseisin (9) where the prosecutor has been removed from his freehold. And the conclusion of a disseisin cannot be a matter of inference (10). Where, indeed, the ejectment complained of is of a tenant for years, or of a copyholder, seisin cannot be stated, because a copyholder has no freehold, and the distinction between this case and indictments (11) for expulsion from freehold has been more than once recognized. And it is also unwise to aver too much, for where it was said that the possession of A. B., *farmer*, was entered upon, and that R. F. was disseised, the indictment was held faulty, for want of saying that A. B., the farmer, had been likewise disseised. Had the pleader forborne to call A. B. farmer, the case had been otherwise, because no title would have been found in any other but in him who was found to be disseised, but finding the woman to be a farmer (an estate known and certain) it became necessary to shew her expul-

(1) Sty. 147, *R.* v. *Bray*,

(2) 1 Mod. 73, *R.* v. *Holmes*, 1 Ventr. 306; 1 Hawk. c. 64, s. 38.

(3) 1 Hawk. c. 64. s. 39; Thos. Raym. 67, *R.* v. *Hardy*. A house taken by a woman who lives apart from her husband is rightly described as the husband's house. It was clearly so held by Lord Tenterden, where the husband had entered for the purpose of restoring possession to the owner, and the wife then entered, as it was alleged, with strong hand, to regain her possession. 1 Moo. & Rob. 155, *R.* v. *Smyth* & others; S. C. 5 C. & P. 203.

(4) 4 Mod. 248, *R.* v. *Waite*.

(5) Cro. Jac. 214, *Poynts's* C.; Id. 239, *Bridge's* C., where "*adhuc*" seems to be wrongly put for "*ad tunc*:" S. P. Comb. 288, *R.* v. *Wogan*; Yelv. 28, *R.* v. *Fenton* & others.

(6) 1 Show. 272, *R.* v. *Hayes*; 1 Hawk. c. 64, s. 39.

(7) See 1 Hawk. c. 64, s. 40.

(8) Id. c. 64, s. 41. "Then and there" are not indispensable in stating the expulsion, nor an identity of place, because both these circumstances must follow upon the entry and disseisin. Id. s. 42.

(9) The word "disseise" includes an unlawful expulsion, Cro. Jac. 32, *Andrews* v. *Lord Cromwell*, Noy. Rep. 125, *Watts's* C.; 1 Hawk. c. 64, s. 43; 3 Leon. 102, *Wroth* v. *Capel*. See Yelv. 15, *Lord Cromwell's* C.

(10) 1 Salk. 260, *R.* v. *Dorney*; S. C. 1 Lord Raym. 610; S. P. 2 Salk. 169, *R.* v. *Griffith* & others; 7 Mod. 123, *R.* v. *Taylor*.

(11) Poph. 205.

sion (1). And as the word "then" has been shewn to be of importance in stating the possession of the freehold, it must also be employed in setting out the expulsion (2). Lastly, the continuance of the disseisin must be expressly averred, because it would be a repugnancy to award restitution to one who never was in possession, and in vain to award it to one who does not appear to have lost it (3).

Where there is no doubt as to the entry, but it is questionable whether the detainer can be proved, or vice versâ, the indictment may be drawn accordingly (4). But if both entry and detainer be alleged, and the jury omit to find as to one, the court will hold the entire charge ill laid. As where the jury found the detainer only: it was moved that a peaceable entry ought in such a case to have been found likewise, and the court were of that opinion, and awarded re-restitution of the property which had been restored (5). Whereas if no mention at all had been made of the entry, it would have been sufficient (6). So where the jury gave a verdict as to both points, and found the detainer peaceable, the court referred to Ford's case as making the distinction, and held the indictment good (7). However, it seems that the grand jury cannot make a division of this nature, because they ought to find the truth or falsehood of the whole of the bill, and therefore, where they found a peaceable entry and forcible detainer, a restitution awarded thereupon by justices was set aside (8).

Pleas.] In answer to this charge of forcible entry and detainer, it is, of course, competent to plead not guilty, which puts the violence in issue (9), but the provisions of 31 El. c. 11, already adverted to in a former page must be pleaded (10). By that act, there is to be no restitution if the person indicted has had the occupation, or been in quiet possession of the premises for three whole years next before the day of the indictment. And the plea need not set forth the title or estate, for the materiality of the issue is in the possession (11). This allegation so pleaded operates (like a general traverse of the force) in stay of the restitution (12), and is capable of being denied or traversed by the prosecutor, and so brought to trial. Indeed, if the justices should refuse to accept the traverse thus tendered, the court will award re-restitution upon a writ of certiorari (13). Defendants, however, should be well

(1) Yelv. 165, *Freiston* v. *Shillito*. See Godb. 45.
(2) Cro. Jac. 41. *Baude's* C.
(3) 1 Hawk. c. 64, s. 41. See Say. Rep. 225. Ry. & Moo. N. P. C. 27.
(4) See Cro. Jac. 31, *Andrews* v. *Lord Cromwell*; Stark Cr. Pl. 445, note (t).
(5) Cro. Jac. 151, *Ford's* C.
(6) Id. 19, *Sir W. Fitzwilliam's* C.; S. C. Cro. El. 915; S. C. Yelv. 32.
(7) 1 Sid. 99, *R.* v. *Sadler*.
(8) 1 Sid. 414, *R.* v. *Serjant*; S. C. 1 Ventr. 23. See further, 2 Bulst. 121, 258.
(9) And the plea must be in writing, 1 Hawk. c. 64, s. 58.
(10) 1 Salk. 353.
(11) 1 Hawk. c. 64, s. 56.
(12) 1 Salk. 260, *R.* v. *Harris*; S. C. 1 Lord Raym. 440; S. P. 1 Keb. 538, 343, *R.* v. *Burges*. See Dy. 122 (6); 1 Ventr. 265; 2 Salk. 588, *R.* v. *Winter*. Ibid., citing *Sir R. Bray's* C.
(13) 1 Sid. 287, *R.* v. *Stacey* & others; 3 Salk. 170, *R.* v. *Bengough*.

assured before they avail themselves of this plea, under 31 El. c. 11, inasmuch as they cannot place not guilty and the possession for three years upon the same record. The statute, it may be naturally concluded, was not intended to protect a tenant from holding out against his landlord, for the possession of the former is that of the lessor (1). The act contemplated cases where the estate should be continued, and a termor who kept out the reversioner with weapons was held clearly guilty of a forcible detainer (2). The plea should be tendered immediately, whether it be of not guilty, or under 31 El. And upon one occasion, where the time for pleading was discussed in the court of king's bench, the rule was, that unless the defendant should plead or demur within two days, and if he plead, to take notice of trial within term, then let restitution be awarded (3).

Judgment.] The judgment upon an indictment at common law is fine and imprisonment, but restitution forms no part of the sentence, which is referable to public grounds only (4).

Restitution.] Where the indictment or inquisition is proceeded with upon the statute of 8 Hen. 6, c. 9 (5), we have seen that restitution may be awarded (6). And it is observable that the possession of visible and corporeal tenements only are con-

(1) See Godb. 45.

(2) Cro. Jac. 199, *Snigge* v. *Shirton.*

(3) Ca. Temp. Hardw. 174, *R.* v. *Marrow.* It may be noticed here, that the person ejected cannot be a witness to prove the case which he prosecutes. It was so held upon an indictment under 21 Jac. 1, c. 15, where Vaughan, B. permitted the tenant for years and his wife to give evidence. Their evidence was material, and a verdict of guilty ensued. The court observed, that both husband and wife were interested in the event, because a conviction would entitle them to a judgment of restitution; and the public would sustain no injury, because the remedy by indictment at common law still remained. The rule for a new trial was, accordingly made absolute. 9 B. & C. 549, *R.* v. *Williams*; S. C. 4 M. & Ry. 471; S. C. 2 Ch. Burn. 899. The same point was ruled by Littledale, J. where the wife of the prosecutor of an indictment on 21 Jac. 1, c. 15, was called as a witness, and objected to on the ground of her husband's interest. Ry. & M., N. P. C. 242, *R.* v. *Beavan* & others.

The statute 31 El. gives costs against defendants who plead the possession of three years unsuccessfully in express terms. 2 Lord Raym. 1036, *R.* v. *Goodenough.*

(4) All accessories, or more properly aiders and abettors, are principals, Co. Litt. 257, although their punishment may not be quite so severe as that of the chief offender. Cro. Jac. 199. And it does not matter that some did not come upon the land at all. 1 Hawk. c. 64. s. 22. But one who barely agrees to an entry made without his knowledge or privity is not within the statute. 1 Hawk. C. 64, s. 24.

(5) As to termors and copyholders, see 21 Jac. 1, c. 15. That lessee for years should sue in the name of the reversioner for restitution, and lessee for years of a copyholder by licence in the name of the lord, see 13 Vin. Ab. 387, *Sir M. Arundell's* C. Restitution is made to him in reversion, and not to the lessee for years, for he who is disseised may be restored, and then the lessee may re-enter, 1 Leon. 327, *Sover's* C.

(6) The judge of assize will sometimes award restitution if a bill of indictment be found (4 M. & Ry. 483 n., *R.* v. *Hake,*) but it lies in his discretion to do so, 8 Ad. & El. 826; *R.* v. *Harland* & others; S. C. 1 Per. & D. 93; S. C. at N. P. 2 Moo. & Rob. 141.

templated by the statute, so that a rent (1) or common is no within its provision. And the reason is, because there cannot be disseisin of such property; such things being mere creatures of the law, and always deemed to be in the possession of those whom the law adjudges to have a right to such possession (2). But the persons who disturb incorporeal rights may be punished under 15 Ric. 2, c. 2 (3), or may be sued by action for the damage caused by the interruption. And tithes have been held subjects for restitution. Further, it is not competent to restore premises to any one who was not in the actual possession of them, so that a mere seisin in law would not afford a ground for the remedy (4). And Mr. Serjeant Hawkins is of opinion, that if a disseisee were to re-enter peaceably upon the disseisor, he might be found guilty of a forcible detainer, and so that the disseisor might have restitution, although it might be said, that the latter had, in judgment of law, no possession at all (5). Nor again can restitution be awarded against any one who had been three years in possession of a lawful estate. This provision was introduced by 31 Eliz. c. 11, for the purpose of quieting the enjoyment of property held for so long a time. So that if A. being entitled to a certain messuage were to enter upon his rightful possession, whether peaceably or otherwise, and were to continue for three years unmolested, he could not be amoved by virtue of 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15 (6). But if A. were wrongfully to gain access to this messuage, and thus were to acquire the character of the disseisor, he could not then plead the statute of Eliz. in bar of restitution as against the disseisee, because he would not have, as against the latter, the groundwork of a legal estate. The maxim "In pari delicto, potior est conditio possidentis," might indeed protect him against the intrusion of a stranger whom he might have disseised and kept out for three years, but the disseisee with a lawful title, and with or without laches as to his right of entry, was considered to have a sufficient claim to restitution, notwithstanding the 31 Eliz. c. 11 (7). And it has already been shewn, that the possession of land under a lease for more than three years, will not make the tenant guiltless of a detainer after the expiration of the term (8). And even if a man be restored to premises, having been three years in possession, he cannot until three years more have elapsed, be able to justify a forcible detainer (9). Again, there will be not any restitution if the complainant has permitted a long season to elapse before he has applied for redress. Three years after a conviction before justices of the peace have been considered too long a period (10). Indeed,

(1) But semble, that rent is within these statutes. See ante.
(2) 1 Hawk. c. 64, s. 45. See Co. Litt. 323; 1 Russ. C. & M. 287.
(3) 1 Hawk. ut supra.
(4) Id. s. 46.
(5) Id. s. 47.
(6) And a plea of possession for three years will postpone restitution until the matter be tried, 1 Freem. 377, *R.* v. *Ellis*.
(7) See 1 Russ. C. M. 292; 1 Hawk. c. 64, s. 54. See also s. 55 and 57.
(8) Cro. Jac. 199, *Snigge* v. *Shirton*.
(9) 1 Hawk. c. 64, s. 53. See 4 Leon. 49, *Weshbourne's* C.
(10) 12 Mod. 268, *R.* v. *Harris*.

the meaning of the act being to afford a present remedy (1), restitution ought to be awarded immediately, and therefore it is that a private justice may put the statute in execution without delaying the restitution till the quarter sessions (2). And the court upon this occasion gave judgment for re-restitution (3). A traverse of the force operates likewise as a supersedeas to the restitution (4).

Restitution by what Justices.] It seems to be a good principle that this restitution (5) cannot take place by any authority except that of the justices before whom the inquest has been found (6). And thus it is that justices of gaol delivery cannot grant such a writ unless where the indictment has been found before them, although they may inquire concerning the forcible entry, and fine the offenders (7). And the jurisdiction of the quarter sessions is acknowledged, because as the justices have power to reseise, they may as well exercise that right in court as out of it (8). But the superior court of the king's bench is an exception to the rule, because the judges there must have a right of putting into execution the remedy which the writ of certiorari removes from the inferior tribunal (9). Although that court will not reverse the decree of a judge at the assizes refusing to award restitution after an indictment for a forcible entry had been found by the grand jury; nor will they enter into the question whether the judge has decided rightly or not (10).

Certiorari.] And, therefore, we come to the change of jurisdiction which is effected in the manner just related. This proceeding, whether a traverse of the force or a three years' possession be the point at issue, retards the restitution till the truth of the plea be enquired into. And, as we have seen that the defendant must not linger in his pleading, although the writ of certiorari has

(1) 5 Mod. 443, *R.* v. *Harnisse.*

(2) 1 Freem. 377, *R.* v. *Ellis.*

(3) 1 Ld. Raym. 483, *R.* v. *Harris;* S. C. Carth. 496; S. C. 3 Salk. 313; S.C. Com. Rep. 61, where the time is said to have been two years and a half.

(4) 2 Salk. 587; 2 Keb. 571, *R.* v. *Winter.* See however Dy. 122.

(5) The justice or justices may execute the writ in person, or direct the sheriff to do it, and the court of king's bench would at once issue a mandate to the sheriff for that purpose. And it is said, that the sheriff or justices may break open doors for this purpose. See 1 Russ. C. & M. 394. And we have seen that the sheriff is bound by the statute to obey the orders thus imposed on him by the justices. Indeed, he may be amerced if he return that he could not make restitution by reason of resistance, 1 Hawk. c. 64, s. 52. It is a misdemeanor (15 Ric. 2, c. 2, punishable by fine and imprisonment) in the proper officer if he be not attendant upon such justices in their procedure.

(6) Jenk. 221, Dy. 187; 1 Hawk. c. 64, s. 50.

(7) See 1 Russ. C. & M. 392, and ib. note (r); and also Sav. 68; 1 Hawk. c. 64, s. 51. See also Holt's Ca., 402.

(8) 1 Russ. C. & M. 392.

(9) 1 Hawk. c. 64, s. 51. A pardon of the force would likewise bar restitution, but the crown would not, probably, interfere in that manner at the present day, unless under very especial circumstances. See Yelv. 99; 1 Hawk. c. 64, s. 64, *R.* v. *Fawcet.* But the pardon would not bar a restitution by action. Noy. Rep. 119, *Fawcet's* C.

(10) 1 Per. & Dav. 93, *R.* v. *Harland;* S. C. 8 Ad. & El. 826.

issued from the prosecutor (1), so he must hasten to trial, or abide the alternative of a restitution (2). And it is a great misdemeanor in justices to proceed to restore after the writ delivered. As where there was an indictment and certiorari, and then a second indictment and another certiorari before restitution executed. But restitution was made notwithstanding, the justices not having granted their supersedeas. The court reprimanded the justices to whom the writ of certiorari was delivered, and set aside the restitution (3). But the justices are not in contempt if they proceed without notice of such a writ (4). And if there be a new forcible detainer pending the certiorari, the justices may record the force (5). It is no ground for arresting the writ that the jury have found a part of the indictment to be false, if they have also found so much true as will warrant the restitution. As where upon an indictment for a forcible entry and detainer, the jury found the entry peaceful and the detainer forcible (6).

This writ of certiorari may be had in respect of all proceedings from the indictment or inquisition to the conviction and award of restitution (7). If the justices however do not return the information and evidence touching the entry upon a writ requiring them to return *all* the proceedings, the court will not grant a mandamus to compel them, especially if there be no affidavit shewing that the evidence had been received (8).

There shall be a second writ of restitution without a fresh inquiry, if the first be defeated by fresh force immediately after its execution, but this second writ must be applied for within a reasonable time (9). There can be no view without consent in criminal prosecutions (10).

Re-restitution.] If, after the award of restitution, justices should come to the conclusion that their judgment has proceeded upon wrong grounds, or if the court of king's bench should be of opinion upon a certiorari, that the conviction of the justices should be quashed, the premises restored must again change hands. In the first case, this new process is called a supersedeas, and may be carried into execution by two or even one of those who have awarded the restitution (11), and when ordered by the court of king's bench it is called re-restitution (12). The party accused of the forcible entry and detainer, then becomes the possessor of the property to which he has laid claim. If a justice neglect to hold his inquest, or if he do not certify his restitution, the court of

(1) Ante.
(2) Ca. Temp. Hardw. 174, *R.* v. *Marrow.*
(3) Yelv. 32, *Fitzwilliam's* C.; 1 Hawk. c. 64, s. 62; 3 Keb. 93. *R.* v. *Speiman.*
(4) 1 Hawk. ut supra. See 3 Keb. 99, where the court suspended a writ of restitution till the case had been tried.
(5) 1 Salk. 151, *Kneller's* C.
(6) 1 Sid. 97, 99, *R.* v. *Sadler*; S. C. 3 Keb. 419, 427; 1 Hawk. c. 64, s. 59.
(7) See also 5 & 6 W. 4, c. 33, as to the writ of certiorari.
(8) 1 Ad. & El. 627, *R.* v. *Wilson.*
(9) 1 Ld. Raym. 482, *R.* v. *Harris*; S. C. 12 Mod. 268.
(10) 1 Ld. Kenyon, 384, *R.* v. *Redman,* moved by defendant.
(11) 1 Hawk. c. 64, s. 61.
(12) See 1 Hawk. c. 64, s. 63.

king's bench will inquire and award re-restitution (1). At one time it seems that it was discretionary with the judges to send out this second writ. They were accustomed to decide according to all thd circumstances of the case, whether the defendant appeared to have some right to the tenements in question which he had lost by the restitution granted to the prosecutor, and when the affirmative occurred, a second restitution was the usual consequence (2). Thus it was said that although the defendant is not entitled *ex merito justitiæ* to re-restitution when an inquisition of a forcible entry is quashed, it is nevertheless usual to give it under such circumstances (3). And the same thing has been affirmed regarding the quashing of an indictment, or a verdict for the defendant upon a traverse (4). And Holt, C. J., took a distinction upon one occasion between cases where the first restitution appears to the court to have been just, and where tortious. That learned judge observed, that upon the quashing of an inquisition, the re-restitution was discretionary if the restitution appeared to have been just, but that if the prosecutor had been wrongfully put into possession by the justices, that the court were then bound to reinstate the defendant (5). And this holding obtained where it appeared to the court that a stranger had recovered possession of the same land in the lord's court. The traverse being found for the defendant, and it being the opinion of the judges that he had been unjustly amoved by the prosecutor's suit of restitution, they awarded him re-restitution (6). But in later cases the court of king's bench has felt itself under an obligation to award the return of the premises to the defendant after conviction quashed, and so it was held, even where an affidavit was made that the title of the party, who was a lessee, had expired since the conviction (7). And again, in a very modern case, where both the inquisition and conviction were quashed, the court considered that they must give re-restitution as a consequence of quashing the conviction without enquiring into the legal or equitable claims of the respective parties (8). And Lord Denman, C. J., after referring to the supposed discretion above mentioned, observed, that it would be highly inconvenient if the question of title were to be inquired into upon affidavit (9). Perhaps, however, a case of fraud might operate with the court. As where the lessor of premises arrested his lessee, and then forcibly entered the messuage upon a pretence of forfeiture. The inquisition being quashed, the lessor prayed re-restitution, but the motion was denied, because here was a fair title standing out which ought not to be set aside by sinister means (10).

Judgment under the Statutes.] It may be just remarked, that

(1) Comb. 260, 262, *Lady Lovelace's* C.
(2) 1 Hawk. c. 64, s. 65.
(3) Comb. 328.
(4) 1 Hawk. c. 64, s. 65.
(5) 1 Ld. Raym. 483.
(6) 1 Hawk. c. 64, s. 66;
(7) Str. 474, *R.* v. *Jones.* See also Yelv. 99, *R.* v. *Ford* & others.
(8) 3 Ad. & El. 817, *R.* v. *Wilson.*
(9) Id. 837.
(10) 2 Salk. 517, *R.* v. *Toslin* & others, "otherwise had no title appeared," S. C.

in addition to the restitution, the judgment under the statutes 5 Ric. 2, and 15 Ric. 2, is imprisonment and ransom at the king's will, which will is not extrajudicial, but such as declared by the judges, his representatives (1).

It is said, that as far as the fine is concerned, the conviction cannot be quashed upon motion, if the fine be set, but that it is otherwise if the justices omit to fine (2), but the authority of this case may be questioned, for there seems to be no good reason for departing from the usual rule with reference to convictions, where the certiorari is not taken away; and that rule would enable the defendant to remove a conviction under 5 Ric. 2, or 15 Ric. 2 into the king's bench for the purpose of quashing it.

Writ of Error.] The defendant may however resort to his writ of error if he should see fit (3).

Sect. III.—*Of Misdemeanors against Public Health.*

Acts which are injurious to the health of the community are, for the most part, common law misdemeanors, and the legislature has not been wanting to lend assistance in cases of novelty or emergency.

Amongst such offences, those which threaten mischief to the largest number of persons are regarded with the most jealousy. And thus it is that the supposed infection of the plague, the spread of an epidemic disorder, as the cholera, have been viewed with much apprehension, and made the subjects of the strongest enactments. For many years, indeed, the breach of quarantine, or the forty days' probation, was a capital crime, and it was not until the 1st year of the reign of the present queen that the statute of James I., prescribing the punishment of death against such infected persons as should go abroad contrary to orders, was repealed (4). But, far from a continuance of such severities, the legislature has reduced the punishment accompanying the violation of quarantine to imprisonment and forfeiture.

Quarantine.] Thus by 6 Geo. 4, c. 78, s. 17, Every commander, master, or other person having charge of any vessel, liable to perform quarantine, and on board of which the plague or other infectious disease shall not then have appeared, who shall quit, or allow any person to quit the vessel without licence during quarantine, or shall neglect to convey such vessel into the place appointed for quarantine, shall forfeit 400*l.* And pilots, or other persons coming in such vessels and leaving them before the end of qua-

(1) 4 Com. 121; 1 Hale, P. C. 375. See also 1 Keb. 585, *R.* v. *Challoner.*

(2) 2 Salk. 450, *R.* v. *Layton*; 11 Mod. 46, S. C.

(3) See 2 Salk. ibid.

(4) It was, however, a clergyable felony, whereas the breach of quarantine was not clergyable. See 26 Geo. 2, c. 6.

rantine, shall suffer imprisonment for six months, and forfeit 300*l.* (5).

This offence, however, is also a misdemeanor at common law. An order in council was made, forbidding persons subject to quarantine from leaving ships coming from infected places, until their time of probation should be at an end. This order was disobeyed by the defendant, and the court was quite clear that as the st. 26 Geo. 2, c. 6, s. 1, had not annexed any punishment for neglecting this order, the defendant had been guilty of a common law misdemeanor, and judgment of one year's imprisonment was pronounced (6).

And, moreover, Lord Hale is of opinion, that it would be a great misdemeanor at common law if one were to go wilfully abroad in an infected state, and so produce the disease in another person through his conversation (7).

Cholera.] So, when the cholera broke out in England, the legislature was not backward in providing against the supposed evils of infection.

By 2 Will. 4, c. 10, It was made competent for the privy council to make such orders as might tend to arrest the spread of that disease. And by sec. 3, Any person wilfully violating an order so made, or neglecting to obey it, or offering resistance to it, was declared guilty of misdemeanor, and liable to a penalty not exceeding 5*l.* nor less than 1*l.* (8). Provided that if any person should have paid the penalty, or should have suffered imprisonment for non-payment, it should not then be lawful to proceed against him as for the misdemeanor.

This act was renewed by 3 & 4 Will. 4, c. 75, until the end of the then next session of parliament, but that time having now expired without a further renewal, the provisions mentioned may be considered as at an end.

Upon the same principle, persons who have exposed their children before the infection of the small pox has abated, have been deemed fully liable to punishment. As where a woman carried her infant along the highway near to certain dwellings whilst the child was labouring under that disease. It was moved to arrest the judgment, but the court was clearly against the defendant, and Le Blanc, J., in passing sentence, said, that this act was a common nuisance and indictable as such (9).

A precedent is also mentioned of an indictment against an

(5) By sect. 21, Any officer or person embezzling goods during quarantine, or being guilty of other neglect or breach of duty, shall lose his office and forfeit 200*l.* And if such person shall wilfully damage any such goods he shall pay 100*l.* damages, together with full costs of suit to the owner.

(6) 4 T. R. 202, *R.* v. *Harris*; S. C. Leach, 549.

(7) 1 Hale, P. C. 432.

(8) To be recovered before two justices by any person who should sue for the same.

(9) 4 M. & S. 72, *R.* v. *Vantandillo*. So again, 4 M. & S. 274, By Le Blanc, J. See also Andr. 163, *R.* v. *Bunce*.

apothecary for keeping a common inoculating house near the church in a town (1). And where it was proposed to quash an indictment for keeping a house for inoculation, the court observed that they would not quash as of course indictments for nuisances: the defendant must demur (2). After these decisions it is not surprising to find that an apothecary, who suffered children to be carried along a public street whilst they had the small pox, was declared to be guilty of a misdemeanor. The plea in arrest of judgment, that the defendant was by profession a person qualified to inoculate, had no weight with the court. Lord Ellenborough referred to the terms "unlawfully and injuriously" distinguishing a course of inoculation when practised lawfully and innocently from the public evil created by the exposure. And the defendant was sentenced to be imprisoned for six months (3).

Mala Praxis.] The offence which is called *Mala praxis*, is also a misdemeanor at common law (4). And, although Dr. Groenvelt, who was fined and imprisoned by the college of physicians, for administering unwholesome pills and medicines, was discharged by the court of king's bench under a general pardon, yet they said, that this evil practice was not the less an offence at common law, for there is a violation of the trust which the party has placed in the physician, and it tends directly to the patient's destruction (5). But the mere fact of failing to cure the prosecutor of an ulcerated sore throat, according to an undertaking made by the defendant, was held not indictable. It was not a public offence (6).

Bad Food.] We have seen, likewise, in a former page, that the sale of unwholesome provisions is a punishable act (7), and although the matter was there treated as a cheat, yet Lord Ellenborough, said, that he who deals in a perilous article, must be wary how he deals, otherwise, if he observe not proper caution, he will be responsible (8).

Judgment.] It may just be remarked, that the sentence in all the respective cases above mentioned, is fine and imprisonment.

Noisome Smells.] In discussing the subject of nuisance hereafter, it will be found that many of these misdemeanors against the public health are also punishable under that head.

So again, a hurtful stink is a nuisance, and likewise the subject of an indictment. As where the defendants were concerned in making acid of sulphur which corrupted the air. The court enter-

(1) 1 Russ. C. & M. 114, note (a), citing 2 Chit. C. L. 656.

(2) 4 Burr. 2116, *R.* v. *Sutton.* This case was recognized by Lord Ellenborough in *R.* v. *Vantandillo*, supra.

(3) 4 M. & S. 272, *R.* v. *Burnett.* See also 3 & 4 Vict. c. 29, s. 8.

(4) 2 Ld. Raym. 214, per cur.

(5) The patient died in this case of Dr. Groenvelt. 1 Ld. Raym. 213, *Dr. Groenvelt's* C.; S. C. 3 Salk. 265; S. C. 12 Mod. 119. See also Com. Rep. 76, *Groenvelt* v. *Burwell* & ors.

(6) 1 Salk. 199, *R.* v. *Bradford*; S. C. 1 Ld. Raym. 366.

(7) Ante, p. 21.

(8) 3 M. & S. 14.

tained no doubt of the validity of the charge, and Dennison, J., mentioned the terms insalubrity and offensiveness as applying to the particular annoyance which had been created (9).

Judgment.] The judgment is that the nuisance be removed (1), if that has not been already done, but the defendant may also be fined and imprisoned, if the court see fit, and, indeed, it is usual to impose a nominal fine although the nuisance has been abated (2).

Sect. IV.—*Of Misdemeanors against Religion and Public Morals.*

1.—Misdemeanors against Religion.

The law regards several acts which are in opposition to the established religion of the country as misdemeanors. And conduct which has a plain tendency to subvert public morals is likewise viewed with disapprobation, and deemed to be the subject of punishment. Offences against the state religion may consist in libels or slander, as blasphemous writings and speeches, abuse or ridicule of the christian religion, contempt of the sacrament of the Lord's supper, expressed either by words or otherwise, impeachment of the divine authority of the scriptures, and in the case of ministers, derogatory observations on the book of Common Prayer. There are also other misdeeds, as neglecting the ordinary prayer, sabbath breaking, swearing, &c. (3) Very many misdemeanors to the detriment of public morals are likewise to be met with in our books. Such are gaming, adultery, acts tending to prostitution, indecencies of various kinds, and many other circumstances which have a tendency to lower the standard of proper conduct. We will examine this list in the order which has been mentioned. And first, with reference to those acts of ill-behaviour, which are committed against the settled religion of the country.

Blasphemy.] It may be said, that blasphemy is one of those offences which the law views with much displeasure. Thus to deny the being or providence of God is punishable under this head (4). So to speak of Jesus Christ in terms of contumely or reproach is not permitted by the common law, and persons who have erred in this manner have been the subjects of severe punishment (5). It was, indeed, urged as a defence upon one occasion, that as the 53 Geo. 3, had relieved persons from penalties who denied the divinity of Jesus Christ, a publication in support of such a position was not a libel, but to this it was replied by the court, that the

(9) 1 Burr. 333, *R.* v. *White* & another. See Cro. Car. 510.

(1) Cro. Car. 510, *Topayle's* C.

(2) 1 Burr. 333, *R.* v. *White* & another.

(3) By 13 Ed. 1, st. 2, c. 6, it is made a misdemeanor to hold a fair or market in a church yard. Fine and imprisonment are the punishments.

(4) 1 Hawk. c. 5, s. 1, 4 Com. 59.

(5) 1 Ventr. 293, *Taylor's* C.; S.C. 3 Keb. 607.

defendant had gone further than this by declaring that the saviour was "an impostor and murderer in principle, and a fanatic," and that the relief contemplated by the statute could never be intended to permit the promulgation of matter, which was, at common law, a blasphemous libel (6). Profaneness on the stage is likewise indictable at common law (7).

Judgment at Common Law.] The judgment for blasphemy at common law (8) is fine and imprisonment, accompanied by such infamous corporal punishment as the court may think fit to adjudge (9). Or these respective punishments may be severally awarded (1).

The Holy Scriptures.] Although blasphemy, strictly speaking, may be said to relate only to a dishonourable mention of the Deity, it is, nevertheless, very commonly understood to extend to speech or writing in derogation of the holy scriptures, so that the Almighty would then be considered as receiving an insult through the medium of a disrespect offered to the Book which he has given. And as the Christian religion is a very chief principle in the holy scriptures, an attack upon that religion is frequently looked upon in the light of a blasphemous misdemeanor. All profane scoffing at the Bible, or exposing it to contempt or ridicule is, accordingly, held to be punishable in like manner as blasphemy at common law (2).

And by 9 & 10 Will. 3, c. 32, any person educated in or professing the Christian religion in the realm who shall by writing, printing, teaching, or advised speaking deny the Christian religion to be true, or the holy scriptures to be of divine authority, shall, for the first offence, upon conviction by the oath of two witnesses, be declared to be incapable of any office (3), (unless he renounce his opinion in the same court within four months after conviction) and for the second, being lawfully convicted in like manner, shall be disabled from prosecuting, pleading, &c. in any court of law or equity, and from being guardian, executor or administrator, or to take any gift or legacy, or bear any office; and, moreover, shall be imprisoned for three years (4). Notwithstanding this statute, it has been clearly held, that the proceeding

(6) 1 B. & C. 26, *R.* v. *Waddington*. See also 3 Meriv. 382 n, *Aikenhead's* C. in Scotland, cited there; Id. 405, 408, Judgment of Lord Eldon C. in *Att. Gen.* v. *Pearson*.

(7) 11 Mod. 142. By 3 Jac. 1, c. 21, If any person shall in any stage play, interlude, show, &c. jestingly or profanely speak or use the holy name of God, or of Christ Jesus, or of the Trinity, he shall forfeit 10*l*., half to the king, and half to him that shall sue.

(8) Which continued in full force notwithstanding the statute of William, 1 East, P. C. 5, *R.* v. *Paine*.

(9) 1 Hawk. c. 5, s. 6, and it should seem that the party may be bound over to his good behaviour.

(1) The pillory being abolished, whipping only remains as a corporal penalty. See as to the old law with respect to the denial of the Holy Trinity, Will. 3, c. 18, s. 17; 9 & 10 Will. 3, c. 32; 53 Geo. 3, c. 160; Str. 416; *R.* v. *Hall*; Id. 790.

(2) 1 Hawk. c. 5, s. 2.

(3) Ecclesiastical, civil, or military.

(4) But information must be given to a justice of the peace within four days after the words spoken, and the prosecution must be within three months after information.

for blasphemy at common law remains untouched (1). And upon a modern occasion, *R.* v. *Robinson* (2) was referred to as an express authority, to shew that where a matter is unlawful at the common law, the punishment prescribed by a statute in respect of that matter is cumulative (3), and, consequently, the conviction for a blasphemous libel was confirmed, although there was no count on the statute of Will. 3 (4). In the case of *R.* v. *Woolston*, likewise, it was declared by the court, that they would not suffer it to be debated whether to write against Christianity in general was not an offence punishable in the temporal courts at common law (5). And they added, that they would not allow even of an indirect attack upon that worship, so that the defendant's suggestion, that the intent of his book went only to disprove the literal meaning of the miracles, and merely as striking against one received proof of Jesus being the Messiah, was deemed quite inadmissible as a defence. For the very foundation of the religion was threatened by such an attempt (6). So again, the reiteration of a blasphemous libel was at once discountenanced by the court, notwithstanding the pretext of legality in publishing a correct account of proceedings in a court of justice (7). And it was subsequently observed in another case, that if the name of the Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed (8). So, words of contumely are said to be indictable, as tending to a breach of the peace, as "your religion is a new religion," &c. (9)

Personating the Saviour, or suffering worship to be paid to the defendant, has been likewise deemed an offence of this nature (10); and religious impostors who pretend to extraordinary commissions, and so terrify or abuse the people with false denunciations of judgments, are offenders of a similar character (11). However, it has long been acknowledged, that disputes by learned men upon controverted points are not to be deemed blasphemies (12). And the distinction recognized by the law seems to be between such discussions as are carried on dispassionately and with decency, and those which treat so serious a matter with offensive levity (13). Yet, nevertheless, doctrines which have immediately a tendency to subvert Christianity cannot be entitled to this indulgence, with whatever tenderness they may be promulgated, for they would savour of that "malicious

(1) Fitzg. 64, *R.* v. *Woolston*.
(2) 2 Burr. 799.
(3) 3 B. & Ald. 163, 164.
(4) Id. 161, *R.* v. *Carlile*. See 1 Wms. Saund. 135 (a), note (4).
(5) Str. 824, *R.* v. *Woolston*; S.C. Barnard. 162. Convicted on four informations for blasphemous discourses on the miracles of our Saviour. See also S. P. *R.* v. *Annet*, cited. Ibid. as from 3 Burn. Eccl. Law, 263; S. C. 1 Sir Wm. Bl. 395; *R.* v. *Williams*, 26 How. St. Tr. 656; *R.* v. *Eaton*, mentioned 3 B. & Ald. 162.
(6) Fitzg. 66.
(7) 3 B. & Ald. 167, *R.* v. *Mary Carlile*.
(8) Holt on Libel. 69 note (e), *R.* v. *Williams*.
(9) Hawk. c. 5, s. 5.
(10) 2 St. Tr. 265, *Naylor's* C.
(11) 1 Hawk. c. 5, s. 3.
(12) Str. 834.
(13) See 1 Russ. C. & M. 220; Starkie on Libel, 496, 497; 3 Merivale, 376, note (a).

and mischievous intention which is the broad boundary between right and wrong (1)." The judgment for these last-mentioned offences in the nature of blasphemy is the same which has already been related in a former page (2). And it may be further remarked, that in case of a second conviction, the defendant might until lately have been punished with banishment, and with transportation, if he had neglected to banish himself (3); but, by a more recent act (4), this sentence of banishment is abrogated, and the offences, upon a second conviction, remains, as on the first occasion, a very high misdemeanour, and punishable accordingly. However, the judge may still, under 60 Geo. 3 and 1 Geo. 4, c. 8, make his order for the seizure and detainer of all copies of blasphemous and seditious libels in the possession of a convicted defendant, or of any other person for his use, such person being also named in the order, for the statute has undergone no repeal in that respect.

Forms of Worship.] A public disrespect to the forms of worship belonging to the established church, and à fortiori, if done by one of the ministers of religion, is punishable as a misdemeanor.

These faults are not at present noticed with the same rigour as in former times; perhaps, indeed, some of them may not be of such frequent occurrence, so that a brief mention of them will be sufficient for our purpose. By 1 Edw. 6, c. 1, s. 1 (5), To treat the sacrament of the Lord's Supper with dishonour, in any way whatsoever, is made punishable upon a conviction at the quarter sessions, with fine and imprisonment (6). But the indictment must be preferred within three months next after the offence (7).

Again, by 1 Eliz. c. 2, ss. 9, 10, & 11, to speak in any way in derogation of the Common Prayer Book, whether in plays, songs, or otherwise, or to compel any minister, or procure him to say any common prayer, or minister any sacrament, in any other form than that prescribed in the Common Prayer Book of the Church of England, or to interrupt the saying of any such prayer, or ministering of any sacrament, is made punishable, for the first offence, upon conviction, by a fine of 100 marks, and of 400 for the second. By sect. 12 & 13, upon default of payment, the party shall, for the first offence, be imprisoned for six months, and for twelve in respect of the second. For the third offence, he shall forfeit his goods and chattels, and be imprisoned for life (8). This act,

(1) See Stark. ut supra.
(2) Ante, p. 255.
(3) 60 Geo. 3, and 1 Geo. 4, c. 8.
(4) 11 Geo. 4, and 1 Wm. 4, c. 73; and a similar provision was made with respect to Scotland by 7 Wm. 4, c. 5.
(5) Repealed by 1 Mar. c. 2, but revived by 1 Eliz. c. 1, s. 14, and confirmed by 13 & 14 Car. 2, c. 4, s. 24.
(6) Three justices at the least, one being of the quorum, must be present.
(7) Sect. 5. The act uses the words "fine and ransom," and it appears from Co. Litt. 127 (*a*), that these terms are but as one; and the case in Dy. 232, which mentions the ransom as being treble the amount of the fine, must be understood to mean where a fine was set nominally and the ransom adjudged accordingly.
(8) Where the party died within six weeks, it was made a question, whether, as his election to pay the

however, does not affect Roman Catholics since the 31 Geo. 3 c. 32, s. 3.

So again, with reference to spiritual persons, If any parson, vicar, &c. shall refuse to use the Common Prayer in a church, or use any other form, or speak in derogation thereof, he shall for the first offence, lose one year's profit of his spiritual promotions, and suffer six months' imprisonment; for the second, shall be deprived; and for a third, shall be deprived and suffer imprisonment for life (9). If the party have no spiritual promotion, he shall for his first offence be imprisoned for one year, and for the second, be imprisoned for life (1). But the prosecution for these respective offences must be at the next general sessions to be holden before justices of oyer and terminer, or justices of assize next after the offence committed (2).

Justices of the peace at their quarter sessions had power, under 23 Eliz. c. 1, s. 8, to inquire concerning these last-mentioned misdemeanors; but this jurisdiction was subsequently withdrawn by the introduction of other forms under later statutes which did not revive the authority of magistrates (3).

It was soon held, that a priest or minister, whether he had the cure of souls or not, was equally within the statute 1 Eliz. c. 2 (4). But it was a part of the offence, that other prayers were used in lieu of the common prayers. The defendant, a clergyman, was charged with this offence under 1 Eliz. and the indictment charged him with using other prayers, and in another manner than that which is mentioned in the Common Prayer Book; but the court held the count bad, for the indictment should have said, that the defendant used other forms and prayers instead of those enjoined, which were neglected by him; for, otherwise, every parson using prayers before his sermon other than that required by the Book of Common Prayer might be indicted (5).

It may be remarked here, that the sentence of deprivation prescribed in respect of the second offence in these respects, does not restrain the ecclesiastical court from awarding that judgment in the first instance. It was so determined by the court of king's bench in an action of trespass brought by a clerk in orders against the defendant, a servant of the ecclesiastical commission (6).

Indeed, in point of strictness, unless the party bring himself within the privileges conferred upon dissenters, the stat. 5 & 6 Edw. 6, c. 1, stands in force against him. By sect. 6, of that act, To be wilfully present at any other form of prayer, or of administration of the sacraments, or ordination of ministers, or other rites, than those recognized by the Common Prayer Book, or which

fine or suffer imprisonment was gone, his executors should continue liable to the forfeiture. See Dy. 203, 231, *Sir E. Walgrave's* C. See also Hob. 97; Gouldsb. 162, *Horne's* C.

(9) 1 Eliz. c. 2, ss. 4, 5, 6; see also 2 & 3 Edw. 6, c. 1.

(1) Id. ss. 7, 8; see likewise 2 & 3 Edw. 6, c. 1.

(2) Id. s. 20.

(3) 3 Mod. 78, *R.* v. *Sparks*.

(4) Dy. 203.

(5) 3 Mod. 78, *R.* v. *Sparks*; S. C. 2 Show. 447.

(6) Poph. 59, *Cawdry* v. *Atton*; S. C. 5 Rep. 1; S. C. mentioned Mo. 228.

are not in conformity with the stat. 2 & 3 Edw. 6, is made punishable with six months' imprisonment for the first offence, with twelve months' imprisonment for the second, and imprisonment for life in case of a third conviction (7).

By 24 Hen. 8, c. 12, s. 3 (8), If any spiritual person, by reason of the fulmination of any interdiction, censure, &c. or other foreign citation, shall refuse to minister the sacraments, &c. he shall be imprisoned for one year, and fined.

Sabbath breaking.] Many statutes have been passed from time to time with respect to the violation of the Lord's Day or Sabbath, but those which are chiefly applicable at the present time relate, for the most part, to the exercise of certain trades on that festival, and to the suing out of civil process. The acts of parliament which treated an omission to go to church, or suffering absence in others, as misdemeanors (9), no longer threaten the community; and even those statutes which forbid trading are very rarely enforced by indictment, and are not very popular when used as the instruments of penalties. It is only when these acts are regarded in the light of misdemeanors by the prosecutor, and so punishable by indictment, that we have to deal with them in this undertaking, and by reason of the rarity of the proceeding, we shall be brief upon this head of Sabbath breaking.

The principle seems to be, that an indictment will not lie at common law unless the act of trading can be viewed under the character of a nuisance, and by this clue the different precedents and cases may be safely reconciled. Thus, it is said, that there is a form of indictment which calls the defendant a common sabbath breaker and profaner of the Lord's day, and for having kept public and open shop, and exposed meat to sale to divers persons unknown (1). And the usual course is affirmed in books of authority to be an indictment for a nuisance, where the offence will bear that aspect (2). Whereas, on the other hand, if the matter be not considered as a public mischief, the authorities tend the other way; and, therefore, it is laid down, that to sell meat on a Sunday is not an offence at common law, so that an indictment must conclude against the form of the statute (3). And so it was held, upon one occasion, where the court, upon demurrer, gave judgment for the defendant (4). And the same law might well apply to a baker, whose exercise of his trade on a Sunday might be productive of that general annoyance which is understood by the term "nuisance."

But an indictment will lie upon the statute respecting these offences. Thus, by 3 Car. 1, c. 2, Every butcher who shall kill or sell any victual upon the Lord's day shall forfeit 6*s.* 8*d.* And, although a pecuniary forfeiture is attached to the offence, together

(7) Confirmed by 13 & 14 Car. 2, c. 4, s. 24.
(8) Confirmed by 1 Eliz. c. 1, s. 4.
(9) See 1 Hawk. chap. 10 & 11.
(1) East, P. C. 5.
(2) 1 Hawk. c. 6, s. 6, citing C. C. C. 372.
(3) 1 Hawk. c. 6, s. 6; 3 Car. 1, c. 2, s. 2.
(4) Str. 702, *R.* v. *Brotherton.*

with the jurisdiction of magistrates who are to inquire summarily into the matter, an indictment will lie, nevertheless, according to the express words of the act.

By 29 Car. 2, c. 7, s. 2, No tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, &c. on the Lord's day, (works of necessity and charity only excepted); provided that nothing in the act shall extend to prohibit the dressing of meat in families, or dressing or selling meat in inns, &c. for such as otherwise cannot be provided; nor to crying milk before nine in the morning or after four in the afternoon. The time for prosecution is limited to ten days after the offence committed.

The stress of this statute seems, in a great measure, to have fallen upon bakers; and before the 34 Geo. 3, c. 61, there was some discussion as to the works of necessity mentioned in the 29 Car. 2, and likewise as to the proviso at the conclusion of the third clause.

There was an indictment against one S. for not executing a justice's warrant upon a common baker for exercising his trade on a Sunday, and the court recognized the principle at once, that the charge could not be sustained in respect of necessaries,(5), as puddings and pies, although it might be good for baking bread (6), evidently because that might have been done on the Saturday. And this doctrine was maintained upon a subsequent occasion.

A motion was made for an information against a justice who had refused to receive a charge against a baker for exercising his trade on a Sunday; and the court observed, that this was an attempt to punish a person for baking pies, puddings, and meat for dinner, but not saying a word about bread which is the business of a baker's ordinary calling, they were, accordingly, of opinion that this act of baking pies, &c. was not within the act, and the rule was discharged with costs (7).

In conformity with the same principle, it seems that the baking of rolls on a Sunday would have been holden to be within 29 Car. 2, had not the conviction been untenable upon another ground (8). But still it was pressed upon the court in another case, that *R.* v. *Cox* turned upon the exception introduced into the statute with respect to necessity and charity, and that it could not be supposed that a baker who should work for his customers on a Sunday could come within that exception.

John Younger was seen baking for several persons, who were by no means in poor circumstances, and it being the Lord's day when he was so occupied, an information was laid against him, and the magistrate convicted him. But the court were quite clear in favour of the baker. "Thirty-four years," said Lord Kenyon, "have nearly passed since the decision of *R.* v. *Cox*, which informed the public that all bakers have a right to do what is

(5) The word "*unnecessary*" is manifestly misprinted for "necessary," 11 Mod. 114.

(6) 11 Mod. 114, *R.* v. *Pawlett*.

(7) 2 Burr. 785, *R.* v. *Cox*, esq.; see Cowp. 643.

(8) Cowp. 640, *Crepps* v. *Durden* & others.

imputed to this defendant as an offence." "I agree," added the lord chief justice, "with Mr. J. Foster, that I am for an observation of the sabbath, but not for a pharasaical observation of it." The conviction was quashed (9).

Shortly after this the stat. 34 Geo. 3, c. 61, passed, and bakers were thereby forbidden to make, bake, or expose to sale, any bread or rolls of any sort or kind, or to bake any meat, puddings, pies, or tarts, or in any other manner to exercise their trade on the Lord's day. Except the selling of bread or baking meat, puddings or pies only, on the Lord's day, before nine in the forenoon and one in the afternoon (1).

Swearing—Drunkenness.] Swearing and drunkenness are likewise offences against religion, but they are not usually treated as misdemeanors, being punishable before a magistrate by way of summary conviction (2). Nevertheless, if it be determined to proceed by indictment against such, the charge should not be that the defendant was a common drunkard, or a common frequenter of tippling houses, for that language would be too loose (3).

2.—Misdemeanors against Public Morals.

Having mentioned several misdemeanours, which are punishable at the common law, and by statute, in respect of the religion of the country, we propose to advert to those crimes which have a tendency to injure public morality. It will not be competent, however, to enumerate all the misdeeds which belong to this class. The more prominent, and those especially which have caused the greatest amount of discussion, will be presented to the attention of the reader in this place. And first, it may be remarked, that misconduct towards females has always invited the censure and penalties of the law.

Abduction—Seduction.] Amongst the offences of this description, there are not any, perhaps, which are viewed in a more obnoxious light than those of abduction and seduction. The abduction of women is a felony, but the mere act of taking an unmarried girl under sixteen, from the custody of her parents, is a misdemeanor. Thus by 9 Geo. 4, c. 31, s. 20, If any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the

(9) 5 T. R. 449, *R.* v. *Younger.*

(1) See further as to convictions upon this act, 1 Hawk. c. 6, ss. 9, 10. As to the sale of mackarel on Sundays, see 10 & 11 Wm. 3, c. 24. s. 14. Fish carriages, 2 Geo. 2, c. 15. Fairs and markets on Sundays (the four Sundays in harvest excepted out of the act), 27 Hen. 6, c. 5; 1 Hawk. c. 6, ss. 1, 2, 11 & 19. Public sports, 1 Car. 1, c. 1; 1 Hawk. c. 6, s. 4; 4 Com. 63. Debating societies, 21 Geo. 3, c. 49; 1 Hawk. c. 6, ss. 5, 12, 13, 14. Carriers, 3 Car. 1, c. 2. Watermen, 11 & 12 Wm. 3, c. 21, s. 13. And see generally, 1 Hawk. c. 6.

(2) See 1 Hawk. c. 6, s. 23, et seq.

(3) 7 Mod. 52, *R.* v. *Buckbridge.*

possession and against the will of her father or mother, or or any other person having the lawful care or charge of her, he shall, on conviction, be fined or imprisoned, or suffer both punishments, at the discretion of the court. By sec. 32, all counsellors, aiders and abettors of such an offence may be proceeded against, and punished as principal offenders.

This statute superseded the old act of 4 Ph. & M. c. 8; and although it differs in a great degree from the former law, some of the decisions upon the corresponding clause of 4 Ph. & M. may be considered applicable to the new provision. As, for example, that the death of the parent does not invest the step-father or step-mother with authority to consent to the removal of the child. For it is *ex jure naturæ* that these respective parties derive their power over the infant, and that authority cannot be dissolved by the death of one, nor can it be delegated to a stranger (4). It was also determined that a natural daughter could not be taken from the custody of her putative father, under these circumstances, without a violation of the law. The question was not whether the child were illegitimate or not, but whether she had been taken illegally from the custody and government of those who, by lawful ways and means, had the guardianship of her. The defendants were, thereupon, convicted, fined, and imprisoned (5). It has been said, that if the parent once agree to the removal, it becomes impossible for him to dissent afterwards (6); but whether this be a correct principle or not, it cannot be construed to extend to cases where a schoolmistress or other person is entrusted with the care of a child, so as to imply an assent on the part of the parent, from the mere circumstance of committing the girl to such custody. For the governance must must still be deemed to reside in the parent (7).

Other cases have happened upon the statute of Philip and Mary, but they have chiefly had reference to the contracting of matrimony provided against by that act (8), and are not now of much value, because the 9 Geo. 4, c. 31, has repealed the former law, and has not re-enacted the provisions concerning marriage (9).

At Common Law.] At common law also, it seems, that although there may be a doubt as to the validity of an indictment for marrying a woman under age, without the consent of the father or guardian (1), the act of carrying away such infants by violence, deceit, or any corrupt practice, or even by ordinary blandishments (2), and à fortiori for any improper or immoral purpose, must certainly be deemed an offence (3).

Nor is seduction by any means an inferior misdemeanor at common law. Thus, an information was preferred against certain

(4) See 3 Rep. 39.
(5) 11 East, 9, note; *R.* v. *Cornforth*; S. C. Str. 1162; S. P. East, 457, *R.* v. *Sweeting*.
(6) See 3 Mod. 169.
(7) See East, P. C. 457.
(8) S. 4 & 6.
(9) See Andr. 310, *R.* v. *Pierson* & others; East, P. C. 457; 1 Russ. C. M. 577, 579.
(1) See 4 Mod. 145, per Holt, C.J.
(2) 1 Leo. 259, *R.* v. *Twisleton* & others.
(3) East, P. C. 458, 459.

defendants for carrying away a young woman for the purpose of marriage, and it was objected, that no artifice had been used, excepting the ordinary compliments which usually take place amongst young people; but the court directed a verdict of guilty, even although some encouragement had evidently proceeded from the girl (4). If such a decision could be come to in the case of a marriage, it is clear that the more grave crime of seduction cannot be justified by pleading that no other means than address and compliment were employed. So, again, the defendant was fined for seducing and lying with the wife of another, but the court would not allow him to be charged with an action as well as punished by a penalty (5). And wherever conspiracy has been made use of to effect the sinister design, no doubt has been entertained of the defendant's liability. As in the well-known case of Lord Grey, who contrived that Lady H. Berkeley should be taken away at night from her father's house, and against his consent, for the purpose of cohabiting with him. Several persons were indicted together with Lord Grey for a conspiracy at common law, and the defendants were found guilty, notwithstanding the absence of any artifice, and the admission of the lady, who was examined as a witness, that she left her father's house willingly, and concurred in all the measures taken for her departure and concealment (6).

The defendant, Sir Francis Delaval, and others, were concerned in obtaining a female apprentice, to be assigned over to Sir F. D., for the purpose of being kept by him. The transaction took place with the consent of the apprentice, but the court made the rule absolute for an information at common law against the defendant, Sir Francis, Bates the master of the girl, and the attorney who prepared the indentures (7).

So where a man had fraudulently assigned his wife to another, Lord Hardwick directed a prosecution, the act being against public decency and good manners (8).

Enticing a Person of Fortune to an Improper Marriage.] It seems, again, to be an offence to persuade a party under age to contract an improper marriage, and the nullity of the union in the case of a minor would not furnish any excuse for the common law misdemeanor.

The council of the Marches in Wales granted an information for this offence in 15 Car. 1, and the parties were fined, but a doubt was raised in the king's bench whether that court had jurisdiction, and the defendants were bailed (9).

This point was argued at some length upon another occasion,

(4) 1 Lev. 257, *R.* v. *Twisleton* & others; S. C. 1 Sid. 387; S. C. 2 Keb. 432; 1 Hawk. c. 41, s. 10.

(5) Comb. 377, *R.* v. *Johnson.*

(6) 3 St. Tr. 519, *R.* v. *Lord Grey* & others; East, P. C. 460.

(7) 3 Burr. 1434, *R.* v. *Delaval* & others; S. C. 1 Sir Wm. Bl. 410, 439.

(8) Id. 1439, by Lord Mansfield; see also 12 Mod. 313, *R.* v. *Sellinger*, where the court refused to quash an indictment for adultery upon motion but left the defendant to demur.

(9) Cro. Car. 557, *Seeles* & others, prisoners upon a habeas corpus.

when the court observed that it was lawful to marry, but that if the marriage were obtained by unlawful means, an offence would be committed. But we are informed that no judgment was given (1). However, soon afterwards leave was given to file an information against the defendants, for "procuring a gentleman's son to marry a woman of infamous reputation (2)." So, again, an information was granted against persons who were suspected of using artifices in order to obtain a will from a female who was addicted to liquor, and who was incapable, from intemperate habits, of making one (3).

Judgment.] The Judgment at common law for these offences is fine and imprisonment, at the discretion of the court.

Brothels.] A bawdy-house is held to be a common nuisance (4), and persons who keep it are liable to be prosecuted for a misdemeanor. A lodger keeping a single room for such immoral purposes is within the rule (5). And so is a feme covert, for participating in the government of the house: she may be said, in that sense, to keep it (6). But the bare solicitation of chastity is not indictable (7).

This conduct of keeping a brothel is narrowly watched by the law. The stat. 25 Geo. 2, c. 36, s. 4, enacts, "that if any two inhabitants of a parish, paying scot and lot, do give notice to any constable, or peace officer where there is not any constable, of such parish of any person keeping a bawdy-house, &c., the constable shall immediately go with such inhabitants before a justice, and upon oath being made by the inhabitants that they believe the contents of the notice to be true, and upon their entering into a recognizance (8) to give or produce material evidence against such person, shall himself enter into a recognizance (9) to prosecute with effect at the next sessions or assizes, according to the discretion of the magistrate. All reasonable expenses of the prosecution to be ascertained by two justices, and paid by the overseers, and 10*l.* to be paid to each of such inhabitants in case of conviction; and in default of payment by such overseers, such overseers shall forfeit to the constable double the amount of the sum he may be entitled to for expenses, and to the inhabitants double the sums of 10*l.* respectively due to them.

"It is extraordinary," says professor Christian, "that prosecutions are not instituted against those who publicly sell their wives, and against those who buy them." Notes to 4 Com. 65.

It is believed, however, that the disapprobation of public opinion has done more towards the decrease of these exhibitions than any prosecutions could have effected.

(1) 5 Mod. 221, *R.* v. *Thorp* & others; S. C. Com. Rep. 27; Carth. 384; Comb. 456; Holt's Ca. 338.

(2) 7 Mod. 39, *R.* v. *Blacket* & another; see also Andr. 310, *R.* v. *Pierson* & others, on the st. of Ph. & Mary. Burr. 606, *R.* v. *Clarke*, esq.

(3) 2 Burr. 1099, *R.* v. *Wright* & others.

(4) 1 Hawk. c. 74.

(5) 1 Salk. 382, *R.* v. *Pierson*; S. C. 2 Ld. R. 1197.

(6) 1 Salk. 384, *R.* v. *Williams*; S. C. 10 Mod. 63.

(7) 1 Salk. 382; 2 Ld. Raym. 1197.

(8) Of 30*l.*

(9) Of 30*l.*

By sect. 6, the person so charged with keeping the house shall be apprehended and bound over, and the justice may take security for the good behaviour of the accused in the mean time, until the indictment shall be found, heard, and determined, or until the grand jury shall throw out the bill.

Sect. 7 imposes a penalty of 20*l.* on the constable who shall neglect, upon the notice given as aforesaid, to go before the justice, or enter into the recognizance, or who shall be wilfully negligent in carrying on the prosecution.

Sect. 8 provides for more easy proof as to the keeping of such a house, and enacts, that any person who shall appear, act, or behave as master or mistress, or as having the care, government, or management of any bawdy-house, &c., shall be deemed and taken to be the keeper thereof, and be punished as such, notwithstanding that he or she shall not, in fact, be the real owner or keeper thereof.

Under sect. 9, any inhabitant of the place may give evidence either for the prosecution (1) or on behalf of the defendant, notwithstanding his inhabitancy, or his having entered into the recognizance. And sect. 10 takes away the writ of certiorari.

However, by 58 Geo. 3, c. 70, s. 7, reciting the stat. 25 Geo. 2, a copy of the notice which shall be given to such constable shall also be served upon the overseers, or one of them, and they shall have reasonable notice to attend before the justice, and if they shall then and there enter into a recognizance to prosecute the offender, then the constable shall be relieved from entering into the said recognizance; but in the event of their neglect to attend, or refusal to comply with the request, the constable shall, in that case, continue liable to prosecute under the circumstances already mentioned in the act of 25 Geo. 2, c. 36.

Judgment.] The judgment for this misdemeanor is fine and imprisonment, and such infamous punishment as the court shall think proper to inflict (2).

Lewdness.] Very nearly connected with the offence just described are the faults of lewdness and disorderliness (3). As the case of Sir C. Sedley, who was fined 2000 marks for indecent conduct in Covent Garden (4). So it is settled that a night-walker,

(1) On an indictment of this nature, a female witness swore she was a sailor's wife, and that she had often prostituted herself in that house during her husband's absence out of the realm. Lord Raymond, C. J., said it was an odious piece of evidence, and ought not to be heard. Burn's Just. tit. Lewdness, citing Barl. title "Bawdy-house."

(2) 3 Inst. 205; 1 Hawk. c. 74. And surety for good behaviour for a reasonable time may likewise be required.

(3) See 1 Hawk. c. 5. s. 4; East, P. C. 3.

(4) 1 Sid. 168, *R.* v. *Sir C. Sedley*; S. C. 1 Keb. 620. And by 5 Geo. 4, c. 83, s. 4, every person wilfully, openly, lewdly, and obscenely exposing 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, shall be deemed a rogue and vagabond, and shall, upon conviction, be committed for a term not exceeding three calendar months, with hard labour. See 1 Barn. & Cress. 933, *R.* v. *Justices of Newcastle*. See also 2 & 3 Vict, c. 47, s. 58. [Metropolis Police Act.]

or other such disorderly person, may be indicted (5), and so likewise the frequenter of a bawdy-house, but it must be shewn that the defendant knew the bad character of the place (6), and care must be taken to discriminate between matters which partake of the character of lewdness and those which merely relate to disorderly persons.

It has been held that a woman who ran in a public way naked down to the waist was not indictable, for "nothing appears immodest or unlawful" (7).

An indictment was once preferred against an individual for converting his house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women, who, after their delivery, went away and deserted their children, whereby such children became chargeable to the parish. It certainly might be desirable that the parish should be indemnified against such casualties, but the court were clear that an indictment could not be sustained, and by Lord Mansfield; "By what law is it criminal to deliver a woman when she is with child?" The rule was, therefore, made absolute to quash the indictment.

Shewing a monstrous birth for money seems likewise to have been disapproved of by Lord Chancellor Nottingham (9).

Judgment.] The sentence for the respective offences mentioned above is fine and imprisonment, together with infamous corporal punishment (1).

Obscene Libels.] Obscene writings or pictures are highly repudiated at common law. Their tendency to deprave public morals cannot be too deeply felt, and we consequently find, that the legislature has not been backward in lending assistance to diminish a nuisance of this discription (2).

But we have, in this place, to deal with the offence as a misdemeanor, and so subject to indictment. At one time, nevertheless, it was conceived, that although a crime calculated to shake religion, as profaneness on the stage, was indictable, yet that the writing of an obscene book was punishable only in the

(5) Poph. 208.

(6) Burn's Just. tit. Lewdness, citing Wood. Inst. B. 3, c. 3.

(7) W. Kel. 163, *R.* v. *Gallard*; Per. Cur. Sembl. S. C. 2 Barnard. 328.

(8) 3 Burr. 1646, *R.* v. *M'Donald.*

(9) Ca. in Ch. 1735, p. 110, *Herring* v. *Walround*, and in the margin of the book it is said to be a misdemeanor.

(1) 1 Hawk. c. 5, s. 6; Poph. 208; and, as it should seem, bound over to good behaviour, if thought fit.

(2) By 5 Geo. 4, c. 83, s. 4, every person exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, shall be deemed a rogue and vagabond, and liable, upon conviction, to be punished with imprisonment for three calendar months, with hard labour. And by 1 & 2 Vict. c, 38, s. 2, reciting that doubts had arisen whether exposing to public view in the windows of shops in streets, highways, &c., any obscene print, &c., was an offence, it was enacted, that whoever shall expose, or cause to be exposed to public view, in the window or other part of any shop, or other building, situate in any street, road, highway, or public place, any obscene print, &c., shall be deemed to have so exposed the print, &c., within the intent and meaning of 5 Geo. 4, c. 83, s. 4, and shall be punished accordingly. See likewise 2 & 3 Vict. c. 47, s. 54. (Fo. 12.)

spiritual court (3). But this opinion was subsequently overruled, after much consideration in *R.* v. *Curl*. The defendant was indicted for printing and publishing an obscene libel, and his counsel urged the case of *R.* v. *Read*, as an authority in his favour, upon which the court determined to give the matter a full consideration. And, subsequently, they said, that they should have adjudged Read's case otherwise, and gave judgment for the crown (4). No doubt has since been entertained, but that such acts as these are misdemeanors.

Judgment.] The judgment is, that the offender be fined and imprisoned, and suffer such corporal punishment as the court may award (5), and hard labour is added by 3 Geo. 4, c. 114.

Bathing.] It has been resolved, that bathing in a place of public resort, is an offence, being contra bonos mores. As where the defendant bathed upon the east cliff at Brighton, dressing and undressing himself upon the beach. However, as it was the first prosecution in modern times, the court consented to his discharge, upon his entering into a recognizance to appear when called for, to receive sentence (6). The judgment would otherwise have proceeded as in cases of misdemeanor similar to those which have been lately discussed.

Gaming and Gambling Houses.] Both gaming and the keeping of a gambling house, are offences punishable by indictment. Gaming accompanied by deceit is a misdemeanor both at common law and by statute, and play beyond a certain sum is made the subject of an indictment by the legislature. And the keeper of a gambling house is likewise obnoxious, at common law as well as by statute, to punishment for his mischievous vocation.

In the first place, if a person be guilty of cheating, as by using false dice or cards, he may be indicted, and upon conviction, fined and imprisoned at the common law (7). And although play when practised innocently and as a recreation, is said not to be unlawful, yet it should seem, that if the stake be excessive, such play would be deemed gaming, and so a misdemeanor at common law.

By 9 Ann. c. 14, s. 5, whoever by any fraud or shift, &c.,

(3) 11 Mod. 142, *R.* v. *Read*; S. C. Fort. 98.

(4) Str. 788, *R.* v. *Curl*. See also id. 790, *R.* v. *Hill*, cited. The defendant went abroad, and was outlawed, being indicted for printing some obscene poems; and by the attorney-general; he would not have done so if his counsel had thought it no libel. See also, 4 Burr. 2527, *R.* v. *Wilkes*, for printing an obscene and impious libel, and the objection was not even taken.

The evidence against the defendant must be exact. Upon a charge of exhibiting a box with an obscene painting on it, it was considered insufficient for the witness to say, "that is the box, or one similar to it." The identical box must be sworn to. 3 C. & P. 424. *R.* v. *Rosenstein*.

(5) 1 Hawk. c. 73. s. 21.

(6) 2 Campb. 89, *R.* v. *Crunden*.

(7) 7 Mod. 40, Anon. defendant prosecuted by information. See 11 Rep. 87 (b), Cro. Jac. 497, Cro. El. 90. Such a person may be apprehended by a private person, if caught in the act of using false dice, Cro. Car. 234.

deceit or unlawful device in playing at or with cards, dice, or any of the games aforesaid (8), or in or by bearing a share or part in the stakes, &c., or in or by betting on the side or hands of such as play, shall win for himself or another, any sum of money or valuable thing, or shall at any one time or sitting, win above the sum or value of 10*l.* (9), shall, being convicted upon an indictment or information to be exhibited against him for that purpose, forfeit five times the value of the money or other thing so won, and shall, moreover, be deemed infamous, and suffer corporal punishment, as in cases of wilful perjury (1); the penalty to be recovered by such person as shall sue for the same by action (2).

By sect. 3, upon a bill filed in equity for any sum won, the defendant may be compelled to answer upon oath with respect to any such gain. Sect. 9, excepts the queen's palaces from the operation of the act during the residence of royalty, provided the play be for ready money.

By 18 Geo. 2, c. 34, s. 8, If any person shall win or lose at play, or by betting, at any one time, the sum or value of 10*l.*, or within twenty-four hours, the sum or value of 20*l.*, he shall be liable to be indicted within six months after the offence, in the king's bench, at the assizes, gaol delivery, or great sessions, and upon conviction, he shall be fined five times the value of the sum so won or lost, which fine (after such charges as the court shall judge reasonable allowed to the prosecutors and evidence out of the same,) shall go to the poor of the parish or place, where such offence shall be committed.

Provided nevertheless, by sect. 9, that upon one offender dis-

(8) That is to say, tables or any other game whatsoever, s. 2; see 9 Ann. c. 14, s. 2, for the penalty to be sued for in cases of gaming. The loser of the sum or value of 10*l.* by playing or betting, and who shall pay the same, may sue within three months for it by an action of debt, and in case the loser shall not bonâ fide sue, any other person may sue for and recover the same, and treble the value thereof, with costs of suit against the winner. But by sect. 4, if any person shall discover and repay the money or other thing, he shall be acquitted and indemnified from any punishment or forfeiture concerning the premises. Games within the act are Cricket, 1 Wils. 220; ut semb. 1 Cr. & M. 798; Foot races, 2 Wils. 36; Cowp. 281; 1 Younge, 361; Horse racing, Str. 1159; 1 Wils. 309; 4 Burr. 2432; 4 T. R. 1; 6 T. R. 499; 2 Bos. & Pul. 51. See 3 Vict. c. 5, repealing so much of 13 Geo. 2, c. 19, as relates to horse racing. Wagers on horse racing, although the race be for a legal plate, 2 Sir Wm. Bl. 706. And see further as to wagers, Cowp. 282; 6 T. R. 499; 3 Campb. 140; as to billiards, Lofft. 29, 42, *R.* v. *Bedford*; see also Burn's Justice, tit. gaming, wagers; 1 Hawk. c. 92, s. 47, et seq.

(9) The loser is a good witness. 3 T. R. 461. Burn's Justice, tit. gaming, citing *R.* v. *Luckup*.

(1) That is to say, to be fined 20*l.* and imprisoned for six months, and in default of payment, or of having goods or chattels of that value, to be set in the pillory in some market place, &c. But now, since by 56 Geo. 3, c. 138, the pillory is abolished, the court may pass in lieu thereof such further term of imprisonment as they may think proper. Common gamblers may, under 9 Ann, c. 14, s. 6, be brought before a justice, and bound over for their good behaviour for twelve months, or stand committed. And by s. 7, to play for 20*s.* during the time, or to bet to that amount, shall be deemed to be a forfeiture of the recognizance.

(2) That is to say, by an action of debt, under s. 2, of the statute.

covering another, so that the latter shall be convicted, the discoverer shall be discharged and indemnified from all penalties, unless such discoverer shall have been before convicted of the same, and he shall be admitted as an evidence to prove such offence (3).

In reviewing these statutes, it will be observed, that both may stand together, although the proceedings against the gamester can only be carried on upon one of them. Indeed, the 10th section of 18 Geo. 2, c. 34, expressly saves the 9 Ann. c. 14. So that after suing the party under 9 Ann. c. 14, and recovering five times the value, it would not be competent to prosecute the offender by indictment, under 18 Geo. 2. Auterfois convict of the same offence might, probably, be pleaded under such circumstances. Nevertheless, it may be noticed, that the loser is included, for the first time in the penal consequences of play, by 18 Geo. 2, c. 34, and that the provision respecting the loss of 20*l.* within twenty-four hours, is new. Probably, the passing of this latter act, 18 Geo. 2, was hastened by the decision of the court, in a case where the defendant was convicted under 9 Ann. c. 14, and a motion made to fine him refused. For it became necessary to bring an action upon the judgment, for the forfeiture, and the only judgment which could be given as the matter then stood, was that the defendant had been convicted; so that he was discharged without either fine or costs (4).

The court, again, will not allow of two proceedings, even upon the same statute, where one has been tried, and may be resorted to a second time. As where an information was moved for against the defendant, upon the prosecutor's affidavit that he had lost 15*l.* to the defendant at one sitting. It was objected, that the prosecutor had already indicted the defendant, and that the grand jury had found the bill, and although to this it was answered, that the indictment had been quashed for insufficiency, yet the court observed, that the grand jury might find another bill, and that there was no reason for their interposition (5).

With regard to the words "*any time or sitting*," Blackstone, J., observed upon one occasion, that to lose 10*l.* at one time, would be to lose it by a single stake or bet, but that to lose it at one sitting, would be to lose it in a course of play, where the company never parts, though the person may not be actually gaming during the whole time. So that an interval of an hour or two at dinner, was held not to be such an interruption as to prevent the sum in question from being considered as won at a single sitting (6).

(3) Sect. 3, contains a provision, empowering a court of equity to enforce its decree in case of a bill filed, so as to compel the defendant to answer upon oath, as in 9 Ann. c. 14. By s. 4, persons who may be summoned to give evidence, and who shall neglect to attend, or shall give false evidence, shall forfeit 50*l.*, and in default of having sufficient goods to satisfy the fine, shall be committed for six months. By sect. 5, no person other than the plaintiff and defendant, shall be disqualified from being a witness. Sect. 6, saves the royal palaces.

(4) Str. 1048, *R.* v. *Luckup*; see also 7 T. R. 461, note.

(5) 8 Mod. 187, Anon.

(6) 2 Sir Wm. Bl. 1220, *Bones* v. *Booth*.

The transactions which seem to be free from the taint of gaming, under the 9 Ann. c. 14, the 13 Geo. 2, c. 19 respecting horse racing, and the statute 18 Geo. 2, c. 34, are where the stake or bet is under 10*l.*, or, in horse racing, where the stake exceeds 50*l.*, and the bet is under 10*l.* (7). The plaintiff sued for 3*l.* 10*s.* for money won at all fours; the play appeared to be fair, and the sums won and lost at the sitting never amounted to 10*l.* And Lord Kenyon, admitting he had never before known an action of this sort, directed the jury in favour of the plaintiff, and a verdict was found for the sum claimed (8). So, with regard to a horse race, where the value of the plate was one hundred guineas, and the bet was under 10*l.*, Lawrence, J., held that the action well lay, and the plaintiff had a verdict (9). And care must be taken to state in the declaration, that the person connected with the transaction was playing at a game; for, upon the occasion of a foot race, where the plaintiff betted that J. C. could not run a certain race on such a day, and lost, the court gave judgment against him, because there was no averment that J. C. was playing at a game, and there must be a betting on the side of a person playing, in order to satisfy the statute, which, in this instance, is penal, and not remedial (1).

It is not necessary, however, to prove the exact sum as laid in the indictment. The defendant and others were indicted for winning at one sitting, the sum of 1,355*l.* and upwards, against the statute 9 Ann. c. 14, s. 5. It turned out, that the prosecutor lost the amount of certain bills of exchange, 1,223*l.*, as well as money, to the defendants, and that he lost about 80*l.* to one defendant alone. It was objected, first, that the indictment could not be supported, since part of the money was lost to one person alone; secondly, that supposing the bills could be considered as money, and had been won by the defendants jointly, still they would not make up the amount charged to have been won, and that it was incumbent upon the prosecutor to prove the sum precisely as laid.

But Lord Ellenborough said, that although, if the prosecutor had averred in the indictment that the defendant had won bills of exchange of a specified amount, the allegation must have been proved as laid, yet, since the sum only was averred, and that laid under a videlicet, the prosecutor was entitled to prove the winning of a smaller sum; and the defendants were found guilty of winning a smaller sum than that alleged in the indictment (2).

These acts, 9 Ann. c. 14, and 18 Geo. 2, c. 34, have in a great measure superseded the old act of 16 Car. 2, c. 7, s. 3. That act forbade play at cards, dice, or other games (3), unless the play

(7) For betting on a horse race is illegal, although the stake exceed 50*l.* if the wager exceed 10*l.*; see 2 B. & P. 51.

(8) 1 Esp. 235, *Bulling* v. *Frost*.

(9) 2 Campb. 438, *M'Allester* v. *Haden*.

(1) 2 Wils. 36, *Lynall* v. *Longbotham*.

(2) 1 Stark. 359, *R.* v. *Darley* & others. As to gaming by artificers and servants, which is punishable on summary conviction, under 33 Hen. 8, c. 9; see Burn's Justice, tit. gaming. Cowp. 35.

(3) Bowls, skittles, &c.

were for ready money. It likewise prohibited betting, and the loss of any sum or thing exceeding 100*l.*, at any one time or meeting, upon ticket or credit; all contracts made upon winning to be void, and the winner to forfeit treble the value of any sum or thing won above 100*l.* (4). The second section of this act relates to cheating (5). The 9 Ann. c. 14, however, punishes those who win above 10*l.* at a sitting, whether for ready money or otherwise. And this statute is preferred by those who think fit to resort to those means of redeeming their follies, to 18 Geo. 2, because it gives them an action on the judgment, whereas the 18 Geo. 2, is confined to the proceeding by indictment, and affords no pecuniary recompense by its sentence (6).

Gambling Houses.] It has been said, that the keeper of a gambling house is punishable both at common law and by statute. It is regarded at common law in the light of a nuisance (7), and the attorney-general may take up proceedings, if he should think fit, which a private party has abandoned, and prosecute the offender to judgment (8).

The statutes more particularly impose forfeitures (9). So that as we are now treating of misdemeanors only, we have merely referred to the acts, and will now proceed with the offence according to the course of the common law. It has been decided, that rouge et noir, is a game punishable by indictment. It was urged on the behalf of a defendant prosecuted for keeping a house where that game was played, that the keeping of a common gaming house was not an offence at common law, and that it only became a nuisance, when it drew together a number of people in an inconvenient manner. It was also alleged, that rouge et noir, was not a game mentioned in any one of the statutes which prescribed penalties for play. But the court would not entertain the rule for arresting the judgment, being clearly of opinion, that the indictment was good, and Holroyd, J., observed, that he should have thought an allegation of the defendants having kept a common gaming house, sufficient (1).

So, a cock pit has always been considered an unlawful game,

(4) See 2 Eq. Ca. Ab. 184, *Humphries* v. *Rigby*; and Burn's Justice. tit. gaming. wagers. 7 Bing. 405. *Shillito* v. *Theed*.

(5) See 9 Ann. ut supra.

(6) With respect to other modes of gambling and lotteries, littlegoes, &c., which are the subjects for the most part of qui tam informations, see Burn's Justice, tit. gaming, (lotteries:) and as to gaming in the public funds, see 1 Hawk. C. 92, s. 157, &c. It may just be noticed, although almost foreign to our present inquiries, that so much of 16 Car. 2, c. 7, and of the first clause of 9 Ann, c. 14, as makes absolutely void securities, the consideration whereof is gaming, was repealed by 5 & 6 Will. 4, c. 41. By sect. 1 of that statute all such securities, instead of being deemed utterly void, shall merely be deemed to have been given for an illegal consideration.

(7) 10 Mod. 336.

(8) 3 B. & Ad. 657, *R.* v. *Wood*; id. 659, note, *R.* v. *Oldfield*.

(9) See 33 Hen. 8, c. 9, s. 11; 12 Geo, 2, c. 28; 18 Geo. 2, c. 34, s. 1, 2, & 7; Burn's Justice, tit. gaming (houses.)

(1) 1 B. & C. 272, *R.* v. *Rogier* & another; S. C. 2 D. & Ry. 431; see also Leach, 493, per Grose, J.; 3 B. & C. 507, by Abbott, C. J.

and although the indictment was at common law, the court, upon one occasion, fined the defendant 12*l.* according to the measure prescribed by 33 Hen. 8, c. 9, (being at the rate of 40*s.* a day) for keeping such a place (2). And one who suffered "fighting of cocks" in his house, was held properly convicted of a nuisance, by keeping a disorderly house (3). And again, Lord Ellenborough refused to try a right to recover four guineas, because the action was founded upon a transaction of this nature (4). So is the law again with regard to bowling, if it be so conducted as to occasion a nuisance (5).

And it may be added with reference to the proceedings against persons for keeping such gambling houses, that a "gaming house" is included amongst the unlawful places mentioned by 25 Geo. 2, c. 36, and, consequently, that the means given by that act and 58 Geo. 3, c. 70, for prosecuting offenders are applicable to the misdemeanor now under consideration (6).

Judgment.] The judgment at common law for unlawful gaming or keeping a gambling house, is fine and imprisonment, and hard labour is added by 3 Geo. 4, c. 114.

Pretending to Witchcraft.] By 9 Geo. 2, c. 5, prosecutions for witchcraft shall be discontinued, and in lieu thereof, persons pretending to witchcraft, or fortune-telling, or dealers in occult or crafty sciences, for the purpose of recovering stolen property, shall upon conviction by indictment or information, be imprisoned for one year, and give sureties for such time as the court may think proper, and likewise be imprisoned till such sureties are found.

Slave Dealing.] By 5 Geo. 4, c. 113, s. 2, If any petty officer, seaman, &c., shall knowingly give his services towards the carrying on any objects or contracts relating to the slave trade, he shall be guilty of a misdemeanor, and be imprisoned for a term not exceeding two years. And all procurers, counsellors, aiders and abettors of such acts are made liable to the same punishment (7).

Attempts to commit Felony, and soliciting to commit Offences.] Attempts and solicitations to commit crimes are, where not otherwise provided for by the legislature, indictable misdemeanors at common law. As an attempt to commit felony or misdemeanor, whether such misdemeanor be statutable or at common law (8). An attempt to commit felony is punishable by hard labour, in addition to fine and imprisonment (9).

(2) 3 Keb. 465, 510, *R.* v. *Howell.* And see 11 Rep. 87 (b); S. P., as to the unlawfulness of cock fighting; 2 Show. 36, *R.* v. *Medlor.*

(3) 2 Burr. 1233, *R.* v. *Higginson.*

(4) 3 Campb. 140, *Squires* v. *Whisken.*

(5) 3 Keb. 465.

(6) See ante, pp. 264, 265, where the statutes are set forth. And see further upon this subject of gaming; 1 Hawk. t. 92.

(7) As to the trial, &c. see ss. 48, 49, 50, 4 & 5 Will. 4, c. 36.

(8) 7 C. & P., 795, *Roderick's* C.; 6 C. & P. 368, *Butler's* C.; Cald. 397, *R.* v. *Scholefield.* See Russ. & Ry. 107.

(9) 3 Geo. 4, c. 114.

Solicitations are equally illegal and punishable. As to commit an unnatural crime (1). And it is not necessary to negative in the indictment the commission of the crime, for the bare inciting is sufficient, being an act of itself. And again, there was the like rule upon an indictment against the defendant for an attempt to suborn a person to commit perjury (2).

So, again, soliciting by bribes, although they be not accepted, is an offence (3). And likewise soliciting a servant to steal his master's goods, although it be not laid in the indictment that the servant stole the goods, or that any act was done excepting the solicitation (4).

The soliciting of any person to commit a misdemeanor under the post office acts, is a misdemeanor, and punishable with two years imprisonment, with or without hard labour and solitary confinement (5).

Cruelty to Children and Servants.] Cruelty is also an offence against public morals. As, where a master neglects to provide sufficient sustenance for his servant. But the indictment must allege that the party was of tender years, and under the defendant's control and dominion. For want of such a statement, a charge of this nature has been considered defective upon more than one occasion (6). Although Lawrence, J., expressed his opinion in *R.* v. *Ridley*, that non-feazance with regard to food and clothing towards a child of tender years, was a misdemeanor (7).

Judgment.] The judgment would be fine and imprisonment.

SECT. V.—*Misdemeanors against the Public Revenue.*

We have not a very extensive list of misdemeanors to deal with in the present section. Those which consist of forgeries to the injury of the public revenue, or of perjuries connected with the national treasury, or assaults upon revenue officers in the execu-

(1) 1 Russ. C. M., 568, citing a precedent in Ch. C. L. 50.

(2) 2 East, 14, 17, 22, at Shrewsbury, cor. Adams, B. And see 1 Russ. C. M. 46, note (b).

(3) See post, sec. 7, bribery.

(4) 2 East, 5, *R.* v. *Higgins*; 1 Salk. 380, *R.* v. *Daniel*; S. C. 5 Mod. 99, 182; S. C. 2 Ld. R. 1116; 3 Salk. 42, *R.* v. *Collingwood*; S. C. 2 L. R. 1116; S. C. 5 Mod. 289.

(5) 1 Vic. c. 36, s. 36. Provided such confinement do not exceed one month at a time, nor three months in one year.

(6) 2 Campb. 650, *R.* v. *Ridley*; Id. 652, case at Exeter, cor. Le Blanc, J. This is the case of *R.* v. *Friend* and ux. Russ. & Ry. 20. The wife was acquitted upon two indictments, and the husband convicted on both, and sentence of imprisonment was passed upon him, but as the objection presented to the judges related not so much to the indictment as to the evidence adduced in support of it, they thought it best to adjourn the final decision, and so allow the defendant to undergo the whole of his sentence, although they considered the indictment defective for want of the allegation as to tender years mentioned in the text. Chambre, J., thought that this was not in any manner an indictable offence, being founded wholly on contract. Id. 22.

(7) 2 Campb. 653. See also the case of an overseer who refused to provide necessary food for a pauper; Russ. & Ry. 47, note, *R.* v. *Booth*, and post, sec. 7.

tion of their duty, &c., are either felonies, or have been already mentioned in former portions of this work, and a very considerable section of the offences upon this head are punishable, not as misdemeanors, but by pecuniary penalties.

Smuggling.] The act, however, for the prevention of smuggling (8) contains, amongst many felonies, a misdemeanor respecting signals at sea. By that statute no person shall, after sunset, and before sunrise, between September 21 and April 1, or after eight in the evening, and before six in the morning, at any other time in the year, make, aid or assist in making, any signal from any vessel or boat for the purpose of smuggling, or on the coast, or within six miles thereof, for the like purpose. Any person may stop and arrest the offender making such signal, and convey him before a justice. And it shall not be necessary to prove on any indictment or information that any vessel or boat was actually on the coast. And the judgment is, that the offender shall, upon conviction, pay the penalty of 100*l.*, or, be imprisoned, at the discretion of the court, for any term not exceeding one year, and be kept to hard labour (9).

By sect. 54, it is provided, that if the defendant mean to insist that the signal was not given for the purpose charged, he must himself be prepared to shew that fact negatively. And by s. 55, in order to prevent the making of any such signal any person may go for that purpose upon any lands without being liable to any indictment, suit, or action, for the same.

In a case upon the 52nd section of 6 Geo. 4, c. 108, which is now superseded by the 53rd section above-mentioned, the indictment had set out that the defendants between sunset on the 8th and sunrise on the 9th of March, *i. e.* on the morning of the said 9th of March, did make the signal charged as the offence. Proof was given to this effect. But, it was objected, that the indictment should have alleged the making of this signal "between the 21st day of September and the 1st of April," inasmuch as the prosecutor was not bound to the day laid, but might prove the offence to have been committed on any other day, or in any other month, so that, time being here of the essence of the misdemeanor, it ought to have formed a distinct and substantive averment in the words of the statute. But the court held, that judicial notice must be taken that the day averred in the indictment was, in fact, within the period mentioned in the statute. What burthen of proof that throws upon the prisoner, it is not necessary to inquire; upon the face of the indictment the offence is charged upon a day between September and April (1).

(8) 3 & 4 Will. 4, c. 53, s. 53.

(9) The words of the statute are: "The court before whom such offender or offenders shall be convicted." The same term occurred in an old act, and it was objected for a defendant, that the court before whom, &c., must mean the judge at nisi prius. But per cur. "These words mean the court before whom judgment is given," and the defendant received sentence. 4 M. & S. 71, *R.* v. *Cock.*

(1) M. & M., 163, *R.* v. *Brown* & others.

When the defendant is brought up upon an attachment for rescuing a person arrested on a warrant for obstructing excise officers, the court will allow interrogatories to be put to the defendant, if it be thought fit on the part of the prosecution (2).

It is a misdemeanor to obstruct officers of the revenue in the execution of their duty, and the defendants are punishable with fine and imprisonment (3). And, with reference to a search by custom-house officers, it has been said, that the person obstructing them in their search is liable to be proceeded against in cases where an information concerning smuggled goods has been laid, whether smuggled goods are found or not (4).

In this case, however, the information was probably upon oath, for the writ of assistance conferred upon officers by the act of 3 & 4 Will. 4, c. 53, s. 38, has been held not to authorize them to break open and search houses without probable cause, or without reference to the event.

And, therefore, under 6 Geo. 4, c. 108, s. 40, (a similar clause to the present) it was determined that an information against persons for assaulting and obstructing officers of the customs in the execution of their duty, cannot be supported, unless, at all events, some reasonable cause of suspicion be shewn, as that uncustomed goods were in the house with a guilty knowledge on the part of the defendant. And, perhaps, that knowledge would be presumed from the circumstance of such goods being found in the house (5).

Post Office.] By 1 Vict. c. 36, s. 25, every person employed by or under the post office, who shall, contrary to his duty, open, or procure or suffer to be opened, a post letter, or shall wilfully detain or delay a post letter, shall be guilty of a misdemeanor, and be punishable by fine or imprisonment, or both, as the court may think fit. Provided, that nothing shall extend to the opening, detaining, or delaying of a post letter returned for want of a true direction, or by reason that the person is dead, or cannot be found, or shall have refused the same, or refused or neglected to pay the postage thereof; nor to the opening, detaining, or delaying of a post letter in obedience to an express warrant in writing under the hand of one of the principal secretaries of state.

(2) 5 T. R. 362, *R.* v. *Horsley.*

(3) 3 & 4 Will. 4, c. 53, s. 61.

(4) 6 Esp. 125, note, *R.* v. *Akers.* By Lord Kenyon. "But the officers search at their peril." Ib. The name of the person giving the information shall not be asked by the defendant's counsel. Ibid.

(5) 1 B. & Adol. 166, *R.* v. *Watts* & another. That informations may be exhibited before commissioners of excise by another person than the attorney-general, or a revenue officer, see 2 East, 362, *R.* v. *Steverton* & others. In this case it was held, that the stat. 26 Geo. 3, c. 77, extends only to the superior courts of record. See also post, sec. 7, Bribery of officers, 13 East, 506, *R.* v. *Barfoot* & others; Custom house officer authorized to seize goods out of the limit of the particular port in respect of which he has received his deputation. What shall be said to be "*found on board on the high seas,*" so as to incur a forfeiture; 8 B. & C. 644, *R.* v. *Nunn;* 3 M. & Ry. 75.

By sect. 31, wilfully to secrete, keep, or detain, or upon demand by an officer of the post office, to neglect or refuse to deliver up a post letter which ought to have been delivered to another person, or a post letter bag, or post letter which shall have been sent, whether the same shall have been found by the person secreting, &c., or by any other person, is declared to be a misdemeanor, and punishable by fine and imprisonment (6).

By sect. 35, abettors shall be punished as principal offenders.

By sect. 36, persons soliciting, or endeavouring to procure the commission of such misdemeanors, shall be guilty of a misdemeanor, and be imprisoned, at the discretion of the court for any term not exceeding two years (7).

SECT. VI.—*Of Misdemeanors against Public Trade,*

The common law and the legislature have recognized many acts as prejudicial to commerce in general, and have marked them with the character of misdemeanors. The offences known by the names of engrossing and forestalling, although not at present popular subjects for prosecution, were obnoxious to the common law, and are still punishable by indictment. The common law likewise views with displeasure any attempt to deceive by fradulent exhibitions of goods, so as to give them a different appearance from their real value or composition, and the legislature has inflicted penalties for this misdeed.

All oaths taken by secret associations or societies are declared to be unlawful by statute, and such, therefore, which may be the fruits of private meetings, in order to raise wages, or compel regulations respecting work, &c. are illegal. The payment of wages otherwise than in coin is likewise, for the third offence, a misdemeanor. It seems also, that if a mayor or other officer corruptly refuse to confer the freedom of the borough upon a person who has earned it, or become entitled to it, he may be proceeded against by information; for the freedom is one of the rewards belonging to industry, and it is to the disparagement of trade to withhold it, but this is not an offence punishable by indictment (8). Nor is it the subject of an indictment to keep an open shop in a city contrary to immemorial custom (9). Nor to exercise a trade, contrary to the by laws of a borough (1).

Forestalling, &c.] It has been said that forestalling and engrossing are punishable at common law. They were formerly

(6) With or without hard labour and solitary confinement, s. 42. But the solitary confinement may not exceed one month at a time, nor three months in one year; 1 Vict. c. 90, s. 5. As to the venue, see s. 37. The admiralty jurisdiction, s. 39. Property to be laid in the postmaster-general, s. 40.

(7) See the note above.

(8) 3 Salk. 188, *R.* v. *Atkinson.*

(9) 3 Salk. 188, *R.* v. *George.*

(1) 4 T. R. 777, *R.* v. *Sharples.*

subject to imprisonment and the pillory by statute, but by 12 Geo. 3, c. 71, the acts upon this head were repealed (2), and the matter was again left to the operation of the common law.

Forestalling consists in enhancing the common price of merchandize, or in using means to that effect, as by spreading false rumours, buying things or going to market (3) before the usual hour of the market, buying and selling the same thing in the same market, &c. (4). Wherefore it is that corn cannot be sold in the sheaf at common law (5).

Engrossing is the getting into possession of large quantities of provisions, as fish (6), with intent to sell them again at an unreasonable profit (7). Regrating, a species of huckstery, is the buying and selling again in the same market, or within four miles thereof. But at the present day, it may be doubtful whether an indictment could be maintained in respect of any other offence than that of an intent to raise the price of provisions, and it may be said, therefore, that forestalling the market, or buying up large portions of corn or other victual, would not now be deemed misdemeanors (8). And it is said that the court were divided upon one occasion as to the point whether regrating were an offence at common law (9). So that it would seem safer to charge, that the acts complained of were done with an evil design to raise the price of the article in question (1). The great case upon the subject is that of a Kent merchant, who was tried at Worcester for endeavouring in that city to raise the price of hops at market. The defendant found the market there very slack. The price had been 15*l.* and 16*l.* per cwt. but it had declined to 11*l.* and 13*l.* per cwt. The defendant said that this fall was owing to a prosecution which had been instituted against him, that the charge had been abandoned, and that hops must rise again. Further, he said that the stock of hops in the hands of the brewers was nearly exhausted, so that they must soon come to him or to the hop planters for hops, that hops would be at 20*l.* per cwt. and that the planters might depend on his help to keep up the price. The defendant then entered into contracts, by which he would become

(2) See 1 Russ. C. M. 169, 170.

(3) Therefore an indictment charging the purchase of goods coming *towards* the market will be insufficient, Gilb. Ca. 276, *R.* v. *Patchin*.

(4) 1 Hawk. c. 80, s. 1.

(5) Id. s. 4, clearly not in the market itself, Holt's Ca. 325.

(6) Cro. Car. 314, *Penn's* C.

(7) And the quantity engrossed should be stated in the indictment, 1 Lord Raym. 475, *R.* v. *Foster*; engrossing wild fowl. Apples have been held by the barons of the exchequer not to be within the statute of 5 Ed. 6, c. 14; 13 Rep. 18, *Baron & Boys's* C.

(8) 1 Russ. C. M. 171, citing 2 Chit. Cr. L. 528.

(9) Id., ib. *R.* v. *Rushby*, citing the same, 536, note (r.)

(1) Id., citing the same, 528, in notis. But the defendant had been previously convicted before Lord Kenyon of the offence of regrating 30 quarters of oats, and the learned chief justice expressed a strong opinion against the defendant, although it was strenuously urged on his behalf by *Law*, that one partner could not be held criminally answerable for the act of another partner, and it was proved that the act of regrating in question was done against the defendant's express order and consent by his partner; Peake's Add. Ca. 189, *R.* v. *Rusby*.

the purchaser of one-fifth of the produce of Worcestershire and Herefordshire, at a much higher price than that at which hops were when he arrived at Worcester: telling the hop-dealers at the same time that they had better withhold their hops from market, or not sell them at a less price than he offered to give. The defendant succeeded in raising the value of hops from 13*l.* to 15*l.* per cwt. in a very short time.

The reports he had thus promulgated appeared to be without foundation. Being convicted upon an information filed by leave of the court, who clearly recognized the conduct of the defendant as a misdemeanor at common law, he was fined 500*l.*, and sentenced to a month's imprisonment. But the prosecution by indictment against him had not been abandoned, as the defendant incorrectly declared in the Worcester market. This charge against him was for engrossing hops at Maidstone, and being convicted in London before Lord Kenyon, he was fined 500*l.* more, and sentenced to three months' imprisonment, it being considered that his offence had been aggravated by his neglect of the first proceedings which were taken against him (2). Soon afterwards, a person was indicted for engrossing a great quantity of fish, geese, and ducks, with intent to sell the same again, but, as no quantity was specified, judgment was given in his favour upon demurrer (3).

If there be an information for engrossing 1000 quarters of corn, and judgment by nil dicit, and upon a writ of inquiry the engrossing of 100 quarters only appear in proof, it is good (4).

Judgment.] The judgment at common law for these offences is fine and imprisonment.

Monopolies.] Monopolies are also offensive to the common law, and those who engage in them are liable to fine and imprisonment. The monopoly arises by patent from the king, whereas engrossing is the act of the subject. But certain patents are legalized in the case of new inventions, with restrictions as to their term, and others concerning printing, saltpetre, &c. are likewise made exceptions (5). And although there is not much fear of jeopardy at the present day from such an event, it appears that an undue abatement of the price of our native commodities, as wool, &c. is punishable by fine and ransom (6).

By 6 Geo. 1, c. 18, s. 18, to raise large sums of money by small subscriptions—to create transferable shares in such undertakings—to presume to act as a corporation without authority, or to enter upon any undertaking to the detriment of trade and commerce, by way of public subscription or otherwise, are respectively

(2) 1 East, 143, *R.* v. *Waddington*; second case, Id. 167. The defendant had likewise suffered some imprisonment when he was called upon to receive his first sentence.

(3) Id. 583, *R.* v. *Gilbert*.

(4) Winch. Rep. 5, by Hobart, C. J.; S. P. 1 Ro. Rep. 134, *R.* v. *Gouldsburrough*. A heap of corn is clearly insufficient, 2 Bulst. 317; Semb. S. C. Sale in one county and indictment in another, are held sufficient, Comb. 3, *R.* v. *Copeland*.

(5) See 1 Russ. C. M. 175; 3 Inst. 195, &c.; 1 Hawk. c. 79; 21 Jac. 1, c. 3.

(6) See 1 Russ. C. M. 175.

declared to be illegal attempts, and by sect. 19, are to be deemed public nuisances; the offenders to be punished by such fines, &c. as persons convicted of public nuisances may be, and likewise by the penalties of præmunire (7).

It has not been found very easy to convict upon this statute. Upon one occasion a question was made, whether the mere raising of a large sum by subscription, and making shares transferable were unlawful, without reference to the tendency of the particular facts likely to come before the court and the jury. But it seemed to be considered an offence within the act that subscriptions were invited by holding out false and illegal conditions. The court, however, would not grant an information in the particular case, because the statute had not been acted upon for a great length of time, and the application was made by a private relator who had not been deluded by the scheme (8).

Upon another occasion, the defendants were charged with making subscriptions towards raising a great sum of money for the purpose of buying corn, grinding it, making bread, and dealing in or distributing flour and bread. They were also charged with presuming to act as a corporate body, and pretending to raise a transferable and assignable stock. Other counts varied the mode of setting out the misdemeanors imputed. The jury found a special verdict, from whence it appeared that this was a company known by the name of "The Birmingham Corn and Bread Company," instituted for the purpose of supplying Birmingham and its neighbourhood with provisions during a time of scarcity. The jury further found that the company was beneficial to the inhabitants at large, but that, at the time of the verdict, the bakers and millers were injured by it (9). The court, after hearing argument upon the subject, gave judgment for the defendants; for, first, the special verdict negatived the nuisance as to the time mentioned in the indictment, by using the word "is," by which the time of finding the verdict must be intended. And secondly, the particular facts complained of were not only not found to be nuisances, but the contrary, and as they did not come within any of the specific grievances pointed out by 6 Geo. 1, c. 18, the defendants could not come within the fair sense and meaning of any of the prohibitions (1).

So again, where fifty persons agreed to raise 200 shares, at 210*l.* each, by small monthly subscriptions, for building houses for each other, the engagement being at an end as soon as the money should be paid, the court held that there was no illegality in the undertaking. And it made no difference that these persons were not to employ any others than their own tradesmen, or that the shares might be sold and transferred, because the purchaser was to be approved of by the society, and to become a

(7) Punishable by forfeiture of lands, goods, and chattels, and imprisonment for life.

(8) 9 East, 516, *R.* v. *Dodd.*

(9) The words of the verdict were "it *is* prejudicial," &c.

(1) 14 East, 406, *R.* v. *Webb* & others. See 4 Taunt. 587, 3 M. & S. 488.

party to the original articles. And if it were alleged that numbers joining in such undertakings might work a prejudice to the community, it might be at once replied, that the jury would take that point into their consideration, and weigh it in deliberating upon their verdict (2).

Fraud.] The common law would, without doubt, punish an attempt to impose false goods upon the market. But the legislature has interfered on several occasions, and has particularly pointed out certain frauds against trade, visiting them with pecuniary penalties (3). At common law, an offence of this nature would be a misdemeanor, and punished accordingly (4).

Unlawful Oaths.] By 39 Geo. 3, c. 79, s. 2, All societies where unlawful oaths shall be taken within the intent and meaning of 37 Geo. 3, c. 123, or any oath not required nor authorized by law—and every society where the names of the members shall be kept secret from the society at large—and branch societies, acting separately from each other, but yet composing altogether one society—shall be deemed guilty of the like unlawful confederacy. Sect. 3, excepts declarations approved by two justices, and registered with the clerk of the peace, provided such approbation be confirmed at the quarter sessions. Sect. 4, Excepts former members who do not continue members of such societies after the passing of the act. And, sects. 5, 6, & 7, relate to freemasons, who are likewise excepted upon certain conditions. Then, by sect. 8, the proceedings against offenders is declared to be either before a justice, who may impose a penalty of 20*l.*, or by indictment. The judgment in this latter case is transportation for seven years, or imprisonment not exceeding two years. Sect. 9, Empowers the justice or court to mitigate the punishment, if by fine or imprisonment, to one-third of such fine or imprisonment. Sect. 10, Declares that the defendant shall not be punished by both modes of proceeding. And, by sect. 11, offenders may be indicted, as heretofore, if not prosecuted under the act.

It is an offence against this statute to enter into an engagement not to make buttons under a certain price (5).

By 57 Geo. 3, c. 19, s. 25, All Spencean clubs, and every other

(2) 15 East, 511, *Pratt* v. *Hutchinson* on demurrer. The plea did not allege that the society was prejudicial to the public at large. See 1 Campb. 547, *Buck* v. *Buck*; 4 Bingh. 5, *Kempson* v. *Saunders*; S. C. 12, Moore, 44; 5 Bingh. 248, *Duvergier* v. *Fellows*; S. C. 5 M. & P. 403; 3 B. & C. 639, *Josephs* v. *Pebrer*; S. C. 5 D. & Ry. 542.

(3) See 6 T. R. 374, *R.* v. *Pack*; id. 375, *R.* v. *Reason*, on 7 Geo. 2, c. 19, s. 2, for colouring hops with the vapour of the sulphur and brimstone; 8 T. R. 536, 542, 625, *R.* v. *Jackson*, on 26 Geo. 3, c. 60, s. 2, For falsely marking buttons with the word "gilt," knowing the same not to be gilt. 1 Eliz. c. 12, s. 1, Concerning deceitful practices with linen cloth so as to make it look better than it really is. Punishment, one month's imprisonment, fine, and forfeiture.

(4) See ante, False Pretences.

(5) 6 C. & P. 563, *R.* v. *Bell* & others. See 6 East, 417, *R.* v. *Nield* & others, upon the repealed statute, 39 & 40 Geo. 3, c. 106.

society where unlawful oaths contrary to 37 Geo. 3, c. 123, and 52 Geo. 3, c. 104, are permitted, or where any illegal oath is taken, or any test or declaration, whether by words, signs, or otherwise, or any society employing any committee, delegate, &c. to confer with any other society, or to induce persons to become members thereof, shall be deemed unlawful combinations and confederacies within 39 Geo. 3, c. 79; and all persons corresponding with such societies, shall be considered equally guilty.

Sections 26 & 27 except freemasons' lodges and declarations approved by magistrates under 39 Geo. 3, c. 79; and, likewise, meetings of Quakers or for charitable purposes.

Payment of Wages otherwise than in Coin.] By 1 & 2 Wm. 4, c. 37, s. 9, Any employer entering into a contract, or making any payment declared illegal by the act, which forbids such payment otherwise than in the current coin of the realm to certain artificers (6), shall, for the third offence (7), be guilty of a misdemeanor, and, on conviction, shall be liable to a fine not exceeding 100*l.*

5. *Refusing Freedom.*] And, lastly, it has been held, that an information, in the nature of a quo warranto (8), should go against the mayor of a borough for refusing to admit certain persons to their freedom (9). But it was subsequently arranged, that the right should be tried by means of feigned issues (1).

However, an information for a conspiracy will not be granted for disfranchising freemen if corrupt motives be denied (2).

(6) In iron manufactories. Working mines of coal, iron, stone, limestone, salt rock. Working stone, slate, or clay; making salt, bricks, tiles, or quarries. Nails, &c. or articles of hardware made of iron or steel. Plated cutlery. Brass, tin, lead, pewter, or other metal, or japanned wares. Making, spinning, throwing, &c. any kinds of woollen, worsted, yarn, stuff, kersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures. Making or preparing any glass, porcelain, china, or earthen ware, or branches, &c. Making any bone, thread silk, or cotton lace, or lace made of mixed materials. Sect. 20. Not to extend to any domestic servant, nor servant in husbandry. Sect. 21.

(7) First offence, a penalty before justices not exceeding 10*l.* nor less than 5*l.*; second offence, not exceeding 20*l.* nor less than 10*l.* By sect. 10.

(8) Not an indictment. See ante, p. 276.

(9) Com. Rep. 240, *R.* v. *Osborn.* By three justices. Eyre, J., contra.

(1) Id. 241.

(2) Dougl. 588, *R.* v. *Davie* & others. To the misdemeanors above mentioned in this section, offences against the stat. 5 Eliz. c. 4, respecting terms of apprenticeship. and 23 Geo. 2, c. 13, concerning the seduction of artificers, might have been added. But these statutes have been repealed. the 5 Eliz. by 54 Geo. 3, c. 96, and 23 Geo. 2, by 5 Geo. 4, c. 97, which also repealed the 39 & 40 Geo. 3, c. 56, as to the seduction of colliers from the kingdom. See as to the old law upon 5 Eliz. c. 4, Burn's Justice, tit. Apprentices; 3 Campb. 344. Upon 23 Geo. 2, c. 13, Burr. 2026; 6 T. R. 739.

To entice an apprentice from his master is not a misdemeanor, although the court would not quash an indictment for that act, leaving the defendant to demur. 6 Mod. 99, *R.* v. *Daniell*; 12 Mod. 195, *R.* v. *Kitchner.* An action upon the case is the proper remedy. Cowp. 54.

SECT. VII.—*Of Misdemeanors against Public Economy and Convenience.*

There are several misdemeanors in contravention of public order or economy and public convenience. It is not proposed to enumerate them in a regular series, but, by adverting to some general heads, the reader will be, perhaps, the more easily enabled to discern the principle which governs all the offences contemplated in the present section.

Thus, it is contrary to the opinion which is entertained by the legislature concerning the public interest, that jesuits should be allowed to make proselytes, or, it may be said, even to dwell within the realm, without licence.

It is contrary to legal policy that any assembly met for religious worship should be disturbed, of whatever character their sect may consist.

It is not considered wise that persons should be allowed to pretend to supernatural powers, especially when their assumed knowledge is employed to gain money from others. Witchcraft and fortune-telling, therefore, are misdemeanors.

It is a fact so manifest as to admit of little discussion, that bribery of public officers, or of any nature relative to the affairs of the nation, is an evil of considerable magnitude.

Unlawful oaths are also sufficiently mischievous to call forth a law for their repression without much reluctance.

Matters concerning baptisms and marriages are of importance to the public welfare, and it is rightly a misdemeanor to infringe any judicious rules which the common law or legislature may have adopted for the regulation of those incidents. Thus, clandestine marriages are condemned by the law, and undue or improper certificates of baptism or marriage are declared to be subjects of misdemeanors. And although it might seem that the concealment of the birth of infants could take place upon some occasions without criminality, yet there are so many circumstances of suspicion attendant on such an act as to warrant the infliction of punishment in respect of it.

So to bury before the coroner has held his inquisition is a misdemeanor; and to obstruct the performance of a funeral service is likewise such an offence, although the occurrence may have taken place in the prosecution of a supposed right.

It may likewise be added, that contempt of a constituted authority is frequently treated as an offence of a similar nature.

Of misdemeanors on the subject of public convenience, none are more open to observation than the extensive class ranged under the head of nuisance. Whether these acts relate to thoroughfares, as roads, bridges, navigation, or to unwholesome trades or occupations, or to illegal games, or annoyances of other kinds, they are, for the most part, viewed as mischiefs which the common law will abate and punish. Libel is another fruitful source of inconvenience, and we shall consider, in a great measure, the

law upon that subject in criminal matters under this head. Besides these, however, there are several other misdemeanors belonging to the present section. As, if a person should take an exorbitant amount of brokerage. So, if the provisions of acts of parliament concerning licences of different kinds should be evaded or neglected, it is frequently a misdemeanor in parties so misbehaving themselves. And disobedience to certain statutable regulations, as, for instance, in the cases of the poor laws, tithes, newspaper acts, the anatomy act, &c. is declared to be a misdemeanor.

There are many others. To set spring guns, except in dwelling-houses, may be included. To burn a house through carelessness or negligence is a misdemeanor. In the one case, the gun may occasion a serious calamity; and, in the other, the idea of punishment is supposed to induce caution. If an innkeeper should refuse to open his door to a guest, he is punishable for this offence against public convenience, unless he can show, in his defence, that the person requiring admittance was guilty of some misbehaviour which justified the refusal. But we will proceed to enter more particularly into the consideration of the respective cases which have been adverted to.

1.—Misdemeanors against Public Economy.

Jesuits.] By 10 Geo. 4, c. 7, s. 29, If any jesuit or member of any religious order, community, or society, of the church of Rome, bound by monastic or religious vows, shall come (without licence) into the realm; or, having obtained such licence from the secretary of state to remain there (3), shall not depart from the United Kingdom within twenty days after the expiration of such licence, or of its revocation after notice given to him, shall be guilty of a misdemeanor, and be banished for life (4). And, if, after sentence of banishment, such person shall be found at large, without lawful excuse, after the end of three calendar months from the time of the sentence, he shall be likewise deemed guilty of a misdemeanor, and be transported for life (5). And the offence of being admitted or becoming a jesuit, or brother, or member of any such religious order, community, or society as aforesaid (6), is made punishable in like manner (7).

And if a jesuit or member of any religious order, community, or society of the church of Rome, bound by monastic or religious vows, within any part of the United Kingdom, shall admit any person to become a regular ecclesiastic, or brother, or member of any such religious order, &c. or aid or consent thereto, or shall administer or cause to be administered, or aid or assist, &c. in taking any oath, vow, or engagement purporting or intended to bind the person taking the same to the rules, ordinances or ceremonies of such religious order, &c. he shall be guilty of a misdemeanor (8), and be punishable by fine and imprisonment.

(3) Under the same act.
(4) By sect. 31.
(5) By sect. 36.
(6) Under sect. 29.
(7) By sect. 34.
(8) 10 Geo. 4, c. 7, s. 33.

Clergy using Canons, without Licence in Convocation.] It might be inconvenient to have an ecclesiastical code of laws in opposition to the common or statute law. And thus by 25 Hen. 8, c. 19, s. 1 (9), any of the clergy who shall presume to attempt, allege, claim, or put in use any constitutions, ordinances, provincial, or synodal, or any other canons; or enacting, promulgating, or executing any such canons, constitutions, &c. by whatever name they may be called in their convocations, unless the same clergy may have the king's most royal assent and licence to make, promulge, and execute such canons, constitutions, and ordinances, provincial or synodal, shall be guilty of a misdemeanor, and imprisoned, and fined at the king's will (1).

Farmers committing Waste.] By 52 Hen. 3, c. 23, any farmer making waste or exile of house, wood, and men during his term, or of any thing belonging to his farm, without special licence by writing of covenant, shall yield full damage, and be grievously amerced. The bill for the preservation of woods, 35 Hen. 8, c. 17, although not very much acted upon, is still in force. In 34 Car. 2, an information was brought against Lord Stafford upon that statute, for converting wood land into pasture, and it was objected, that an information would not lie, but the court refused to quash the count, being an information (2). In the reign of Elizabeth, an information was brought for not fencing coppices under the same act, but it failed—first, because it was not alleged that the defendant had a lawful interest in the coppices, and, secondly, because it was not shown what coppices they were (3).

Bribery.] Leaving matters connected with the church, it may be observed, that few circumstances appear more obnoxious to the affairs of the state than the bribery of public officers. In an extensive sense, this expression means the receiving or offering of any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice (4). And the buyer or seller of offices is likewise said to be guilty of bribery (5). A fortiori, corruption in a judicial place is bribery (6). All these respective offences are misdemeanors at common law.

Elections.] For although penalties are ordained by various statutes against the crime, the common law punishment remains. Thus it is with respect to the corruption of voters. Very heavy fines are awarded by the legislature against such as tamper with the parliamentary franchise (7), but the proceeding by informa-

(9) Confirmed by 1 Eliz. c. 1, s. 6.
(1) Which means, at the will of the king's justices.
(2) Skin. 52, *R.* v. Lord *Stafford.* It was, however, quashed subsequently for want of showing a particular local description. Id. 116.
(3) Cro. El. 117. *Edwards v. Ebsworth.*
(4) 1 Hawk. c. 67, s. 2.
(5) Id. s. 3.
(6) See 3 Inst. 145.
(7) See 7 & 8 Will. 3, c. 7, s. 4; 2 Geo. 2, c. 24, s. 7, et seq. A discoverer is indemnified from the penalties mentioned in this section.

tion (1) or indictment is not by any means taken away. It was only intended that a penal action should be added, and the words, " or being otherwise lawfully convicted thereof," on the 2 Geo. 2, c. 24, is said to allude particularly to the reservation of the common law indictment. However, as the statute which imposes the penalty prescribes two years as the limit of the time for prosecution, and as the punishment by way of penalty is not warded off by the judgment upon indictment or information (2), the court will not aid an attempt to inflict the double pain. And although informations were, at one period, granted by the court within the two years, yet it was subsequently resolved, that an information ought not in general to be allowed, and especially after a judgment for the penalty, and that whilst the person is liable to that judgment, the extraordinary interposition ought to be withheld (3). But the court entertained no doubt of their jurisdiction to permit such an information, as at common law (4), in addition to the penalties of the statute (5). It was the same thing, as though the defendants had been convicted upon an indictment (6). And where there has been a conviction upon an *indictment*, the court will adjourn the passing of their sentence until the two years shall have elapsed, upon the defendant's entering into a recognizance. It was arranged upon one occasion, that the defendant should be bound in his own bond in 100*l.* to appear at the expiration of that period (7). As soon as the time had expired, however, the defendant was brought up, and received judgment of fine and imprisonment (8). And an information will not be granted until the same period has elapsed (9). It is totally immaterial, under the statute 2 Geo. 2, whether the party bribed has a right to vote or not, by reason of the words " claim to have " in that act of parliament; but this point does not seem to have been decided at common law (10). So again, an information will lie for endeavouring to corrupt an elector to vote at the election of mayor, although no money be paid (11).

Other Cases.] But bribery may be committed in many other matters connected with public affairs and the administration of

As to the person who shall be said to be the discoverer, see 1 Hawk. c. 67, s. 10, note (4); 1 Russ. C. M. 159.

(1) 11 Mod. 387; *R.* v. *Cripland*, 2 Ld. Keny. 202. See also 49 Geo. 3, c. 118.

(2) 1 Sir Wm. Bl. 524.

(3) 3 Burr. 1335; *R.* v. *Pitt* and *R.* v. *Mead*; S. C. 1 Sir Wm. Bl. 380.

(4) See 12 Mod. 314; *R.* v. *Taylor*.

(5) 3 Burr. 1339.

(6) Ibid.

(7) Id. 1359, 1389, *R.* v. *Heydon*; S. C. 1 Sir Wm. Bl. 351, 356, 404.

(8) Id. 1389; S. C. Although he stood convicted on the testimony of a single witness, whom he had himself indicted for perjury. But the court said, that all the witnesses to be brought forward upon the trial for perjury (except one), as well as Heydon himself had been examined on Heydon's trial, and they added, that he could not be examined by reason of interest, and so they would not defer their judgment; S. C. See also Id. 1440.

(9) 1 Sir Wm. Bl. 541, *R.* v. *Robinson*.

(10) 4 Burr. 1591. See further upon this subject, 1 Hawk. c. 67, s. 9, &c.; 1 Russ. C. M. 157.

(11) 11 Mod. 357, *R.* v. *Cripland*. And procuring one to personate a voter is a misdemeanor, 6 Ad. & El. 236, *R.* v. *Marsh*.

justice. And thus the defendant who promised one H. 500*l.* as a compensation for his vote, in the election of certain members of a corporation, was held to be guilty of this offence(1). And, again, in a case concerning the election of a mayor, informations for bribery were allowed to be filed against both the contending parties(2). So a bribe offered to a juryman, in order to influence his verdict, whether accepted or not, may be made the subject of an information(3). So where the defendant, who was clerk to an agent for French prisoners, took bribes in order to procure the exchange of some of them out of their turn, he was visited, upon conviction, with a heavy punishment(4). So, under 33 Geo. 3, c. 52, s. 62, to demand or receive any sum of money, or other valuable thing as a gift or present, or under colour thereof, by any British subject holding office or employment under the crown, or the East India Company, shall be deemed and taken to be an extortion and a misdemeanour at law, and the offender shall forfeit the whole gift or present, or the full value thereof(5).

So if an attorney should receive a bribe, he may be punished; and any undue reward for any thing either against justice, or exceeding the fair measure of a reward, is a bribe(6). So if a commissioner for the examination of witnesses, were to take a bribe, it would be a breach of trust, and he might be indicted and fined at the common law(7). And, of course, judicial bribery is a most grievous offence, whether the judge be swayed by the temptation, or refuse to accept the tender(8). Bribery, on the part of officers of the customs or excise, or officers of the army, navy, or marines, duly employed for the prevention of smuggling, is punishable by a pecuniary penalty(9); and an attempt to bribe such a person is an undoubted misdemeanor (10). So again, the court were quite clear that the defendant, who attempted to induce a privy councillor to give him a situation, by offering 5,000*l.* for that purpose, was guilty of misdemeanor (11).

Buying and selling offices.] From hence it may easily be collected, that the sale or purchase of offices is regarded in a very inestimable light. There is no doubt but that such an offence is

(1) 2 Ld. Raym. 1377, *R.* v. *Plympton*. It was deemed sufficient to allege, that H. had a right to vote without setting out the enabling clauses of the corporation charter.

(2) 8 Mod. 186, *R.* v. *Mayor of Tiverton*,

(3) 2 East, 14, 16, *R.* v. *Young*, cited.

(4) 1 East, 183, *R.* v. *Beale*, cited.

(5) See upon this statute, 5 East, 244, *R.* v. *Stevens* & another.

(6) Hob. 9.

(7) Cro. Jac. 65.

(8) See 3 Inst. 147; 4 Burr. 2500.

(9) 3 & 4 Will. 4, c. 53, s. 33.

(10) 5 Esp. 231, *R.* v. *Cassano*. But the defendant was acquitted, because the averment was ———. Delivered at a quay or wharf, appointed for the landing of certain goods, whereas the order was to deliver them at the *king's* warehouse, which, not being a quay or wharf, became thus the subject of a variance. 8 B. & C. 114, *R.* v. *Everett*; S. C. 1 M. & Ry. 35. But the defendant was held entitled to have the judgment arrested for want of an allegation that the officer was a person whose duty it was to make seizures of goods liable to forfeiture, because every person employed in the service of the customs is not so authorized.

(11) 4 Burr, 2494, *R.* v. *Vaughan*.

punishable at common law. And thus Hawkins says, that the *taking* or *giving* a reward for offices of a public nature is bribery (1). And, again, where it was objected upon an indictment for a conspiracy, that it was not a misdemeanor at common law to buy or sell the office of coast waiter, Lord Ellenborough observed, that it would be very difficult to argue after reading the case of *R.* v. *Vaughan*, in Burrow, that such an act was not a misdemeanor. It must be debated upon arrest of judgment, or upon a writ of error, and Grose, J., expressed himself without doubt to the same effect (2).

But the sale of offices has always been a ground for prosecution (3). This conduct was early forbidden by the legislature (4). The statute, however, which declares both sale and purchase to be misdemeanors, is the 49 Geo. 4, c. 126. By that act, sect 3, if any person shall sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond or assurance, or shall by any device or means, contract or agree to receive or have any money, &c.; or shall purchase or bargain for the purchase of, or give or pay any money, &c.; or make or enter into any promise, &c., to give or pay any money, &c.; or shall by any way, &c., contract or agree to give or pay any money, &c., directly or indirectly, for any office, commission, place, or employment specified or described in the said recited act (5), or this act (6), or for any deputation thereto, or any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto or resignation thereof, or for any consent to such appointment, nomination, or resignation, he shall be guilty, together with all such as wilfully and knowingly aid and abet the same, of a misdemeanor. By sect. 4, the like offence is declared in respect of any person who shall, in like manner make bargains, either by receiving or paying money, &c., for any interest or solicitation, or negociation relating to such

(1) 1 Hawk. c. 67, s. 3.

(2) 2 Campb. 229, *R.* v. *Pollman* & others.

(3) Noy. Rep. 102; Mo. 781.

(4) By 12 Ric. 2, c. 2, in the case of chancellors, &c., who should appoint justices, sheriffs, escheators, &c. or other officers or ministers of the king. By 4 Hen. 4, c. 5, in the case of sheriffs, who are forbidden to let their bailiwicks to farm. By 5 & 6 Ed. 6, c. 16.

(5) That is to say, 5 & 6 Ed. 6, c. 16; and the offices are—s. 2, any office, or the deputation thereof, concerning the administration of justice, or the receipt, controlment, or payment of the king's treasure, rent, revenue, &c.; or the customs, or custom houses, or the keeping of towns, castles, and fortresses, or any clerkship in a court of record where justice is to be administered.

(6) That is to say,—sect. 1, offices in Scotland and Ireland,—all offices in the gift of the crown, or appointed by the crown. All commissions civil, naval, or military. All places and deputations belonging to the treasury, the secretary of state, the admiralty, the ordnance, the commander-in-chief, secretary at war, paymaster of the forces, the India board, excise, the treasurer of the navy, the commissioners of the navy, the commissioners of transports, the commissary general, the storekeeper general, and also to the principal officers of any public department or office in the kingdom, or the king's dominions here or abroad; and also to the East India company.

office, &c.; or shall, for or in expectation of any gain, &c., solicit, recommend, or negociate in any manner for any person touching a nomination or appointment to such office.

And by sect. 5, persons opening or keeping any house, room, office, or place for soliciting, transacting, or negociating such appointments, &c., or who shall knowingly aid, abet, or assist therein, shall be deemed and adjudged guilty of a misdemeanor. Exceptions to the rule are however enacted by sect. 7 (7), provided there be no advertisements, nor printed proposals; nor any bribe of any kind whatsoever relating to the same. And again, by sect. 9, offices particularly specified by 5 & 6 Ed. 6, c. 16, are excepted (8), and offices legally saleable before the passing of the 49 Geo. 3, c. 126, and in the gift of any person, by virtue of any office of which any person is or shall be possessed under any patent or appointment for his life, and all promises, &c., which were valid before the passing of the act, and acts done in pursuance thereof. Sect. 10 saves all legal deputations to offices, and all agreements, &c., lawfully made in respect of any allowance, salary, or payment by or to such principal or deputy respectively, out of the fees or profits of such offices. Sect. 11, excepts annual payments of fees due to former possessors of offices, and agreements, &c., relating thereto, provided that the amount thereof be stated in each particular commission. Sect. 12 excepted certain offices in Ireland (9).

With regard to the offices which have been held to belong to these laws, questions concerning them have, for the most part, been raised by pleadings, rather than criminal prosecutions. A short summary of the places embraced by the acts, and those which are not affected by them, is given in the note (1). Where an office is within the statutes, and the salary is certain if the principal make a deputation, reserving a lesser sum out of the salary, it is good. So, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good, for the deputy in these cases is not to pay unless the profits rise to a certain amount. But where the reservation or agreement is not to pay

(7) Commissions in the board of gentlemen pensioners, or yeomen of the guard. The marshalsea, the palace court, army commissions.

(8) Offices whereof a person is seised in any estate of inheritance, or parkership, or keeping of any park, house, manor, garden, chase, forest, sect. 4. And sect. 7, saved harmless, the chief justices of the king's bench and common pleas, and the justices of assize; but alterations have been made in some respects with regard to these functionaries.

(9) Sect. 13 directs the punishment of these misdemeanors in Scotland.

(1) Ecclesiastical offices, of chancellor, registrar, and commissary, cofferer, surveyor of the customs, customer of a port, collector and supervisor of the excise, clerk of the crown, and clerk of the peace, are within the law. Offices in fee; the bailiwick of a hundred, a six clerks' office, offices belonging to to the plantations, have been held to be excluded. But it seems that the purser of a ship, notwithstanding one decision to the contrary, is an individual whose place is governed by these statutes. See 1 Russ. C. M. 150. citing the authorities, 3 Lev. 289; 2 Ventr. 187; 1 Hawk. c. 67, s. 4.

out of the profits, but to pay generally a certain sum, it must be paid at all events, and such bond is void by the statute (2).

Trial.] By sect 14, all offences committed against 5 & 6 Ed. 6, c. 16, and 49 Geo. 3, c. 126, by any governor, lieutenant-governor, or person having the chief command, civil or military, in any of his majesty's dominions, colonies, or plantations, or his or their secretary or secretaries, may be prosecuted in the court of king's bench, in like manner as any crime, &c., committed by any person holding a public employment abroad, might be prosecuted under 42 Geo. 3, c. 85.

Judgment.] The common law judgment for bribery is fine and imprisonment, but various disabilities have been imposed by statutes upon persons convicted of specific acts of that nature. And the stat. 5 & 6 Ed. 6, c. 16, declares that a party guilty of the offences therein mentioned, shall be disabled from holding the office in question (3), a disability which no grant nor dispensation can restore as long as he lives (4).

Unlawful Oaths.] It has been already shewn in a former section, that oaths which are inconsistent with the public safety are the subjects of misdemeanor. The like may be said of such oaths as are inimical to public trade. And it may here be added, that any oaths which do not fall under the heads already treated of, and which are, nevertheless, against public convenience, are also entitled to be ranked as matters of misdemeanor. Therefore, where certain night poachers were sworn to keep secret a scheme which was proposed to them, it was made the subject of an indictment to administer such an oath. And it was considered sufficient to say that the oath was to do an illegal act, without shewing what the act was. And in the same case it was held immaterial to prove that the parties were sworn upon a Testament (5).

Conspiracy.] Certain conspiracies likewise, which militate against the public convenience, but which are neither mala in se, nor mala prohibita, may be mentioned here. As if an agreement be entered into to indict or acquit, so as to leave the question of right or wrong entirely indifferent (6). So where certain persons agreed to hiss at the Birmingham theatre, it was deemed to be an illegal confederacy, although *one* might clearly have hissed without offence (7). So a combination amongst officers to resign their

(2) 2 Salk. 463, *Godolphin* v. *Tudor*; affirmed in Dom. Proc. 1 Bro. P. C. 101.

(3) Sect. 2.

(4) 1 Hawk. c. 67, s. 5; 1 Russ. C. M. 151. See concerning the promise of a place for election purposes, 49 Geo. 3, c. 118, s. 3.

(5) 6 C. & P. 571, *R.* v. *Broadribb* & others.

(6) 9 Rep. 56; 1 Salk. 374; see 33 Ed. 1, stat. 3.

(7) 2 Russ. C. M. 556, Anon; see also S. P. 2 Campb. 372, in the case of *Macklin*, the comedian, who indicted certain persons for hissing him whenever he appeared upon the stage. 2 Campb. 227, *R.* v. *Clifford* & others, against whom a criminal information was granted for a conspiracy to disturb the performances at Covent Garden theatre.

commissions is a conspiracy. The military service cannot be determined by such a confederacy (8).

Births, Marriages, &c.] Matters connected with births, marriages, and burials, have been considered deserving the attention of the legislature. It is the policy of the law, that births should be not only without concealment, but that a careful registry should be made of all which occur. And thus, the parent, or occupier of each house where a birth happens, must, upon request, give information to the registrar respecting the particulars of such birth, within forty-two days after the application made for that purpose (9). And disobedience to this ordinance is a misdemeanor (1). Penalties are also awarded by the statute just referred to, against such as are guilty of neglect or omission in the prosecution of the registry.

Concealment of Birth.] The concealment of a birth by a woman is a misdemeanor, if the offspring, being born alive, would be a bastard. By 43 Geo. 3, c. 58, s. 3, it was enacted, that trials of women for the murder of bastard children, should be governed by the same rules which obtain in other cases of murder. And by sect. 4, it was declared to be lawful for the jury by whose verdict any such woman should be acquitted, to find, in case it should so appear in evidence that the prisoner did by secret burying or otherwise, endeavour to conceal the birth of her child, and thereupon the court might have sentenced such person to imprisonment, for any term not exceeding two years. This act was repealed by 9 Geo. 4, c. 31; but the 14th section of this latter statute ordains, that if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and shall be punished with imprisonment, for a term not exceeding two years, with or without hard labour. And it shall not be necessary to prove whether the child died before or after its birth. Provided always, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying, or otherwise, endeavour to conceal the birth thereof; and thereupon the court may pass such sentence as if she have been convicted upon an indictment for the concealment of the birth.

It thus appears, that the mother must, under the old act, have been arraigned for murder, before she could be convicted of concealment, and it became the duty of the grand jury to find the bill for murder, although there might not be any evidence of that crime, if there were some grounds for believing that there had been a concealment. Hence it followed, that an indictment

(8) 3 Burr. 2476; see id. 9.
(9) 6 & 7 Will. 4, c. 86, s. 20.
(1) 3 P. & Dav. 421, *R.* v. *Price.*

could not be preferred for the concealment as for a substantive offence (2). But now, the 9 Geo. 4, c. 31, has provided for both alternatives, so that the party may be indicted at once for the misdemeanor; or, after a verdict of acquittal for murder, may be charged, under a subsequent inquiry upon the same indictment, with concealment. It makes no difference, however, whether the charge be made upon an indictment or upon the coroner's inquisition, for as the word "charged" is used generally in the statute 43 Geo. 3, c. 58, and as a coroner's inquisition is certainly a charge, the finding of concealment upon such an arraignment is right, although the bill for murder may have been thrown out by the grand jury. And so it was held by the judges upon a case reserved (3).

The evidence necessary to support this charge is, that the child is dead (4), whether before or after birth need not appear (5), that the woman failed to give proper publicity to the fact of her delivery, by illegally concealing her situation (6), and it must also appear that some ground exists, however improbable, that the child was not still-born, and that the progeny would, if born alive, have been bastard. It is not necessary to prove that the infant was born alive, nor will it be presumed in favour of the prisoner that the case was otherwise; but if there be no foundation at all for the fact of life in the child, the prisoner must then be acquitted. Supposing that the dead offspring were without hair or nails, or that there were any other circumstances from which a high presumption adverse to the circumstance of life might arise, the woman may still be convicted of concealment. This was not the rule under the old statute of 21 Jac. 1, for, in favour of life, every presumption was wont to be made to relieve the prisoner from the capital penalty consequent upon concealment (7). But under 43 G. 3, c. 58, the matter was viewed in a different light. Eliz. Cornwall was charged, together with D. T., with murder. The child was seven months old, and in a putrid state, so that a conclusion of its having been still-born might have been fairly drawn. The prisoner admitted throwing it down the privy, and D. T. denied all knowledge of the child's birth, although she must have known of it. The prisoner being convicted, it occurred to the judge, that the presumption of the infant's death was so strong, as to warrant him in asking the opinion of the judges whether this could be said to be a concealment, and as D. T. evidently knew of the birth, whether her being privy, although an accomplice (8), would take the case out of the statute. And the

(2) 1 Russ. C. M. 475, note, *Parkinson's* C.

(3) Russ. & Ry. 240, *Maynard's* C. Lew. C. C. 43, *Dobson's* C.; S. P. 3 Campb. 371, *Cole's* C., S. C. Leach 1095.

(4) 8 C. & P. 591, *Hopkins's* C.

(5) Lew. C. C. 44, *Perkins's* C.

(6) It seems that some act of disposal of the body should appear. So that where a woman went to the privy for some other purpose than that of delivery, and was delivered of a child unawares, which was suffocated beneath, it was held that she could not be convicted of concealment, although she denied the birth. 8 C. & P. 755, *Turner's* C.

(7) See East, P. C. 228, 229, *Peat's* C.; *Jefford's* C., 1 Russ. C. M. 476.

(8) As in *Peat's* C., under 21 Jac. 1, where Peat, who was heard to call

judges were unanimous, that the act of throwing the child into the privy was evidence of an endeavour to conceal the birth, and that the conviction was therefore right (9). Then, with reference to the question of publicity, it appears that a disclosure to an accomplice is no defence according to the present law (1). But it was once held, that notwithstanding the throwing the child away as above mentioned, if the woman had diclosed her pregnancy to other persons, or had made preparations for her confinement, the offence would not have been committed (2). This case, however, which was decided at Stafford, in 1809, must be considered as of doubtful authority, when contrasted with a recent case. The prisoner was charged with murder, together with Robert Hall the father of the bastard, and it appeared, that with her full knowledge, he had thrown the child into the privy, under very suspicious and discreditable circumstances. But the pregnancy of the woman was known by her mother, and was apparent to other women, and it was proved that a female had been sent for at the commencement of her labour, but that she was too ill to attend. No provision had been made for the birth. The prisoner was convicted, and an argument was permitted before the judges. It was endeavoured on the prisoner's behalf to urge, that here was only an endeavour to conceal the death, the pregnancy having been sufficiently public, and a neighbour sent for in the time of parturition. But the judges affirmed the conviction, being of opinion that the communication thus made to other persons was not a bar, but only evidence for the jury, and however slight the evidence on the other side against the woman might be considered, the verdict of the jury could not be set aside. But they recommended a pardon (3). Where the woman admitted having had a child, and had stated she had sent for a surgeon to attend her in her confinement, and it appeared also that the mother of the prisoner had shewn the witness, a surgeon, some clothes intended for the child, Park, J., held, that these facts went to negative concealment, and he directed the jury to acquit (4). If the charge be for disposing of the body, it must be a complete act of disposing. Whatever the intention of the prisoner might have been, and however apparent her design, yet if she be found with the body in her possession, she cannot be convicted on this branch of misdemeanor (5).

Costs.] No costs were allowable upon prosecutions for this offence as a misdemeanor, until 1 Vict. c. 44. But by that statute, the court is empowered to order payment of the costs and expenses, whether any bill of indictment shall or shall not be preferred, together with a compensation to the prosecutor and

to her mother, an accomplice, was acquitted upon this ground, of concealment. East. P. C. 229.

(9) Russ. & Ry. 336, *Cornwall's* C.

(1) Moo. C. C. 482.

(2) 1 Russ. C. M. 476, *R.* v. *Southern*, cor. Bayley, J.

(3) Moo. C. C. 480, *Douglas's* C. S. C. 7, C. & P. 644. It is to be observed, that where two persons are arraigned for the murder of a bastard, the mother only is to be subjected, after an acquittal of the murder, to the further inquiry.

(4) 4 C. & P. 366, *Higley's* C.

(5) 2 M. & Rob. 44, *Snell's* C.

witnesses for their loss of time and trouble, as in cases of felony (6). By sect. 2, orders for the payment of the money in such cases shall be the same as in cases of felony (7).

Marriages.] The registration of marriages has been provided for by parliament, and certain offences upon this subject are punishable, as we have seen, as felonies or perjuries (8). The residue are made subject to penalties (9).

Burials.] Omissions to register burials are likewise subjects for a penalty (1), but they are not misdemeanors, nor does there seem to be any misdemeanor expressly created by the late act upon that subject. But there is a clause which requires any person present at a death or in attendance during the last illness of the deceased, or the occupier of the house where the death has happened, in case of the death, illness, inability, or default of any such persons as aforesaid, or any inmate in case of the death of the occupier, to give information to the registrar concerning the death, within eight days after a request made for that purpose. And as disobedience to the commands of a statute is a misdemeanor at common law, a default in the particulars above-mentioned will subject the offender to the common law punishment (2).

Obstructing Burials.] It is a misdemeanor to obstruct the performance of a burial service in an illegal manner. But the nature of the obstruction must be specified. Where the defendant was indicted for such an offence, and for unlawfully preventing a burial by threats and menaces, it was held, that the particular threats should have been set out, and the judgment was arrested. In this case there were two counts. One of them described the minister interrupted as W. C., clerk, and the second designated him as the said W. C. The defendant was convicted on the second count only, and for want of saying more than the said W. C., and shewing that W. C. was a clerk, and engaged in the lawful performance of the rites of sepulture, the indictment was held faulty on that ground also, for the court will not make an indictment good by inducement (3).

Disturbing a Congregation.] Whatever pretences, therefore, there may be for a right, it is clear that the law will not allow it to be enforced in a violent manner, and so it is as to a matter of

(6) Sect. 1.

(7) See further upon this subject East, P. C. 228; 1 Russ. C. M. 475; 2 Hale, P. C. 289. Whether it be an indictable offence for a man to secrete a woman big with child by him, in order to prevent her from giving evidence to charge him, quære? See 1 Str. 612, *R.* v. *Chandler*; S. C., 2 Ld. Raym. 1368; S. C. 8 Mod. 336. But the indictment was held bad on demurrer, because the words "*gravida cum fœtu illegitimo*" were used, and that cannot be affirmed until the woman be delivered, for non constat, but that the parties might be united in lawful wedlock.

(8) Ante.

(9) See 6 & 7 Will. 4, c. 86, s. 42, 45.

(1) See 6 & 7 Will. 4, c. 86.

(2) Fine and imprisonment.

(3) 4 B. & C. 902, *R.* v. *Cheere*; S. C. 7 D. & R. 461.

opinion. Thus, with reference to a dissenting congregation, although persons may entertain opinions different from the creed which is established by law, they shall not be disturbed in the exercise of the religious duties of their own persuasion. If it were otherwise, it might be expected, that they in their turn, would be justified, should they become the majority, in persecuting the doctrines and worship of their christian brethren. And, a fortiori, the law has taken care to protect the established church under a peculiar sanction.

By 1 W. & M., c. 18, s. 18, if any person shall maliciously or contemptuously come into any cathedral or parish church (4), chapel, or other congregation permitted by the act, and disquiet or disturb the same, or misuse any preacher or teacher, such person, upon proof before a justice, by two or more sufficient witnesses shall be bound with two sureties in the sum of 50*l.* (5), and, in default thereof, shall be committed to the general or quarter sessions, and, upon conviction there, shall be fined 20*l.* to the use of the king, &c. By 52 Geo. 3, c. 155, s. 12, this fine is raised to 40*l.*

Protection is afforded to preachers and teachers of the roman catholic religion by 31 Geo. 3, c. 32, s. 10; and the fine for disturbing their places of worship is 20*l.* Sect. 14 of this latter act, however, excepts quakers, but they are, nevertheless, protected by the statute 1 W. & M., c. 18, before mentioned.

It was objected in an indictment on the toleration act (6) for disturbing protestant dissenters, that German Lutherans, being foreigners, were not within its provisions, but Lord Kenyon intimated his opinion clearly against the objection, and it was not pressed. It was likewise held to be no defence that the disturbance took place in consequence of a disputed right to the office of clerk (7). And, upon conviction, the court of king's bench were quite satisfied that it was a case which needed not, of necessity, to be tried at the quarter sessions, but might well be removed by certiorari (8).

The question, however, as to the certiorari was raised again some years afterwards, and upon the new statute 52 Geo. 3, c. 155. In that case, Lord Ellenborough confessed he was struck with the passage which enacts that the offender upon conviction of the said offence at the genaral or quarter sessions should suffer the penalty of 40*l.* So that it might seem to be a condition precedent to try at the sessions. But his lordship then went on to say that, upon consideration, he concurred with the decision in *R.* v. *Hube*. And Le Blanc, J., added, that unless the defendant could shew that if the proceedings had been before the quarter sessions, they could not have been sustained, the argument on his behalf would be at an end, for all the incidents of the common law attached to an in-

(4) See likewise as to disturbances at church: 1 Mar. sess. 2, c. 3, where jurisdiction to punish those offences is given to a magistrate.

(5) That is, to appear at the quarter sessions.

(6) 1 W. & M., c. 18.

(7) Peake's Cases; 32, *R.* v. *Hube* & others.

(8) 5 T. R. 542, *R.* v. *Hube* & others; Peake, ut supra; and see ante.

dictment at sessions, and one of these is the certiorari. Judgment was, accordingly given against him (9).

It should not be forgotten, nevertheless, that the act of disturbing a congregation may be treated as a misdemeanor at common law. And the proceeding may be either by indictment or information (1). Thus, where such an information had been granted for a misdemeanor in obstructing divine service in Pewsey church, and insulting the rector, Lord Mansfield took occasion to say, that methodists had a right to the protection of this court, if interrupted in their decent and quiet devotion; and likewise dissenters from the established church, if so disturbed (2).

College of Physicians.] Another breach of public order may be said to exist in contemptuous conduct to persons in official situations. As, where the defendant was charged with using abusive language to the president and censors of the college of physicians, and likewise with writing libellous letters, together with other enormities. He was found guilty upon an information for these offences (3).

Railways—False Return.] By 3 & 4 Vict. c. 97, s. 4, Every officer of a company who shall wilfully make any false return to the lords of the committee of the privy council shall be deemed guilty of a misdemeanor (4).

2.—Misdemeanors against Public Convenience.

It has been observed, that misdemeanors against public convenience comprise a large class.

Innkeeper and Guest.] It is an offence of this nature for an innkeeper to refuse admission to a guest. But there may be circumstances which will tend to discharge the defendant from the indictment preferred against him. As, for example, the drunkenness, or indecent, or improper behaviour of the applicant (5). Or that there was no room (6). Or that the guest refused to tender a

(9) 4 M. & S. 508, *R.* v. *Wadley*; see 5 & 6 Will. 4, c. 33, s. 1.

(1) A certiorari to remove, such an indictment at common law was refused upon one occasion (1 Keb. 491), but the court will exercise their discretion. See 5 & 6 Will. 4, c. 33, s. 1.

(2) 3 Burr. 1683, *R.* v. *Wroughton*. The rule for the information was, however, discharged upon the merits.

(3) 1 Campb. 91, *R.* v. *Campbell*. In this case, it was averred that the court to whom the contempt was offered consisted of certain members of the college, and a by-law was given in evidence shewing that such members were sufficient for the holding of a court; and it was averred, that the quorum were present. Lord Ellenborough held this proof sufficient, although it was objected, that other members might assist at the court, and that it was not certain that the presence of these particular members was necessary for the formation of a court. As to the offence of practising without a certificate from the apothecaries' company, see 55 Geo. 3, c. 194; 4 C. & P. 29, *R.* v. *Clapham*.

(4) Punishable by fine and imprisonment.

(5) 7 C. & P. 213, *R.* v. *Ivers*.

(6) See Dy. 158 (b), *White's* C.

reasonable price for his entertainment (7). But it is not an answer to shew that no sign was visible, if the party in reality kept an inn (8), or that the price of the victuals or lodging was not tendered, if no demand was made by the landlord (9), or that the traveller came on a Sunday, or after the family were gone to bed, or that he refused to disclose the particulars of his name and abode (1).

The indictment must state, however, that the prosecutor was a traveller; for want of such an allegation the court quashed a count for not receiving one taken ill with the small pox (2).

Judgment.] The judgment for this misdemeanor is fine and imprisonment.

Spring Guns, &c.] Another misdemeanor of this nature consists in setting spring guns, man traps, and other engines calculated to destroy human life, or inflict grievous bodily harm. This act is punishable as misdemeanor if done with an illegal intent (3), and it will lie upon the defendant to shew that he had no design to inflict the mischief contemplated by the legislature. The 2nd section of the statute referred to excepts guns or traps usually set with the intent of destroying vermin. By sect. 3, persons knowingly and wilfully permitting any such spring guns, &c., to remain set upon their coming into the occupation of the premises shall be deemed to have set and fixed the same with the like intent. But by sect. 4, it shall not be a misdemeanor to use such engines in a dwelling house for the protection thereof from sunset to sunrise. By sect. 5, nothing in the act shall affect or authorize any proceedings in any civil or criminal court touching any matter or thing done or committed previous to the passing of the act (4).

Judgment.] The judgment is fine and imprisonment.

Negligent Arson by Servants and others.] It should seem, that wilful neglect by which a fire is occasioned is a great misdemeanor at common law (5); and by 6 Ann, c. 31, s. 3, a servant who sets fire to a house or out-houses negligently, shall on conviction before two justices, forfeit 100*l.* to the churchwardens of the parish for the benefit of the sufferers by the fire, and upon refusal to pay after demand by such churchwardens, shall be committed to some workhouse or house of correction for eighteen months, there to be kept to hard labour.

Furious Driving.] By 1 Geo. 4, c. 4, if any person shall be maimed or otherwise injured by the wanton or furious driving or racing, or by the wilful misconduct of any coachman or other person having the charge of any stage coach or public carriage, such

(7) 1 Hawk. c. 78, s. 2; 9 Rep. 87.
(8) Palm. 374; 2 Ro. Rep. 345; Godb. 346; 1 Hawk. c. 78, s. 2; 12 Mod. 255.
(9) 7 C. & P. 213, *R.* v. *Ivers.*
(1) Ibid.
(2) 12 Mod. 445, *R.* v. *Luellin.* An action to recover damages for such a refusal will also lie; 1 Hawk. c. 78, s. 2; Palm. 374.
(3) 7 & 8 Geo. 4, c. 18, s. 1.
(4) Sect. 6 excepts Scotland.
(5) And so punishable by fine and imprisonment.

respective acts shall be misdemeanors, and punishable by fine and imprisonment. But the act is not to extend to hackney coaches being drawn by two horses only, and not plying for hire as stage coaches.

Misconduct on Railroads.] Further, by 3 & 4 Vict. c. 97, s. 14, it is made competent for a justice to commit a person charged with the offences mentioned in the prior section (6) to the sessions, and such person, upon conviction, shall be imprisoned, with or without hard labour, for any term not exceeding two years. But the justice may take bail for the appearance of the offender at the sessions.

And by s. 15, whoever shall wilfully do or cause to be done any thing in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or shall aid or assist therein, shall be guilty of a misdemeanor, and may be imprisoned, with or without hard labour, for any term not exceeding two years.

Offices.] Misdemeanors against public convenience connected with offices are—neglect to take an office which the law has imposed upon the person elected or appointed to it, and breaches of duty in the discharge of the employment.

Refusal of Office.] Questions concerning the refusal of office have frequently arisen in the cases of constables (7), overseers, and sheriffs, but the rule is general, and applies to all public functionaries, whose duty has a tendency to promote the interests of society (8). And it is no ground of defence that the office is one which has been created by statute, because an indictment will lie at common law for disobedience to an act of parliament. Thus a special constable may be indicted (9). Hence it follows, that primâ facie, a party is always subject to be proceeded against for a refusal of this nature, and it consequently lies upon him to urge reasons why he should not be convicted. The most ordinary pleas are those of exemption by virtue of a licence or other privilege, or by a legal incapacity to perform the required duties. Thus, the defendant claimed to be discharged from serving the office of constable because he was a member of the barbers' company, but Lord Ellenborough held that the exemption sought for was limited

(6) Sec. 13.—The offences are these: Any engine driver, guard, porter, or servant, being drunk when employed on the railway: Committing any offence against the by-laws, rules, or regulations of the company. Wilfully or negligently doing or omitting to do any act whereby the life or limb of any person passing along or being upon the railway or the works of the company, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains, shall be or might be obstructed or impeded. Offenders may be apprehended at once by any officer or agent of the company, or by any special constable, and persons whom they may call to their assistance.

(7) Fort. 129.

(8) See as to constable; *R.* v. *Dansey*; *R.* v. *Lone*, Str. 920; Ca. Sett. 212.

(9) 9 C. & P. 105, by Alderson, B.

to such persons as had been examined by the Bishop of London or Dean of St. Paul's, and licensed to practice surgery according to the provisions of certain statutes of Hen. 8, and the defendant was found guilty upon an indictment (1). So a younger brother of the Trinity House was held liable to serve the office of headborough (2), a borsholder—(3), and a watchman—(4), an inspector of lottery offices (5). So a captain in the guards was considered bound to serve as constable, for although he might plead personal attendance on the king, yet the more ancient employment of constable must prevail against a later institution (6). So likewise a practising physician was held liable upon one occasion (7), but the authority of this decision has been doubted (8), and, at all events, if there be sufficient persons besides to execute the office, and no special custom concerning it, the party may, perhaps, be relieved by the king's bench (9), and upon this ground, a gentleman of quality will be excused (10). So, notwithstanding an exemption a person becomes compellable to serve if he be elected for a larger jurisdiction than that comprised in his privilege. As where the defendant had a certificate in respect of all parish offices within the parish of Birmingham, but was subsequently indicted for refusing to take upon himself the duty of constable for the manor of Birmingham, which comprehended the parish of Birmingham and the hamlet of Deritend; the court were of opinion that as the parish and manor in this case were not co-extensive, the defendant must submit to have judgment entered for the crown (11). So again, privilege as to a town was deemed to be no discharge in respect of a superior leet (12). Upon the same principle, tenant in ancient demesne, although discharged from toll, pontage, and murage, was held eligible to be high constable, notwithstanding an objection that he would be drawn out of the ancient demesne, for the office of a constable is for the preservation of the peace and government (13). So again, it was adjudged upon a special verdict that an inhabitant of a particular leet was liable to serve the office of high constable (14), and many years afterwards the same doctrine was adhered to, and the custom to elect a constable in that manner which appeared for the special verdict was held good (15).

It was made a question upon one occasion whether a college barber residing at Oxford in the city out of college could be indicted for not taking upon him this office in the city. It was contended, that

(1) 3 Campb. 91, *R.* v. *Chapple.*
(2) 1 T. R. 679, *R.* v. *Clarke.*
(3) At the same time, Ca. Sett. 100, *R.* v. *Beale.*
(4) 1 Keb. 933, *R.* v. *Clerke.*
(5) 1 Esp. 359, *R.* v. *Wood.*
(6) 1 Sid. 355, *R.* v. *Vane*; S. C. 1 Lev. 233; 2 Hawk. c. 10, s. 41.
(7) 1 Mod. 22, Dr. *Pordage's* C. S. C. 2 Keb. 578; S. C. 1 Sid. 431, where the privilege is said to have been allowed, 2 Hawk. c. 10. s. 41.
(8) Comb. 31, by Wythens, J.
(9) 2 Hawk. c. 10, s. 41.
(10) 2 Keb. 439, *R.* v. *Wright.*
(11) 2 Burr. 1182, *R.* v. *Darbishire.*
(12) 3 Keb. 230, *R.* v. *King.*
(13) 2 Show. 75, *R.* v. *Bettsworth*; S. C. 1 Ventr, 344.
(14) 11 Mod. 215, *R.* v. *Jennings.* But the indictment was quashed for want of stating that the court was held at the time prescribed by magna charta. Id. 227.—See also 1 Ld. Kenyon, 318, *R.* v. *Boycot.*
(15) Cowp. Rep. 13, *R.* v. *Genge*, and it is no defence to urge that the

though he might be a privileged person, yet that as his residence was not within the walls of the college he must still be considered as liable. The verdict being against the defendant the court granted him a new trial upon other grounds, but the case does not appear to have gone before a second jury (1). In 2 Jac. 2, it was agreed by the court that a person might be appointed constable although he did not reside within any leet (2). It has likewise been held that a naturalized foreigner is not liable to serve the office of constable (3). The charge, however, must set forth the authority which elected the constable, and likewise that he had notice of the appointment. For want of these allegations a motion to quash an indictment was allowed (4). And the place also where he ought to be sworn has been deemed a material part of the notice (5). He must also be said to have been an inhabitant when chosen (6). So where a corporation neglected to prescribe for their right to appoint a constable, an indictment was quashed, since a corporation cannot, of common right, elect such an officer (7). By 1 Geo. 4, c. 37, s. 2, any person neglecting to take upon him the office of special constable, and to act, being duly appointed, shall be liable to the same punishment as persons refusing the office of constable.

Again, if a person be elected overseer, he is liable to an indictment for refusing to execute that office (8), and although residence is a necessary ingredient in the qualification required for this employment (9) the payment of rent and taxes, and occupation of premises for the purposes of business have, nevertheless, been esteemed sufficient evidence of being a resident householder for this purpose (10). The court, moreover, in the case referred to remarked, that the defendant had enjoyed one of the privileges of a resident householder, inasmuch as he had voted for a lecturer, a privilege belonging to resident householders only (11). An acting justice of the peace and lieutenant of marines was held to be exempt from serving this office, there being others sufficient within the parish (12). An indictment which stated that the defendant was appointed overseer of the parish for the year then next ensuing was held sufficient, without saying "of the poor of the parish," especially as the word "poor" appeared in a former part of the indictment, and the words "year ensuing" were held to mean the overseer's year (13).

refusal is punishable in the leet. 7 Mod. 411, *R.* v. *Lowe*, cited.

(1) Dougl. 531, *R.* v. *Routledge*.

(2) Ca. Sett. 211.

(3) 5 Burr. 2788, *R.* v. *De Mierre*.

(4) 5 Mod. 96, *R.* v. *Harpur*; Comb. 328, *R.* v. *Halford*. Semble, S. C. Fort. 127, Al. 78, *Prigg's* C.

(5) 3 Keb. 418, *R.* v. *Chute*.

(6) 1 Lord Kenyon, 318, *R.* v. *Boycot*.

(7) 1 Lord Raym. 94, *R.* v. *Bernard*; S. C. 1 Salk. 502; S. C. Comb. 416.

(8) 7 Mod. 410, *R.* v. *Jones* & another; S. C. 2 Str. 1146. As, on the other hand, a person is equally liable to punishment who endeavours, by illicit means, to procure the appointment. 1 East, 154 n. *R.* v. *Joliffe*.

(9) Carth. 161, *R.* v. *Moor*.

(10) 1 B. & C. 178, *R.* v. *Poynder*, sen.; S. C. 2 D. & Ry. 258.

(11) S. C.

(12) 1 Burr. 245 *R.* v. *Gayer*: and so is a constable. Tho. Jones, 46, *R.* v. *Price*.

(13) 4 T. R. 778, *R.* v. *Burder*.

Sheriff.] Again, an indictment will lie for not serving the place of sheriff. And where sentences of excommunication and disabilities for not taking the sacrament were connected with a refusal to serve this office, it was the opinion of the courts at one time that the person so refusing was, nevertheless, answerable under an indictment because it was his duty to remove the incapacity (1). But a different construction subsequently prevailed in the case of conscientious dissenters (2), and religious tests are now, for the most part, withdrawn by late acts of the legislature. In these cases the indictment must show the liability, and how the defendant refused to serve (3).

A refusal to take office is shown by the defendant's unwillingness to take the proper oaths of office or otherwise to qualify himself for his appointment (4), and à fortiori by his express refusal (5).

There are, notwithstanding, many instances in which the requisition to serve these offices has been successfully resisted on the ground of privileged exemption, non-residence, or otherwise. Thus, with reference to the want of inhabitancy, although an overseer may not be discharged on that ground, a constable can well avail himself of such a defence, being taken to be "conversant where his bed is" (6), and the distinction is, that the constable's duty consists in personal attendance, and a principal qualification on his part is the circumstance of his being known to the inhabitants of the district. Therefore, where the defendant was not resiant in the parish where he was appointed constable, he had judgment upon an indictment after argument, although he occupied a house within the parish, and paid all rates in respect of it. And it was held to be no answer that he could appoint a deputy, for supposing that he could do this without the assent of some other authority, he would not be compellable in consequence to take upon himself an office requiring personal services, especially in the absence of any proof that there was a necessity for his appointment (7).

A license or privilege is likewise an exemption. As in the case of a surgeon who is discharged by the custom of the realm as well as by the equity of some statutes and the positive enactments of others (8). So an attorney or barrister enjoys a privilege of exemption, because of attendance in public courts (9), and these persons are entitled to be free whether there be a special custom to choose constables or not (10); and the servants of a member of parliament have been mentioned as equally privileged (11). So,

(1) 2 Mod. 299, *Attorney-General* v. *Sir J. Read.* See 2 Ventr. 147.
(2) 1 Ld. Raym. 29, *R.* v. *Larewood;* S. C. 4 Mod. 270; 1 Salk. 108; Skin. 574; see also 2 Str. 1193, *R.* v. *Grosvenor;* 1 Wils. 18, S. C. 6 Bro. P. C. 181, *Harrison* v. *Evans;* see Str. 1193, *R.* v. *Grosvenor,* and ibid. note 1.
(3) 3 Mod. 167, *R.* v. *Sellars.*
(4) See 5 Mod. 96, *R.* v. *Harpur,* S. C. cited Leach, 795.
(5) 3 B. & Adol. 614, *R.* v. *Brain.*
(6) See 2 Inst. 122.
(7) 4 B. & C. 772, *R.* v. *Adlard;* S. C. 7 D. & Ry. 340.
(8) Com. Rep. 312, *R.* v. *Pond.*
(9) 1 Mod. 22.
(10) 2 Hawk. c. 10, s. 39.
(11) 1 Mod. 13, 2 Hawk. c. 10, s. 39.

again, an alderman of London has been held entitled to his writ of discharge (1). And there is a power inherent in the crown to exempt from the office of constable or headborough (2), subject only to this modification at common law, that there be a sufficient number of persons left to serve (3). So persons of quality are not liable, if this common law doctrine of a want of other sufficient officers do not apply to their cases.

And it is no ground for objecting to the exercise of a privilege that the party has not sued out his writ of privilege. It is enough if he be in a condition to have his writ at the time of the appointment. The court, therefore, in the case of an officer of customs, who had been elected overseer, made the rule absolute for a new trial, where a conviction had taken place under such circumstances, and they would not saddle the defendant with the costs of the trial which had taken place (4).

The common course of proceeding is by indictment or information, but the court will not always grant the latter remedy, especially where there is a doubt as to the general liability of the individual. Nor, again, where the party is not usually resident within the corporation, nor where there is no ground for imputing obstinacy to him (5). If the attorney-general should be satisfied that the defendant is exempted, as in the case of a surgeon, he will, if he thinks fit, enter a noli prosequi. But the court of queen's bench will not interfere by granting a writ of privilege, because a person is appointed who is manifestly disqualified by reason of his holding another employment. Thus Mr. Delamotte, who was a justice of peace, living at Blackheath and in London, was referred to the sessions upon his appointment as a constable in London, and the writ of privilege was denied (6).

But the sessions cannot commit. They can only direct an indictment to be preferred against the party refusing, and thus a defendant was discharged upon a habeas corpus sued out by him in consequence of a commitment by the justices at sessions (7). The court, however, granted an information against a person for refusing the office of sheriff, because it would be nearly a year before the indictment could be tried, and there would, in the mean time, be a hindrance to public justice (8).

Breach of Duty.] Secondly, as the person appointed to be overseer, constable, or other officer is indictable if he refuse to take office, so if he accept it and do not discharge his employment properly, he is punishable for his misbehaviour. As if he neglect to provide properly for the poor (9), or refuse to render his accounts (10), or neglect to make a proper rate (11).

(1) Cro. Car. 585; *Abdy's* C.; S. C. W. Jones, 462.
(2) 1 T. R. 686, by Buller, J., 1 Sid. 272.
(3) 1 T. R. ut supra.
(4) 8 T. R. 375, *R.* v. *Warner.*
(5) 2 Ld. Keny. *R.* v. *Denison.*
(6) 2 Str. 698, Mr. *De la Motte's* C.
(7) Cro. Car. 567, *Crawley's* C.
(8) 2 T. R. 731, *R.* v. *Woodrow.*
(9) 16 Vin. Ab. 415, *Tawney's* C.
(10) 5 Mod. 179, *R.* v. *Commings* & another.
(11) 2 Salk. 609, *R.* v. *Barlow.*

An information was filed against one of the members of council at Madras for malversations in office (1).

So an indictment was framed against the defendant as bailiff of the borough of Ilchester, for absenting himself from a corporate meeting, for the election of a new bailiff; but, in this latter case, the prosecution did not succeed for want of proof that the presence of the bailiff was necessary at such an election (2). So an indictment lies for not collecting the poor's rate (3). So where collectors of taxes made an unequal rate, and applied monies to their own purposes, which they had managed to levy from some whose names they had omitted in their books, they were found gnilty upon an indictment for misdemeanour (4). And it has been held, that in an indictment against a person for misconduct to the poor, the names of the poor persons need not be specified (5). Every person holding a patent office under the crown, or derivatively from such authority, is liable to be indicted for not discharging his duty (6)

So an information against overseers for removing a sick person illegally, was granted with approbation by the court (7). So there may be an indictment against a surveyor for a breach of duty (8).

Judgment.] The judgment for these respective offences of refusals to take office, and breaches of duty, is fine and imprisonment.

Refusing Apprentice.] It does not appear to be settled, whether a refusal to receive a parish apprentice is an indictable offence (9). A penalty was attached to such a refusal by 8 & 9 Will. 3, c. 30, s. 5; and there has been a decision upon appeal to the effect, that a party occupying lands in a parish, is compellable to receive such an apprentice, although he do not reside in the parish (10). The court, however, upon considering the validity of an indictment for this act of omission, declined to enter upon the general question, being of opinion that the binding brought before their notice was not one within 43 Eliz. c. 2 (11).

Usury.—Illegal Brokerage, &c.] It seems that usury, unless to

(1) 5 T. R, 607, *R.* v. *Hollond.* In this case, it was held, that the indictment need not shew the appointment, if there be a general statement, that the defendant is an officer; that each individual of a body is liable in his own person for a breach of duty, although the duty be thrown on the whole body; that it is sufficient to state a wilful breach without calling it corrupt; that it is not necessary to aver a revocation of orders, or that they are in force; nor to allege notice of certain acts which the officer must be presumed to know. It was held, however, that a charge for not prosecuting a war with vigour and decision was too uncertain, though the charge were made in the very words of the order given to the defendant.

(2) 5 East, 372, *R.* v. *Corry.*

(3) 1 Keb. 49, *R.* v. *Brown.*

(4) 6 Mod. 306, *R.* v. *Buck* & another.

(5) Caldw. 432, *R.* v. *Wetherill.*

(6) 1 Salk. 380, note (a), *R.* v. *Bembridge.*

(7) 8 Mod. 326, *R.* v. *Edwards.* S. P. 2 Barnard. 89, *R.* v. *Busbey* & others.

(8) 3 Ch. Burn. 104, *R.* v. *Anderson.*

(9) See Str. 1268.

(10) 3 T. R. 107, *R.* v. *Clapp.* See also 7 T. R. 33, *R.* v. *Barwick.*

(11) Str. 1268, *R.* v. *Trevilian.*

the amount of 40 per cent. (which was called Jewish usury), is not an offence at common law (1). But Mr. Serjeant Russell cites an eminent legal opinion in favour of an indictment at common law, where the usury is clear and palpable (2). However, by 12 Ann. stat. 2, c. 16, s. 1, it is forbidden to take more than 5 per cent. for interest, upon pain of forfeiting treble the value of the monies, wares, merchandizes, or other things lent. And although the point has not been settled, there is ground for believing that an indictment will lie upon the statute, notwithstanding the prescribed mode of proceeding for penalties, and the infrequency of such a course (3). But the loan, or the taking of excessive interest, must appear in evidence. The reservation of rent, so as to produce an illegal interest, will not be a defence against usury (4). It is not enough to shew a corrupt agreement, without any measures founded upon the illegal contract. Judgment was arrested upon an indictment, by reason of this fault, after a verdict for the crown (5). The corrupt bargain may be stated generally in the indictment (6). With respect to an information, if the year be suffered to elapse within which the common informer (7) should institute his proceedings, the court of queen's bench will not grant it, but will leave it to the attorney-general to file such an information or not, according to his discretion (8). The indictment must contain all the requisites of a declaration qui tam for usury (9).

A modification of the law of usury is, however, to be met with in the following recent act. By 1 Vict. c. 80. No bill or note made payable at or within twelve months after date, or not having more than twelve months to run, shall, by reason of any interest taken or secured thereon, or any agreement to pay, receive, or allow interest in discounting, negociating, or transferring the same, be void; neither shall the liability of any party to any bill or note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or body corporate drawing, accepting, indorsing, or signing any bill or note, or lending or advancing any money, or taking more than the present rate of legal interest for the loan of money on such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture.

(1) Hardr. 410, per *Hale*, C. B. 1 Russ. C. M. 409.

(2) C. & M. 409, note (c).

(3) 1 Hawk. c. 82, s. 59; 2 Str. 816. There is, indeed, a short report of a case in 11 Mod. 174, *R.* v. *Dye*, to the contrary of this position, but it might have been only that the doctrine of there being no jurisdiction over the offence at sessions was recognized according to *R.* v. *Smith*, 1 Salk. 680; 2 Ld. Raym. 1144. And at all events, the decision took place upon a different statute, 12 Car. 2, c. 13. The principle is, that where newly created offences are prohibited by a substantive clause, an indictment will lie. 1 Burr. 544; and as the prohibition against usury is distinctly affirmed by 12 Anne, c. 16, the rule seems fairly to apply.

(4) Cro. Jac. 440. The value of the house in respect of which the corrupt contract was made, need not be stated. Ibid.

(5) 2 Str. 816, *R.* v. *Upton*; S. C. 1 Barnard. 97.

(6) Cro. Jac. 440.

(7) Under 31 El. c. 5, s. 5.

(8) 2 Str. 1234; *R.* v. *Hendricks*.

(9) 2 Russ. C. M. 411; Citing 2 Ch. Cr. L. 549, note (f). See also 7 Mod. 118, *R.* v. *Sewel*.

Then, as to illegal brokerage: by the same statute of Anne, s. 2, If any scrivener, broker, solicitor, or driver of bargains or contracts shall take directly or indirectly more than five shillings for the loan of 100*l.* a year, for brokage, &c., or above twelve pence, over and above the stamp duties, for making or renewing of the bond or bill for loan, or forbearing thereof, or for any counter-bond or bill concerning the same, he shall forfeit 20*l.* with costs of suit, and suffer imprisonment for half a year. In the case of annuities or rent charges, the sum of 10*s.* for any 100*l.* is allowed by 53 Geo. 3, c. 141, s. 9, for the soliciting or procuring of loans, and for brokerage, and every person, whether solicitor, scrivener, broker, or other person taking more is declared guilty of a misdemeanor, and punishable by fine and imprisonment, or by both, at the discretion of the court. The parties, moreover, who have paid the money shall be deemed competent witnesses to prove the same (1). This act of 53 Geo. 3, repealed the statute 17 Geo. 3, c. 26, s. 7, relating to the same subject. Upon this 7th section, one Gillham was indicted for taking more than 10*s.* in the 100*l.* for brokerage. In this case it was held, that the exact sum taken was not necessary to be proved, the quantum of excess being immaterial; and Lord Kenyon mentioned *R.* v. *Burdett*(2) as decisive, where the indictment for taking 20*s.* extorsively was deemed sufficiently satisfied by proof of taking 1*s.* in that manner. And with regard to any sum claimed for drawing deeds or writings, it was rightly left to the jury to say, whether the whole transaction were not in fact for the purpose of gaining usurious interest, though a sum might ostensibly be received for another object (3).

Lastly, by 53 Geo. 3, c. 141, s. 8, If any one shall either in person, or by letter, agent, or otherwise howsoever, procure, engage, solicit, or ask any person under twenty-one to grant, or attempt to grant any annuity or rent charge, or to execute any bond, deed, or other instrument for securing the same, or shall advance, or procure, or treat for any money to be advanced to any person under twenty-one, upon consideration of any annuity or rent charge, to be secured or granted by such infant after he or she shall have attained the age of twenty-one, or shall induce, solicit, or procure any infant upon any treaty or transaction for money advanced, or to be advanced, to make oath, or to give his or her word of honour, or solemn promise that he or she will not plead infancy, or make any other defence against the demand of any such annuity or rent charge, or the repayment of the money advanced to him or her when under age, or that when he or she comes of age, he or she will confirm or ratify, or in any way substantiate such an-

(1) Exceptions.—Annuities given by will, or marriage settlement, or to advance a child. Annuities secured upon freehold, copyhold, or customary lands of equal or greater annual value than the annuities, &c. Voluntary annuities, or rent charges granted without regard to pecuniary consideration or money's worth. Annuities or rent charges granted by corporations, or under any authority or trust, created by act of parliament, s. 10. The act is not to extend to Scotland nor Ireland, s. 10.

(2) 1 Ld R. 149.

(3) 6 T. R. 265, *R.* v. *Gillham*; 1 Esp. 287.

nuity or rent charge, every such person shall be guilty of a misdemeanor, and shall be punished by fine, imprisonment, or other corporal punishment as the court shall think fit to award (4).

It is likewise a matter of public convenience that licences, or certificates required by statute upon many occasions should be punctually obtained. The neglect to procure such instruments is punishable at common law by indictment where there is a prohibitory clause independently of that which prescribes a penalty. But where the act embraces both the forfeiture and the mode of procedure in one clause, an indictment cannot be maintained. An example of this may be found in a decision upon the 8 & 9 Will. 3, c. 25, concerning hawkers and pedlars (5).

Aliens.] Disobedience to any act of parliament is likewise punishable as a breach of public duty. As under the aliens' registration act (6). All certificates are required to be given without fee or reward whatsoever; and every person who shall take any fee or reward of any alien, or other person for any certificate, &c. shall forfeit 20*l.* Here, as the sentences are not united, strictly speaking, an indictment may be presumed to lie, although it is probable that the question may never be raised, by reason of the more easy course of recurring to the penalty; and, of late, the legislature has often expressly denounced acts in opposition to its ordinances as misdemeanors.

Anatomy Act.] As under the anatomy act (7), any person offending against its provisions, is declared to be guilty of that offence, and punishable by imprisonment not exceeding three months, or by a fine not exceeding 50*l.*

Insane Persons.] So under the act for regulating the care and treatment of insane persons in England (8), it is declared by sect. 22, to be a misdemeanor (9) to keep a house for the reception of two or more insane persons, unless such house shall have been previously licenced in conformity to the act. So, again, under sect. 27, it is a misdemeanor (1) to receive an insane person, or person represented to be insane, into a licenced house without an order under the hand of the person by whose direction such insane person is sent, stating the christian and surname, and place of abode of such person, and the degree of relationship, or other circumstances of connection between such person and the insane person, and the true name, age, place of residence, and former occupation of the insane person, and the asylum or other place (if any) in which the insane person shall have been previously confined, and whether such person shall have been found lunatic or of unsound mind under a commission ———, or without a me-

(4) See generally upon the subjects of usury and brokage, 1 Hawk. c. 82.

(5) 1 Ld. Raym. 347, *R.* v. *Savage* and others. A single act of selling does not constitute a hawker. Burr. 610, *R.* v. *Little.*

(6) 6 Will. 4, c. 11, s. 8.

(7) 2 & 3 Will. 4, c. 75, s. 18.

(8) 2 & 3 Will. 4, c. 107.

(9) And punishable by fine and imprisonment.

(1) And punishable as above.

dical certificate of two physicians, surgeons, or apothecaries (2),— or without making, within three clear days after the reception of such patient, a minute or entry in writing, in a book kept for the purpose, of the true name of the patient, and of the christian and surname, occupation, and place of abode of the person by whom such person shall be brought.

The 28th section explains the nature of the medical certificate required (3), and declares that any person who shall knowingly and with intention to deceive sign any such certificate untruly, setting forth any particular (4), shall be guilty of a misdemeanor (5). There is a proviso likewise, that no physician, surgeon, or apothecary shall sign any such certificate of admission to any licenced house, who is wholly or partly the proprietor, or the regular professional attendant of such licensed house, nor shall any physician, &c. sign such certificate, if his father, son, brother, or partner be wholly or in part proprietor, or be the regular professional attendant of such licensed house, upon pain, in either of the above cases, of being deemed guilty of a misdemeanor (6). The 29th section prescribes the order and certificate in the cases of parish pauper lunatics, and declares that if any person shall knowingly and wilfully receive any parish pauper represented or alleged to be insane into any licensed house, without such order and medical certificate, he shall be guilty of a misdemeanor (7). Further, two days after the reception of an insane patient into a licensed house, the proprietor or resident superintendant must transmit a copy of the order and medical certificate to the clerk of the metropolitan commissioners, with a written notice to that effect, and likewise a duplicate copy to the clerk of the peace, and if he knowingly and wilfully neglect to do this, he shall be guilty of a misdemeanor (8). The 31st section provides for cases of removal or death. Upon these occasions, the proprietor or superintendant shall two days afterwards transmit a written notice to the clerk of the commissioners or to the clerk of the peace; and, in cases of removal, shall state by whom the patient was removed, and in what state of mind, and whither, and if he neglect this duty, he shall be guilty of a misdemeanor (9). The 40th section enacts, that if any proprietor or resident superintendant shall fraudulently conceal or attempt to conceal any part of his pre-

(2) See sect. 28, infra.

(3) It must state, that the medical person has separately visited and personally examined the patient not more than seven clear days next before the confinement, and that the person is insane, and proper to be confined. Sect. 28.

(4) As that he has separately visited and personally examined the patient when he has not done so. Under the old act 9 Geo. 4, c. 41, now repealed, the jury acquitted the defendant of an intention to deceive, but found him guilty of having untruly stated that he had visited and personally examined the patient, and the court was of opinion that the verdict was right, for the statute not having introduced the words, "with intent to deceive" into the clause, concerning the visit and personal examination, it was mere surplusage to put them into the indictment. 2 B. & Adol. 611, *R. v. Jones.*

(5) Punishable by fine and imprisonment.

(6) And punishable as above.

(7) And punishable as above.

(8) And punishable accordingly. Sect. 30.

(9) And punishable as above.

mises, or any person detained therein, as insane, from the commissioners, or visitors, or from any medical or other person authorized under the act to visit and inspect any licenced house and the patients confined therein, he shall be guilty of a misdemeanor (1). The 45th clause provides against an admission to unlicensed houses, enacting that no person, (except he be a guardian or relative who does not derive any profit from the charge, or a committee appointed by the lord chancellor, or other person entrusted), shall, under pain of being deemed guilty of a misdemeanor (2), admit any insane person without an order and medical certificate, as is the case of licenced houses.

Certain amendments to the act of 2 & 3 Will. 4, c. 107, were made by 3 & 4 Will. 4, c. 64, and by the 7th section of the latter act, all proprietors and resident superintendants neglecting to comply with its provisions shall be deemed guilty of a misdemeanor.

Election of Mayor.] By 11 Geo. 1, c. 4, s. 6, Any attempt by a mayor, bailiff, or other chief officer of a borough or town corporate to hinder the election of a mayor, by absence upon the proper day, or by preventing the election in any other manner, is made punishable by imprisonment for six months, and disability to hold office in the corporation (3).

Poor Law Act.] By 4 & 5 Will. 4, c. 76, s. 13, If any person shall wilfully refuse to attend in obedience to any summons of any commissioner, or assistant commissioner, or to give evidence, or shall wilfully alter, suppress, conceal, destroy, or refuse to produce any books, contracts, agreements, accounts, and writings, or copies of the same which may be required to be produced before such commissioner, or assistant commissioner, he shall be deemed guilty of a misdemeanor (4).

Tithes.] So under the tithes commutation act (5), If any person shall wilfully refuse to attend in obedience to any lawful summons of any commissioner, or assistant commissioner, or to give evidence, or shall wilfully alter, withhold, destroy, or refuse to produce any book, &c. which may be lawfully required from him, he shall be guilty of a misdemeanor (6)

Copyholds Enfranchisement Act.] So, wilfully to refuse attendance in obedience to a summons under the copyholds' enfranchisement act is a misdemeanor, and to withhold evidence is a similar offence (7).

(1) And punishable accordingly.
(2) See the note above.
(3) See *R.* v. *Nicholetts*, 6 Nev. & M. 827. Criminal information against the town clerk of Bridport, for misconduct relating to the election of borough councillors. 1 Nev. & P. 187, *R.* v. *Marsh*. Indictment for soliciting Joseph M. to personate John M. at an election for ward councillors.
(4) And punishable with fine and imprisonment.
(5) 6 & 7 Will. 4, c. 71, s. 93.
(6) And punishable accordingly, with fine and imprisonment.
(7) 4 & 5 Vict. c. 35, s. 94.

Newspaper Stamps.] By 6 & 7 Will. 4, c. 76, s. 6, If any person shall knowingly and wilfully sign and make a declaration, with the name, addition, or place of abode of the proprietor, publisher, printer, or conductor of the actual printing of any newspaper to which such declaration shall relate, who shall not be a proprietor, printer, or publisher thereof, or from which shall be omitted the name, addition, or place of abode of any proprietor, publisher, printer, or conductor of the actual printing of such newspaper, or shall make any other untrue statement in his declaration, or omit any thing required by the act, he shall be guilty of a misdemeanor. (8)

Election Writs.] If any person concerned in the transmitting or delivery of any election writ, shall wilfully neglect or delay to deliver such writ, or shall take any fee, or otherwise violate the act, he shall be guilty of a misdemeanor (9).

Act for the Qualification of Members of the House of Commons.] By 1 & 2 Vict. c. 48, s. 7, any person who shall make and subscribe any declaration under the act, or who shall sign and deliver in any paper under the act, knowing the same to be untrue in any material particular, shall be guilty of a misdemeanor. (1)

Elections.] The st. 3 Ed. 1, c. 5, threatens with "great forfeitures" such as shall by force of arms, malice, or menace, disturb any from making his free election.

Identity of Voter at Elections.] By 2 Will. 4, c. 45, s. 58, if any person shall wilfully make a false answer to the questions as to the identity of the voter, the fact of his having voted, or as to the qualification for which his name was originally inserted in the register, he shall be deemed guilty of an indictable misdemeanor, and shall be punished accordingly. The *same* qualification means the indentical, and not a similar qualification in respect of other premises of a like description. Nevertheless, if the voter be shown to have possessed property of an equal value, and it appear that he acted bonâ fide, although under a mistaken impression, he ought to be acquitted (2). But it is not a defence that he acted under the advice of an electioneering committee (3). A copy of the original register may be given in evidence to prove the charge, and if it resemble the original in respect of the name and description of the defendant, it will be sufficient. (4)

(8) And punishable with fine and imprisonment.

(9) 53 Geo. 3, c. 89, s. 6. And be proceeded against either by indictment or information, and punished by fine and imprisonment, at the discretion of the court.

See also 5 Ric. 2, st. 2, c. 4, as to sheriffs omitting cities or boroughs which ought to send members, or being negligent as to his writs. The punishment was amercement. By the same act, any person, whether archbishop, peer, or other person, absenting himself from a summons to parliament, was to be amerced.

(1) And punishable as above.

(2) 8 C. & P. 218, *R.* v. *Dodsworth.*

(3) Ibid.

(4) 2 Jurist. 131, S. C.

Vestries.] A churchwarden or other officer may be guilty of a misdemeanor, subject to the common law punishment, by refusing to call meetings, pursuant to the vestry act, 1 & 2 Will. 4, c. 60; by refusing or neglecting to make the declarations or give the notices required by that act, or to receive the vote of any ratepayer as therein mentioned, or by altering, falsifying, concealing, or suppressing any vote.

NUISANCE.

We come now to the rather extensive head of nuisance. The common law professes to regard with jealousy the health, the comfort, and the morals of society. And hence a noisome smell, an outrageous noise, or an idle occupation, are alike obnoxious to its ordinances. And so likewise is an obstruction to any thoroughfare whether by land or water. And it is not a defence to urge that the business carried on is advantageous to the community, or that the pastime complained of is an amusement. It is true that there is a principle which exonerates a tradesman from blame, if persons elect to live near the offensive employment which he pursues; but, otherwise, it becomes the duty of an individual to exercise a noxious calling in an isolated situation; and pleasurable enjoyments must be such as have no tendency to injure public morals.

Offensive Trades and Occupations.] By 26 Geo. 3, c. 71, s. 9, it is declared to be a misdemeanor punishable by fine or imprisonment, and public or private whipping, as the court shall direct, for any person keeping a slaughtering-house to throw into any lime pit, or immerse in lime, or any preparation thereof, or to rub therewith, or with any corrosive matter, or destroy or bury, the hide or skin of any horse, mare, gelding, &c. slaughtered, killed, or flayed. And, likewise, if there be any other offence under the 26 Geo. 3, c. 71, (the act which regulates the slaughtering of cattle,) not described as above, the same punishments shall be awarded.

The erection of a soap-boilery to the annoyance of the neighbourhood was adjudged to be a nuisance; because, however honest the trade, if the stench be an annoyance to the neighbours, it cannot be tolerated (5). So the steeping of hides in water is a nuisance to the neighbouring inhabitants (6). The same law was laid down in the case of a brewhouse on Ludgate Hill (7). So to erect a tallow furnace may be said to be a similar offence (8). Although if persons come to inhabit in the vicinity of such a business, the case will be different, or if the party should take up his abode at a reasonable distance from the vill so as to cause only a moderate degree of inconvenience; because the needfulness of the candles may dispense with the noisomeness of the smell (9). So the owner of a glasshouse at Lambeth was convicted and

(5) 2 Show. 327, *R.* v. *Pierce.*
(6) Str. 686, *R.* v. *Pappineau.*
(7) *R.* v. *Jordan*, cited 2 Show. 327.
(8) Cro. Car. 510, *Morley* v. *Pragnell*, action on the case, *Tohayles's* C. cited there.
(9) 16 Vin. Ab. 23, *Ranketi's* C.

fined; and a general pardon which the defendant urged was held to extend to the fine only, and not to the statement of the nuisance (1). The defendants erected works at Twickenham for making acid spirit of sulphur, oil of vitriol, &c. and they were compelled to remove their buildings, and submit to a fine of 6*s*. 8*d*. (2). And it is worthy of remark, that if the smell complained of be offensive to the sense, it is sufficient proof for an indictment, without showing it to be injurious to health (3). So a steam-engine, with a furnace for burning coals, whereby unwholesome smokes and smells arose, was considered to be a nuisance (4). So the works of a gas company, by which the fish in a water are destroyed, and the water rendered unfit to drink (5), are annoyances. But the mere fact of fishermen being thrown out of employment is insufficient to sustain the indictment (6). But a coke oven was held by Heath, J. not to be a nuisance, as it did not affect houses when the windows were shut, so that the general health of the inhabitants was not injured, nor were their dwellings rendered either uncomfortable or untenantable (7). And, if persons come to the nuisance, the defendant will be entitled to an acquittal (8), unless he be found to have increased the noisomeness of his undertaking. And the same rule prevails if particular trades have been carried on in the same place for a considerable time without interruption; for that which is a nuisance in one situation is not so in another. The defendant was charged with carrying on the business of a melter of kitchen stuff and other grease; but it appeared that much time had elapsed since manufactories equally disagreeable and noxious had existed in the neighbourhood, and Lord Kenyon observed, that the fact of enduring such smells for many years would operate as a consent on the part of the residents, though, had objection been made in time, the law might have considered the matter as a nuisance. The defendant had come into the neighbourhood about four years, and it was a question whether he had increased the unpleasantness of the atmosphere; and Lord Kenyon held, that although such increase might not amount to a nuisance by itself, yet that if the excess made the place disagreeable and uncomfortable, which before was only a little unpleasant, the defendant would be answerable. The jury found the defendants not guilty (9). It is,

(1) 1 Salk. 458, *R.* v. *Wilcox*; 1 Vent. 26; S. P. Trem. P. C. 195, *R.* v. *Brookes*. See Vaugh. 333.

(2) 1 Burr. 333, *R.* v. *White* & another. See 5 Geo. 2, c. 16, an act for regulating buildings and trades in Blandford.

(3) 2 C. P. 485, *R.* v. *Neil*.

(4) 16 East, 194, *R.* v. *Dewsnap* & another.

(5) Of which the jury are the competent judges.

(6) 6 C. & P. 292, *R.* v. *Medley* & others, and it is no defence to urge that the directors were ignorant of the evil, or that their original plan was neglected.

(7) 5 Esp. 217, *R.* v. *Davey* & another.

(8) 2 C. & P. 483, *R.* v. *Cross*, a case of slaughtering horses, where persons built close to the noxious trade.

(9) Peake, 91, *R.* v. *Neville*. In this case Lord Kenyon admitted in evidence a bond from the defendant to the parish officers where he lived before, acknowledging his trade to be a nuisance, and binding himself not to continue it. It was proved that his trade was carried on at the place where he really resided in the same manner as at his former abode.

indeed, a proper question for the jury to say whether there has been any increase of nuisance. As, where the defendant carried on the business of a horseboiler, Lord Tenterden observed to the jury, that there might be no increase of annoyance, although the business itself should have increased, because (as it appeared in evidence) of the improved method of carrying it on, whereas, if the annoyance had increased, the defendants ought to be convicted. Verdict, guilty. (1)

Keeping gunpowder in an improper place, so as to be dangerous, is a nuisance at common law (2). The act of keeping hogs in the back streets of London has been held to be a nuisance at common law (3).

There has been an instance of an indictment for dividing a house in a town for poor people to dwell in, the court holding it to be a common nuisance by reason of infection in time of plague (4). But a building erected for the purpose of inoculation has been deemed no nuisance, for the fears of mankind, however reasonable, will not create that offence (5). And it seems that an indictment will not lie against a man for the mere act of affording entertainment to vagrants (6).

Noise, &c.—Not only are trades and employments which threaten the health of inhabitants abateable as nuisances; such likewise as tend materially to diminish the comfort of a neighbourhood are equally objectionable. The case of the tinman of Clifford's Inn turned upon the fact of his trade being an annoyance to three houses only belonging to the society, so that the noise of his work, although very considerable, could not be called a general grievance (7). There would otherwise have scarcely been a question but that such a disturbance would have been held a nuisance. So a common scold is a nuisance, and punishable accordingly (8). Scolding once or twice is no great matter; for scolding alone is not the offence, but it is the frequent repetition of it to the disturbance of the neighbourhood which makes it a nuisance (9): and two may be charged jointly with scolding, but it must be as common scolds (10). So a defendant who was convicted of making great noises in the night with a speaking trumpet, and so disturbing the neighbourhood, was fined 5*l.* (11). So the placing of effigies in the street calculated to draw crowds is an annoyance,

(1) Moo. & Malk. 281, *R.* v. *Watts* & another. The defendant is not entitled to any compensation if he carry on a trade indictable at common law. 2 C. & P. 486, *R.* v. *Watts*.

(2) Holt's Ca. 499. See 3 & 4 Vict. c. 47, (Metropolis Police Act) s. 35.

(3) 1 Salk. 460, *R.* v. *Wigg*; S. C. 2 Lord Raym. 1163; 2 Show. 216, *R.* v. *Record*.

(4) 1 Hawk. c. 75, s. 11.

(5) 3 Atk. 21, 726, 750. See 4 Burr. 2116, *R.* v. *Sutton*.

(6) 2 Lord Raym. 790, *R.* v. *Langley*.

(7) 4 Esp. 200, *R.* v. *Lloyd*.

(8) 6 Mod. 213, *R.* v. *Foxby*; S. C. 1 Salk. 266.

(9) Ib. per Holt, C. J. See also 2 Str. 849, 1246.

(10) Holt's Ca. 352, *R.* v. *Hoskins* & others; 2 Sess. Ca. 22, *R.* v. *Taylor*.

(11) 2 Str. 704, *R.* v. *Smith*; 2 Sess. Ca. 6.

and liable to be suppressed (1). It has been held, however, that the building of a house in a larger manner than before, whereby the street became darker, was not a public nuisance on that account (2).

By 9 & 10 Will. 3, c. 7, s. 1, no person shall make or cause to be made, or shall sell, utter, or offer or expose to sale any squibs, rockets, serpents, or other fireworks, or any cases, &c. for making the same, nor permit any such squibs, &c. to be thrown from his house into any public highway, &c. nor throw any squibs, &c. into any public way, nor aid and assist therein, upon pain of being adjudged guilty of a public nuisance. And it is an offence at common law to keep gunpowder so as to be a source of danger to the neighbourhood (3). Although, in order to support the indictment, there must be apparent danger, or mischief done. And again if houses be built up to the nuisance, the charge cannot be maintained (4). So if articles of a combustible nature be put on board of a ship, without due notice, the parties engaged in so doing will be punishable for a misdemeanor at the least (5). So, upon the principle of avoiding public danger, if a house be ruinous and likely to fall, an indictment will lie against the occupier, though he be only tenant at will (6). But the landlord may be indicted if it be thought fit, for he is liable for all nuisances which are not created by the tenant during the term. And, therefore, it is the interest of the landlord to stipulate that the tenant shall do what is necessary to prevent the premises from becoming a nuisance, or to reserve to himself a right of entry for that purpose (7). So if the landlord let a building which requires care to prevent its becoming a nuisance, he is liable (8). And a purchaser is also amenable for a continuing nuisance, although he has not had any opportunity of removing the nuisance (9). But if the tenant has created the nuisance, and there be no fault in the reversioner, a purchaser is not clothed with this liability (10).

Nuisances against Morals.] We have already mentioned some of the nuisances against public morals of the more aggravated kind, as keeping a bawdy-house, a gambling-house, cock fighting, &c. (11) There are others, notwithstanding, which have a great tendency to corrupt idle persons, and are prohibited accordingly. Thus, it is said, that Noy, came into court and prayed a writ to prohibit a bowling-alley erected near St. Dunstan's Church, and had it (12). And a booth erected in the street for rope dancing was adjudged a nuisance, for that it occasioned broils and fightings, and drew rogues to the spot, so that the inhabitants lost things

(1) 6 C. & P. 636, *R.* v. *Carlile.*
(2) 1 Lord Raym. 737, *R.* v. *Webb.*
(3) 2 Str. 1167, *R.* v. *Taylor.*
(4) 12 Mod. 342; Anon, S. C. as *R.* v. *Williams*, cited, 1 Russ. C. M. 297. See 11 Geo. 3, c. 35, 12 Geo. 3, c. 61, as to the keeping of gunpowder.
(5) 3 East, 201, by Lord Ellenb.
(6) 1 Salk. 357, *R.* v. *Watts*; 2 Lord Raym. 856, S. C.
(7) 3 Nev. & M. 627, *R.* v. *Pedley*, S. C. 1 Ad. & El. 822.
(8) S. C.
(9) S. C.
(10) S. C.
(11) Ante, sect. 4.
(12) Per Hale, C. J., 1 Mod. 76.

out of their shops every afternoon (1). Next, with regard to playhouses, it has been observed, that although not of themselves nuisances, they may become so by drawing persons and coaches and sharpers together (2). And it is now necessary to have a license in order to legalize those places of amusement (3).

So an inn may be a nuisance (4), and it is, again, the rule to apply for a licence in order to keep such a house of public entertainment.

Pigeon-shooting may be a nuisance, both on account of the shooting and the collection of idle people, as well as the group of persons waiting outside of the ground in order to shoot the pigeons which might fly off. Where such conduct caused great damage and apprehension in the neighbourhood, the defendant was held answerable for it as a nuisance (5).

General Annoyances.] Any other acts which may not fall exactly within the cases above referred to, but which, nevertheless, are public annoyances, may be treated as nuisances. Thus, the lord chancellor considered, that to shew a being of unnatural and monstrous shape for money would be a misdemeanor (6). Eavesdroppers, who loiter under walls or windows, or eaves, in order to frame tales of slander according to the discourse they may happen to overhear, are common nuisances (7). So are nightwalkers (8). If a man keep a fierce dog, as a mastiff, and suffer him to go at large unmuzzled, it seems that he may be indicted for a misdemeanor, and the more especially if the dog be of a ferocious nature (9). If a person put gunpowder on board of a ship without notice, he may perhaps be indicted for a nuisance (10). But an indictment for laying timber so near a chimney as to endanger property, was held invalid (11). There is likewise a case where a vicar was indicted for not repairing the fences of the churchyard, by which means swine and other cattle invaded the tomb-stones and porch and the paths leading thereto, to the nuisance of the inhabitants of the parish. The verdict, however, was for the defendant (12). A new trial being moved for, the court declined to make a precedent, observing that the defendant might be indicted again if the fences continued out of repair since the last indictment (13); but Mr.

(1) 1 Mod. 76, *Jacob Hall's* C.; S. C. 1 Vent. 169; S. P. Comb. 304, *R.* v. *Bradford.* It is a nuisance in se, 5 Mod. 142, per Holt, C. J.

(2) See 5 Mod. 142, *R.* v. *Betterton* & others; S. C. Skin. 625; S. C. Holt, 538, where a prohibitory writ was issued, but the court took time to advise.

(3) See 1 Russ. C. M. 300; 6 T. R. 286, *R.* v. *Handy*; 1 Ro. Rep. 109, where Coke said that stage-players were guilty of a riot and illegal assembly. 1 Hawk. c. 75, s. 7.

(4) Palm. 374.

(5) 3 B. & Adol. 184, *R.* v. *Moore.* As to pigeon-houses, see 16 Vin. Ab. Nuisance, (F. 2,) 1 Hawk. c. 75, s. 8.

(6) 2 Chanc. Ca. 110.

(7) 4 Comm. 168.

(8) Bendl. 199, *Wheelhouse's* C. S. C. Poph. 208.

(9) See 1 Russ. C. M. 303, citing 3 Ch. C. L. 643.

(10) See 3 East, 192.

(11) 2 Sess. Ca. 6, *R.* v. *Parr.* The igniting of the wood, it was said, would endanger the village.

(12) 6 East, 315, *R.* v. *Reynell,* Clk. See however 1 Sess. Ca. 84, *R.* v. *Bingley.*

(13) Id. 316.

Serjeant Russell makes a quære, as it should seem, to the validity of the charge as a matter of nuisance (1). Furious driving is a nuisance (2); and so is the conveyance of passengers in boats or other beyond the licensed number, in case one or more of them be drowned (3). It is not a nuisance to inclose a common (4), or make a dovecote (5); but to set up a fair or market illegally is indictable (6).

Proceedings.] The proceedings usual in cases of nuisance are by indictment or information, but the court of queen's bench may, by a mandatory writ, prohibit such an annoyance, and the party who disobeys their order to abate the nuisance will subject himself to an attachment (7). And in the case of the rope dancer, the court first sent for him, and ordered that he should be indicted, but as he forthwith continued making his booth, they ordered the marshal to bring him into court, and interrogated him. His answers being unsatisfactory, the court required a recognizance of 300*l.* from him that he should cease from building, which being refused, they, as upon their own view, caused a record to be made of the nuisance, committed the offender, and awarded a writ to the sheriff of Middlesex, commanding him to prostrate the building (8).

Indictment (9).] In all indictments for nuisance, the offence must be charged as having been done to the common injury of the king's subjects (10); and if the fact be so, the continuance of the nuisance should be stated. It is sufficient to say, that a offensive trade was carried on at the parish of A. near the common highway, without adding in the town or village of B. (11) But some parish or place must be mentioned (12). So, "near the highway, and near certain dwelling-houses," was esteemed a sufficient description (13). With regard to a common scold, Serjeant Hawkins says, it seems agreed that an indictment against such a person is good, without setting forth the particulars (14). And the distinction seems to be, that where the thing is unlawful in its nature, as the keeping of a bawdy-house, &c. the circumstances of the case need not be set forth, whereas if the nuisance be in respect of a fact lawful in itself, as the erecting of an inn, the matters which make the illegality must be stated (15). But where it becomes necessary to set out facts, they must be shewn with

(1) 1 C. & M. 304, note (z).
(2) 1 Geo. 4, c. 4.
(3) 7 & 8 Geo. 4, c. 75, s. 38. Punishable as a common law misdemeanor.
(4) Cro. El. 90, *Willoughby's* C.; S. C. 2 Leon. 117.
(5) Poph. 141.
(6) 6 Mod. 184, Anon.; 12 Mod. 285, *R.* v. *Moor*; 2 Nev. & P. 169, *R.* v. *Starkey*.
(7) 1 Russ. C. M. 304, citing Bac. Abr. tit. Nuisance.
(8) 1 Ventr. 169, *Jacob Hall's* C.
(9) If a fact done in one county prove a nuisance to another, it may, as it seems by the common law, be indicted in either county. 2 Hawk. c. 25, s. 37.
(10) Cro. Jac. 382; 1 Ventr. 26; 2 Str. 1146, *R.* v. *Cooper*. The case of a scold, see 1 Hawk. c. 75, s. 4.
(11) 1 Burr. 334, 337.
(12) 2 Show. 216, *R.* v. *Record*.
(13) 2 Str. 686, *R.* v. *Pappineau*.
(14) 2 Hawk. c. 25, s. 59.
(15) 2 Hawk. c. 25, s. 57.

sufficient clearness, else the indictment will be vitiated for generality (1). An alternation—as he raised, or caused to be raised a hedge, &c.—must be avoided (2). And if the nuisance be continuing, it should be so mentioned (3). If an indictment conclude, "against the form of the statute," in respect of a nuisance punishable at common law, the conclusion is merely surplusage (4). And it may be said here, that a summary proceeding before justices (5), or a forfeiture under any circumstances, affords no grounds of defence to an indictment (6). Nor, again, will any length of time legitimate a nuisance (7).

Costs.] Where the defendants had been convicted of working a steam-engine so as to create a nuisance, it was objected, that the prosecutors were not parties grieved within 5 W. & M. c. 11. But Lord Ellenborough said, that although a nuisance might be public, a special grievance could well arise out of the common cause of injury which might press more upon particular individuals than upon others not so immediately within the influence of it, and the rule for settinga side the taxation was discharged (8).

Moreover, by 1 & 2 Geo. 4, c. 41, considering that great inconvenience and injury have arisen from the improper construction and negligence of furnaces employed in working steam-engines, and the expenses attending the prosecution of indictments for such nuisances, it is enacted, that the court by which judgment ought to be pronounced in case of conviction on any such indictment, shall and may award such costs as shall be deemed proper and reasonable to the prosecutor, to be paid by the defendants, such award to be made either before or at the time of pronouncing final judgment, as to the court may seem fit. By sect. 3, however, this provision shall not affect the owners or proprietors or occupiers of any furnaces of steam-engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals, on or immediately adjoining the premises where they are raised.

Judgment.] Besides the usual judgment of fine and imprisonment in cases of misdemeanor, there is likewise in this case a consequence that the nuisance must be abated or dejected. But it is clearly no error to omit this latter judgment when there is nothing to abate. As in the case of steeping sheep skins, where the annoyance was only temporary; and the court took occasion to observe that the house where an offensive trade is carried on

(1) 2 Str. 849, *R.* v. *Taylor.*
(2) 1 Barnard, 425, *R.* v. *Stowton.*
(3) 8 T. R. 142, *R.* v. *Stead.*
(4) 1 Salk. 460; S. C. 2 Ld. Raym. 1163. See also Id. 150.
(5) 2 Nev. & M. 478, *R.* v. *Gregory.*
(6) 1 Salk. 460, *R.* v. *Wigg.*
(7) 3 Campb. 227, by Lord Ellenb. A note of the several acts of nuisance intended to be proved must be furnished by the prosecutor. 3 Ad. & El. 815, *R.* v. *Curwood;* S. C. 5 Nev. & M. 369. But if the nuisance be permanent, although a rule as to the particulars of the acts of nuisance themselves will be granted, the court will not allow a rule for particulars as to the dates. 7 Dowl. P. C. 665, *R.* v. *Flower* & others; S. C. 3 Jur. 558.
(8) 16 East, 194, *R.* v. *Dewsnap* & another.

must not be pulled down. So of a house, if a portion of it be the nuisance, that part may alone be abated; and if the whole be condemned, the materials must not be wantonly destroyed (1). So of a bank; the nuisance of three feet was abated, but no more, the rest of the bank being preserved (2). The nuisance only need be abated, and there cannot be judgment to abate in the case of a transitory nuisance (3). And although the indictment should state a continuing nuisance, and affidavits be produced in confirmation of that fact, the court will not give judgment of abatement, if they should be satisfied upon other grounds, and from other circumstances, that the annoyance has ceased (4). A fortiori, such a judgment will not be allowed if the indictment omit to allege such continuance (5). With the consent of the prosecutor, the court will even permit an acquittal, upon an understanding that the nuisance has been abated (6). The prosecutor's consent is necessary, because of the expense which he has incurred. So that the rule of the court is not to set a small fine, unless the defendant will consent to go before the master for the purpose of making satisfaction (7), unless the matter should relate to a private injury, for then an action might have been brought (8). Whilst, on the other hand, the consent of the defendant, when convicted, to pay the prosecutor's costs will operate to mitigate the fine (9); but the court cannot compel a defendant to go before the master for the purpose (10).

It being admitted, then, that there are occasions when there is something to abate, it may be remarked, that any person may abate a public nuisance (11), and that it is not necessary to shew upon a justification of such an abatement, that as little damage was done as might be (12). So that where a person threw certain materials into the sea, it was held, that he was not bound to abate the nuisance orderly, but that he might well roll away the walls, which were the subjects of annoyance, as he did, into the sea (13). And where it is said that upon the abatement of a house, it is not lawful to destroy the materials, which remain for the use of the owners (14), the meaning is, that no wilful damage is to be committed, and thus the position is not inconsistent with that which has just been laid down. But it is not competent to abate any matter upon the ground of its being likely to become a nuisance (15). However, it is usual for the defendant to be called

(1) W. Jones, 222.
(2) 16 Vin. Ab. Nuisance (A. a. 2.)
(3) 2 Str. 686, *R.* v. *Pappineau.* Fortescue, A., J., contrâ, who thought there should have been judgment to prevent the defendant from steeping the skins again.
(4) 13 East, 164.
(5) 7 T. R. 467; 8 T. R. 142, *R.* v. *Stead.*
(6) 8 C. P. 755, *R.* v. *Macmichael.*
(7) Say. Rep. 19, *R.* v. *Goodman;* S. P. *R.* v. *Dyke;* S. P. *R.* v. *Haddock,* cited there.
(8) Id. 195, *R.* v. *Tew* & another.
(9) 2 Ld. Keny. 307, *R.* v. *Gray.*
(10) 6 D. & Ry. 141, *R.* v. *Richardson;* the defendant was fined 200*l.*
(11) 1 Salk. 458; Cro. Car. 184; as a parishioner, who may abate a wall hindering his way to church, or an obstruction in the burial ground, &c., however long it may have remained. W. Jo. 222; 16 Vin. Ab. Nuisance (W. 8).
(12) 1 Salk. 459; 1 Hawk. c. 75, s. 12.
(13) 1 Salk. 458, *Lodie* v. *Arnold.*
(14) Sir Wm. Jones, 222.
(15) 12 Mod. 510.

upon in the first instance to remove the mischief he has occasioned, at his own expense, and then, if he neglect to abate, a writ goes to the sheriff, and the court will raise the fine accordingly, or there may be an attachment (1). And it may be added, that a second indictment will lie, if the nuisance be not discontinued (2). In the case, however, of a wall or other thing which is capable of an easy removal, the sheriff, upon the defendant's default, will abate at once, without an increase of fine (3).

By 1 & 2 Geo. 4, c. 41, s. 2, (in the case of steam engines) if it shall appear to the court by which judgment ought to be pronounced, that the grievance may be remedied by altering the construction of the furnace, the court may, without the consent of the prosecutor, make such order as they may see fit for preventing the nuisance in future before final sentence shall be passed.

Highways.] We come now to the consideration of nuisances in public thoroughfares; and first, of obstructions to highways, whether arising from want of repair or otherwise.

An obstruction, in the ordinary sense of the word, signifies an opposition to the passage of the king's subjects along the highway; and whilst the common law visits this offence with an indictment, the highway act gives, in many cases, a more summary proceeding before justices for the recovery of penalties (4). For it being once admitted that a particular road is a thoroughfare, the proceeding for an obstruction follows of necessity, whence it is that the question of dedication to the public has occasionally arisen as a ground for removing or abating the impediment complained of. On the other hand, the public have been subjected to a qualification of their rights, as in the case of a prescription, fair, or market. The law exercised its functions very early with jealousy with reference to nuisances in the public way. As where a person placed logs of wood, so as to narrow the passage (5); and it was considered no excuse to say that the people might have windings and turnings through the logs (6). But it is not a a nuisance to exercise a right, which is, of necessity; as the unloading of billets in the street, provided the wood be not allowed

(1) Comb. 10; 1 Hawk. c. 75, s. 15; 3 Jur. 1076, *R.* v. *Gower*, S. C. 8 Dowl. P. C. 102. Verdict for the crown, and reference to a barrister who awarded in favour of the prosecutor. But the defendant is entitled to see the affidavits as to the continuance of a nuisance before judgment is moved for. S. C.

(2) 3 Ch. Burn, 135, citing 1 Hawk. c. 76, s. 157; 2 Ro. Ab. (B. 4). *Austin's* case, 1 Ventr. 183, does not seem to militate against this position, because there was not a clear proof that the defendant had set up the posts and rails, so that there could not be a continuing nuisance in respect of what had not been stamped with the legal character of a nuisance.

(3) Comb. 10. In addressing the court in aggravation, the provisions of an act of parliament relating to a private company may be referred to if it be declared to be a public act, although it be not referred to in any of the affidavits.

(4) And it is to be noted, that the summary procedure does not invalidate the common law process, 2 Nev. & M. 478, *R.* v. *Gregory*.

(5) 16 Vin. Ab. (B. 1); 1 Hawk. c. 76, s. 144; Cro. Jac. 446.

(6) 1 Hawk. c. 76, s. 145.

to remain there for an unreasonable time (1). So to unload beer with a similar restriction. As soon, however, as a due portion of time has elapsed, the party becomes clearly guilty of nuisance. And, à fortiori, a person cannot defend himself upon an indictment for placing timber in the street on the ground of the narrowness of his premises. The defendant had large pieces of wood sawed into smaller, and then had them carried into his yard. His counsel pleaded that it was an act of necessity, but Lord Ellenborough expressed himself satisfied of the correctness of the charge, and observed that the defendant must remove to a more commodious situation if his premises were too inconvenient for his business (2). The same principle of law prevails throughout the decisions. The waggoner at Exeter, who persisted in keeping several waggons during the day and night before his warehouse, in a street thirty-seven feet wide, was deemed guilty of a nuisance. The waggons occupied one half of the street, so that no carriage could pass on the opposite side, the gutter being in the middle, and, through the constant loading and unloading, even foot passengers were driven across the way. It seems that the coach-makers in Long Acre had endeavoured to set up a claim similar to this made by the defendant, who was said to be the principal waggoner in the west of England (3), but the court declared that he could not carry on any part of his business in the public street to the annoyance of the public (4). So again, the proprietor of a Greenwich coach was convicted of a nuisance for permitting his carriages to remain for an unreasonable time in Charing Cross. The length of time during which this practice had prevailed was held to make no difference, for no length of time can legitimate a nuisance (5). So a hackney coach stand may be a nuisance, and the commissioners for paving may remove it if they have the power of directing and regulating the stands (6). Every unauthorised obstruction is a nuisance (7). The stell fishery across the river at Carlisle had been established for a vast number of years, but Mr. Justice Buller held its continuance unlawful, and gave judgment that it should be abated (8). So, if persons were to crowd the footway with poles and handbills in an unreasonable manner, it would be a nuisance, although the mere act of setting one individual on a footway to distribute bills is not an offence by the general law (9).

So it was held, that throwing skins into a highway, by which a person lost his eye, was not indictable (10); but if the skins had been thrown constantly, or for an unreasonable time, it might

(1) 1 Hawk. c. 76, s. 145.
(2) 3 Campb. 230, *R.* v. *Jones*.
(3) 6 East, 429.
(4) Id. 427, *R.* v. *Russell*.
(5) 3 Campb. 224, *R.* v. *Cross*. The counsel for the defendant urged the case of a rout, but lord Ellenborough at once observed, that a rout would be a nuisance if coaches were to wait in the street for an unreasonable time.
(6) 4 D. & Ry. Mag. C. 186, *R.* v. *Rawlinson*.
(7) 3 Campb. 226; so that ploughing up a footway may be indictable; see 3 Ch. Bur. 132.
(8) 3 Camp. 227, by Lord Ellenborough.
(9) 1 Burr. 516, *R.* v. *Sarmon*.
(10) 1 Str. 190, *R.* v. *Gill* & others.

have been otherwise. So to make a hoard for the purpose of building or repairing, in such a manner as to encroach unreasonably, would be a nuisance (1).

To dig a ditch, or to make a hedge across a highway, is clearly an illegal act (2); or to build a wall, whereby the way would be straitened (3); or to use such a way unwarrantably, so as to "plow it," according to an expression once used by the court (4). So to carry an unreasonable weight upon the road (5). So to place a gate on the way where no gate was before (6). But if the gate has been time out of mind upon the way, the case has a different complexion (7); for it might have been so, of necessity, to keep cattle within bounds (8), or by composition with the owner of the land when he consented to the thoroughfare (9), or by license from the king, and upon a writ of ad quod damnum, and no nuisance found (10). And although the defendant in *James* v. *Hayward* might have opened the gate, yet it was held, that he might lawfully cut it down (11), a circumstance which shews how amply the public may set themselves free from an impediment to their passage.

So, if a bridge be built in a slight or incommodious manner, it is a nuisance, for no person can impose such a burden upon the county as the repair of such an insufficient structure (12). It would be making a colourable use of the doctrine of repair (13).

Any other act savouring of obstruction or encroachment, or even damage to the way, is the subject of a prosecution. As where a carrier, by overloading, injured the road in consequence of the extraordinary weight of his goods (14). So where the defendant removed the gravel and soil upon a brick-culvert (15). So where an act forbade the erection of buildings within ten feet of the road, and directed that the footpaths should be deemed part of the road, it was held, that a building erected within ten feet of the footpath was a nuisance and encroachment within the act (16). So to erect pens for pigs or other cattle in the street is a nuisance, unless the fact can be justified under a prescription or grant in respect of a fair or market, or otherwise (17). So where an act gave authority to lay waggon ways along or across certain roads, provided the roads were kept in repair for twenty yards on each side of the waggon way, it was held, that where there

(1) 1 B. & Pnl. 407, by Eyre, C. J.
(2) 1 Hawk. c. 75, s. 144; 16 Vin. Ab. Nuisance (A. a.) (10); and any body may break down the hedge; 16 Vin. Ab. Nu. (W. 6).
(3) W. Jo. 277, *Browne's* C.
(4) 6 Mod. 145.
(5) 3 Salk. 183, *R.* v. *Egerly*; 1 Freem. 100.
(6) Cro. Car. 184, *James* v. *Hayward*; S. C. W. Jo. 221.
(7) 1 Hawk. c. 75, s. 9.
(8) Cro. Car. 184, per Croke, J.; 1 Jurist, 960, *R.* v. *Bliss*; see 2 Nev. & P. 464, S. C.
(9) 1 Hawk. ut supra.
(10) Cro. Car. 185, per Jones, J.
(11) Id. 184; 2 Salk. 459.
(12) 2 East, 348, by Lord Ellenborough.
(13) Id. 352, by Grose, J.; and see 54 Geo. 3, c. 59, s. 5. And the justices have jurisdiction over it under 1 Ed. 3, c 16; 6 Mod. 255.
(14) March. Rep. 135, pl. 215; Jenk. 284.
(15) 7 B. & C. 413, *R.* v. *Knight* & others; S. C. 1 M. & Ry. 217.
(16) 2 Nev. & M. 478, *R.* v. *Gregory*.
(17) 1 M. & S. 67, *R.* v. *Cotterill*; see 7 Ad. & El. 95 *R.* v. *Starkey*.

were not twenty yards of waggon way on each side, no waggon way at all was authorized. And where one clause of an act directed proprietors of a railway to make new roads in lieu of such as their railroad might injure, and another subsequent section gave them a general power of constructing railways without reference to any former limitation, it was held, that this general power was, nevertheless, controlled by the former clause, so that it became necessary for such proprietors to leave a space for the public to use; and it was considered, moreover, that the benefit which the railroads conferred upon trade were not such as could justify the obstruction of the highway (1).

But the frightening of horses, in consequence of the movement of the locomotive engines, is not ground for an indictment, although the railroad be parallel to the road, and, in some places, within some few yards of it. Here the great public utility of the railway obtains its due consideration, and the interference with the rights of the public must be taken to have been contemplated by the legislature (2).

Dedication.] It has, however been said, that the question of dedication occasionally arises upon these indictments for obstruction, and that the rights of the public are sometimes narrowed, so as to preclude them from preferring indictments which would certainly lie under other circumstances.

First, then, with regard to dedication; it seems that if a person manifestly shows his intention to throw open a street or way to the public, an obstruction of such an easement will be indictable. As where a passage had been left for several years without either a bar or a chain across it, and had been lit at the expense of the city of London: the defendant was convicted of an obstruction (3). So where the public had used a footway for fifty years, during the occupation of successive tenants, and with notice to the landlord's steward, which was notice to the landlord (4).

But if a bar or chain be put up, or any other mark of interruption be exhibited, the presumption of dedication is much lessened, if not destroyed (5), and so likewise if the owner of land evince his determination to allow a qualified right only, a party will become a trespasser for the excess (6). And if there be no intention to dedicate visible on the part of the owner, or the public have enjoyed the way for a short time only, the presumption is rebutted (7) These facts are, for the most part, questions for the decision of the jury (8).

(1) 1 B. & Adol. 441, *R.* v. *Sir J. Morris.*

(2) 4 B. & Adol. 30, *R.* v. *Pease*; S. C. 1 Nev. & M. 690.

(3) 1 Camp. 260, *R.* v. *Lloyd*; see also 11 East, 375, n.; 5 Taunt. 142; 3 Bligh. 440.

(4) 4 Campb. 16, *R.* v. *Barr*; see also 3 Bing, 447; Lew. C. C. 158, *R.* v. *Allanson.*

(5) 5 Taunt. 126; 1 Camp. 263, n.; 5 B. & Ald. 454: 4 B. & C. 474; and it is no defence that the bar has been knocked down without further evidence of dedication, 1 Campb. 262, n.

(6) 7 B. & C. 257; see also 4 Campb. 189.

(7) 2 Str. 909, *R.* v. *Hudson.*

(8) 3 B. & Adol. 681, *R.* v. *Wright.*

Secondly, as to the limitation of the public right in consequence of a prescriptive privilege elsewhere, it was held, in the case of *Rag Fair*, that if the place said to have been obstructed were subject to the franchise of a fair and market, or appeared openly to be so, as, for instance, by an enjoyment of twenty years, a man could not be deemed criminal who should come there under a belief that the fair or market was legally instituted. The defendants were accordingly acquitted (9).

With regard to obstructions dealt with by statute, they will, for the most part, be found in the 5 & 6 Wm. 4, c. 50, to which we refer the reader (1). The offences of this latter class are punishable upon summary conviction before justices.

Indictments for not repairing a highway.] We proceed to another class of obstructions or nuisances, the remedy for which is by indictment. The non-repair of a road is the cause of such a grievance. And it may be safely affirmed, that wherever a way acquires the character of a thoroughfare, this principle of law will apply. And the parties who lie under the obligation to repair, and are thus the subjects of prosecution, are, in the first instance, the inhabitants of the parish or township in which the particular road is situate (2). From this common law liability, unless the burden can be satisfactorily shewn to belong to others, or the road be shewn to be in good repair, there is not any appeal; so that if through the default of commissioners, or from any other cause, a *turnpike road* should become ruinous, the necessity for repair lies upon the parish. Even where an act of parliament placed the care of a particular street in the hands of commissioners, and another act passed for paving the streets of the parish excluded the former street from its provisions, the parish was still deemed liable. The tolls constitute an auxiliary fund, and the parish having seen that the road is in good repair, would then be in a condition to seek a remedy over against the commissioners (3). After conviction, the inhabitants may apply to the court upon motion, under 3 Geo. 4, c. 126, s. 110 (4). Nothing short of an express exemption will discharge a parish or township. But if there be such an exemption in an act of parliament, it must prevail; and it was so held in a case where a township successfully resisted a claim made on them by the remainder of a

(9) 4 Esp. 189, *R.* v. *Smith* & others.

(1) See sect. 72, 73.

(2) Mar. 26, p. 62. Not the overseers; 12 Mod. 198, *R.* v. *Dixon* & another.

(3) 3 Campb. 222, *R.* v. *St. George, Hanover Square*; 2 B. & Ald. 179, *R.* v. *Netherthong*; 1 Ld. Raym. 725.

(4) Which enables the court to apportion the fine and costs between the trustees and the parish, so as not to endanger the security of the creditors who have advanced their money upon the credit of the tolls. And although the indictment be removed by certiorari, after having been preferred at the assizes, the court of king's bench will exercise this jurisdiction of apportionment. 2 East, 413, *R.* v. *Upper Papworth*. Rule to show cause why the inhabitants of the parish convicted should not be fined 1200*l.*, and calling also on the trustees of the turnpike road to shew cause why the fine and charges should not be apportioned between them and the parish.

parish, in consequence of a particular provision in a local act (5). No agreement with other persons will discharge the parish (6). Hence it follows, that if the parish will endeavour to release themselves, they must find out some parties or person who ought to stand in their stead (7), or they must be in a condition to prove that the road indicted is not a public highway. These two lines of defence are the most usual upon indictments for non-repair. Thus, the inhabitants of Ecclesfield pleaded a prescriptive obligation under which certain districts and divisions were bound by immemorial usage to repair the road in question, "except a certain common highway in the said district of W." This excepted road was proved to have been made under an inclosure act about twenty-five years since. It was objected, that the defendants ought to have shown that this way had existed immemorially, being pleaded as an exception to an immemorial obligation, but Wood, B., held the statement sufficient, although it might have been more explicit, and a motion to enter up judgment for the crown, non obstante veredicto, was not successful (8).

The inhabitants of Hatfield, on the contrary, being indicted as a township, for non-repair, pleaded not guilty, instead of shewing in particular the parties whom they sought to charge, presuming upon the distinction between a township and a parish. But the court held, that as the evidence shewed an immemorial custom on the part of Hatfield, to repair all roads within the township, which but for the prescription would be repairable by the parish at large, the township stood in the light of a parish, and could not be discharged without pointing out in a plea the persons who were to take upon themselves the duty which the public required (9). And Holroyd, J., noticed a diversity between cases where the indictment charges a special prescription to repair a particular road, and a general prescription to repair all roads. In the former case, the plea of not guilty might serve; but, in the latter, a more particular designation is indispensable. And the learned judge added, that he remembered the distinction to have been taken in a case before Chambre, J. (1). So, in charging the township, the immemorial usage is set forth, because it is against common right to call upon a section of the parish; but as soon as the obligation is fixed upon the township commensurately with the parish, the township must bear the burthen equally, or shew cause why they should be relieved. And hence it was, that where the division of Great Broughton, in the parish of Bridekirk was indicted in the common form, judgment was arrested for want of a reason upon the face of the record why the special obligation had accrued (2). Nevertheless, where an act of parliament imposes the burthen of repair, the parish, although

(5) 2 T. R. 106, *R.* v. *Sheffield.*
(6) 1 Ventr. 90; 3 East. 86, *R.* v. *Mayor of Liverpool.*
(7) See 5 Ad. & El. 765, *R.* v. *Eastington*; S. C., 1 Nev. & P. 193.
(8) 1 Stark. 393; 1 B. & Ald. 348, *R.* v. *Eccleafield.*
(9) 4 B. & Ald. 75, *R.* v. *Hatfield.*
(1) Id. 80.
(2) 5 Burr. 2700, *R.* v. *Great Broughton*; S. P. 5 T. R. 514, *R.* v. *Linkfield Street*, cited, S. P. Id. 513, *R.* v. *Penderryn.*

not delivered from their common law liability, may take advantage of this mode of defence under the general issue (3).

It is, however, to be noticed, that the consideration for the liability incurred by parties foreign to the parish at large, need not be set out in the special plea by the parish. It is only when the road is without the boundary of the parish or township indicted, that a consideration should appear on the record. Thus a plea charging a particular district or division was held good, without the mention of consideration (4). But where the inhabitants of a parish pleaded that the inhabitants of another parish had been accustomed to repair, the plea was held bad for want of consideration (5). Although by prescription one parish may certainly be bound to repair the way in another (6).

Repair Ratione Tenuræ, &c.] A parish, however, may discharge itself in other ways than by imputing repair to another township, or denying the existence of the highway. For it may be suggested, that a party is liable by reason of his tenure of certain lands to do the required amendment, or shewing a consideration, by prescription; or again, by reason of his having at some time encroached upon the road. And a consideration evidently appears upon the face of these pleas which charge the repair *ratione tenuræ* or *clausuræ*. The person thus called upon by reason of tenure (7), cannot defend himself upon the ground of allowing his land to lie fresh (8), or of opening an inclosure, for he is bound in perpetuity (9). And where the abbot of S. charged *all* his lands for the repair of a way, it was held, that not only those which had been set apart originally for the purpose were liable, but likewise *all* lands which the abbot might have since acquired (1).

Where it is sought to enforce the claim of repair by prescription, a consideration must be shewn, or by the receipt of toll, or other profit; and this, although the ancestor may have done the repair, for the act of the ancestor cannot charge the heir without profit (2). And the road must be of public utility. For occasional repairs done by an adjoining occupier will not make him liable to repair the whole road along his line, any more than an individual

(3) 3 Campb. 222, *R.* v. *St. George, Hanover Square*; see 4 B. & Adol. 109.

(4) 1 B. & Ald. 348, *R.* v. *Eccles-field.*

(5) 5 M. & S. 260, *R.* v. *St. Giles's, Cambridge*; see 1 Ad. & El. 744, *R.* v. *Bp. Auckland*; 1 Nev. & P. 582, *R.* v. *Scaresbrick*; S. C. 6 Ad. & E. 509. It is, however, no objection that three townships are charged conjointly. *R.* v. *Bp. Auckland*, ut supra. If a highway should be in two parishes, the justices at a special sessions shall apportion the part to be repaired by each parish or person liable *ratione tenuræ*, or otherwise. But the person so liable may appear and make his objection before the justices, if he shall not be satisfied, and they shall determine upon the same. 5 & 6 Will. 4, c. 50, s. 58, 59; see also sect. 60 & 61, and likewise sect. 92. See as to a highway in two counties, 5 T. R. 498, and post, in this section.

(6) 12 Mod. 409.

(7) See instances of indictments for non-repair ratione tenuræ, Palm. 389.

(8) Palm. 389; 5 Esp. 219; 3 Campb. 444, &c.; 1 Str. 187.

(9) 2 Saund. 160.

(1) 4 Mod. 48, *R.* v. *Buckeridge.*

(2) 13 Rep. 33; Sty. 400.

would be bound by repairing the road before his gate (3). Moreover it is to be remarked, that this liability by tenure is not extinguished by an alteration in the line of road, so as entirely to discharge the individual. But under recent statutes it may be changed for a pecuniary compensation to the parish. As under the turnpike act (4), where it is ordained, that two justices shall apportion the amount of road which has been widened, altered, diverted, or turned, and with the consent of the parties liable, shall discharge their liability altogether, upon payment of a gross or annual sum, as may be found convenient. Under the new highways act (5) this conversion of liability is made absolute. For roads repairable ratione tenuræ are placed at once under the care of the surveyor, when such roads come to be widened, enlarged, turned, or diverted. The roads, however, are to be viewed by two justices, who are to report to the special sessions, and the justices at special sessions shall fix 'an annual sum in gross, to be paid in lieu of the repairs formerly due by the individual.

And by a previous clause, (sect. 62), any person liable *ratione tenuræ* or otherwise, may, with the consent of the inhabitants in vestry, obtain the opinion of justices at special sessions, as to the propriety of exchanging his obligation for an annual payment, or the payment of a sum in gross. And if the justices decide for the changing, the road shall be repaired by the parish for the future. Should the gross sum exceed 100*l.*, it is to be vested in the funds, and the interest applied to the repair of the roads within the parish. If under 100*l.*, the gross sum, or any part thereof, is to be applied at once towards the repairs, with the consent of the vestry, and of such justices at special sessions.

Repair by reason of Encroachment.] A liability to repair may, again, arise by reason of encroachment. The rule seems to be, that if one inclose land on one side, the other side being anciently inclosed, he shall be compelled to repair all the way; but only half the way, if there should be no ancient inclosure; and clearly, if he inclose both sides, he becomes liable to the reparation of the whole way (6). Still, the obligation endures only so long as the enclosure is continued (7). Although, as we have seen, a person cannot discharge himself from an obligation ratione tenuræ by opening an inclosure (8). And, therefore, if the party would seek to be relieved from his burden by reason of his inclosure, he must restore the land he has acquired, to the road. So that, in order to carry out his object, he would put the way into repair, so far as it had been interfered with by the encroachment, and would then leave it to the trustees or parishioners. But where, not content with throwing open the inclosure, and repairing the road once, the defendant continually did acts of repair for twenty-five years, Heath, J., held that he had manifested a sense of liability by his act, and he was found guilty upon an indictment (9).

(3) Lew. C. C. 158, *R.* v. *Allanson*, Hullock, B.
(4) 4 Geo. 4, c. 95, s. 68.
(5) 5 & 6 Will. 4, c. 50, s. 93.
(6) 1 Sid. 464.
(7) 2 Saund. 160.
(8) Ante.
(9) 5 Esp. 219, *R.* v. *Skinner*.

During the continuance of the inclosure, the state of the road must not only be no less useful than before, but there must likewise be a good and sufficient way. So that, where the defendant had made the passage better than before, but it was still so narrow as that neither a cart nor a carriage could pass, but horses only, the court decided, that he must put the road into a perfect and ample condition (1). However, the law above set forth does not apply in cases of enclosure by virtue of an act of parliament, or where an enclosure takes place in consequence of the writ ad quod damnum, unless, in the latter case, it be in respect of lands in another parish than that in which the road originally lay. For the inclosure under an act of parliament cannot be likened to a voluntary inclosure, but may rather be called a parliamentary ad quod damnum (2). And under the writ ad quod damnum, as the parish can bear no further expense in respect of the old road, the inhabitants ought, for the future, to repair the new. Whereas, if the road were in another parish, the inhabitants of that other parish would not be relieved from the repair of the old way, because they could never have been liable to the repair of it, and in that case, the party inclosing under an ad quod damnum must be subjected to the burthen. The heir may be indicted for the continuance of an encroachment, although he do no new act, the continuance being a new nuisance (3).

Defence.—No Highway.] Secondly, a parish may allege as a defence, that the way in question is not a highway, and that, of course, is an ample answer to an indictment. So, that a church path "for all the parishioners of D." cannot be the object of an indictment (4). And here, again, questions as to dedication have arisen, because in the event of an insufficient dedication, and, a fortiori, if there were none at all, the parish could not be charged with the non-repair of that which, at best, must be deemed but a private way. Before the late act for consolidating the law upon the subject of highways, contradicting decisions had taken place as to the necessity of acquiescence on the part of the parish in a dedication or adoption by the parish of a road so dedicated. For some time it was considered, that acts of adoption or acquiescence must appear on the side of the parish (5), but upon a subsequent occasion, two judges against one (6) held that a way was repairable by the parish when used by and dedicated to the public, without any other sanction (7).

Now, however, by 5 & 6 Will. 4, c. 50, s. 23, The circumstances

(1) Cro. Car. 366, *Sir E. Duncomb's* C.

(2) 1 Burr. 461, *R.* v. *Flecknow*; S. C., 2 Ld. Keny. 261; see to the same effect, 3 Atk. 772, *Vennor*, ex parte.

(3) 16 Vin. Ab., Nuisance, B. 4.

(4) 1 Ventr. 208, *Thrower's* C. But if "for all the parishioners of D." were omitted, and the sentence were "a common footway to the church of ——," it would be good. 1 Hawk. c. 76, s. 238; Poph. 206, *Hebborne's* C.

(5) 4 B. & A. 447, *R.* v. *St. Benedict*; 9 B. & C. 456, *R.* v. *Paddington Vestry*. See also 1 M. & Rob. 24, *R.* v. *Edmonton*; 1 B. & Adol. 32, *R.* v. *Mellor*.

(6) Denman, C. J., Parke, J.—Diss.—Littledale, J.

(7) 2 Nev. & M. 582, *R.* v. *Leake*.

which constitute a public road repairable upon a dedication, or under an enclosure act (8), by the inhabitants at large of each parish, are set forth. First, the person intending to dedicate must give three months' notice in writing to the surveyor of such his intention, describing the situation and extent of the way. He must then shew that the way is made in a substantial manner, and of the width required by the act, and to the satisfaction of the surveyor and any two justices of the division where the highway is situate. The justices then certify as to the substantial state and width at the expense of the party requiring the view, and the certificate is enrolled at the quarter sessions. Upon which, after the public have used the road, and the person dedicating it has kept it in repair for twelve months, it shall thereafter be repaired by the parish. Nevertheless, the surveyor must previously, upon the receipt of the above notice, summon a vestry, and if such vestry shall be adverse to the dedication, any one justice may summon the party proposing to make the new highway to the next special sessions, and the question shall be there determined by the justices. A parish, therefore, may defend itself on the score of undue dedication.

So, again, it is a sufficient answer by the parish to say that commissioners of inclosure have set out the road indicted as a private road (9). So, it would be quite sufficient to allege that a road had not been finished according to the provisions of the act of parliament under whose authority it had been commenced (1). And, clearly, where a way is stopped by an order of justices, the public liability in respect of it is at an end.

So, where the road intended was from A. to C., but an intermediate part from A. to B. had been finished and repaired for twenty or thirty years, it was held that no indictment would lie till the whole should be complete. And it made no difference, that the road joined another public road at B., which last road was complete (2). So, in the case of a branch road to C. from a road marked A. B., the branch must be finished before the public can be called upon to repair (3). And it may be a defence to allege that there is another road in good repair equally convenient to the public, although the distance be somewhat greater, provided the public make little or no use of the way indicted (4).

But it would not be a defence to urge the existence of an inclosure award which placed the road in another parish, unless proof be given that the notices required by the act had been given by the commissioners, especially where the usage has not been according to the award. For the continuance of repair by the inhabitants

(8) The act embraces roads or occupation ways, *made* or *to be made*, or roads *set out*, *or to be set out* as private drift ways or horse-paths under inclosure acts.

(9) 6 T. R. 20, *R.* v. *Cottingham*; 8 T. R. 634, *R.* v. *Richards* & others; 3 Chit. Burn, 82, *R.* v. *Enfield.*

(1) 3 B. & Adol. 108, *R.* v. *Cumberworth*, Littledale, J. dub. As that eleven miles and a half only were completed out of twelve.

(2) 4 Ad. & El. 723, *R.* v. *Edge Lane*; S. C. 6 Nev. & M. 81.

(3) 4 Ad. & El. 731, *R.* v. *Cumberworth*; S. C. 1 Nev. & P. 197.

(4) Say. Rep. 92, *R.* v. *Steyning.*

of the indicted parish where the road originally was, would raise a presumption that the due notices had not been given (5).

Nor again, that a water, being an ancient highway, had changed its course; for the highway continues in the new channel as it did in the old (6). Nor can the public be deprived of a highway except by express words. So, that an old towing path was considered to remain liable to public user, although some alteration had been made in the use of it by an act of parliament for private purposes (7).

And, where a road is changed or in any way altered by an act of parliament, it is usual to designate it as a public highway after such alteration, and, consequently, it is repairable by the parish (8). And by sect. 92 of the highway act, where a highway shall have been turned or diverted under the provisions of that statute, the parish or other party liable to the repair of the old highway, shall repair the new without reference to its parochial locality.

There is one other defence which has been occasionally brought forward,—that a parish need not make a road better than its immemorial condition. But this mode of meeting an indictment must, of necessity, become less and less applicable by reason of the improvements required by recent acts of parliament. As that public ways should be of a certain width (9), and that justices should order narrow ways to be widened upon compensation made to the owners of adjoining lands (1). These two clauses seem to give full authority to improve a road so as virtually to make the defence above-mentioned of rare occurrence. For, instead of indicting the parish for not maintaining a sufficient width of road, (a proceeding which might probably fail), the surveyor would be indicted for disobedience to the act of parliament, unless it were thought proper to resort to the general clause of 5 & 6 Will. 4, c. 50 (2), for the recovery of a penalty against him.

Nevertheless, where the road cannot be widened by reason of the interposition of private property, and the justices do not perform their duty by requiring the widening of highways under the 82nd section of the above act, it is possible that an indictment might be adventured, and in such a case, the defence of an immemorial condition might still be interposed. As, where a parish was indicted for allowing a road to be so muddy and narrow that people could hardly pass along (3). So it was said, that a person need not repair beyond the original state of the road (4). So, where a public way crossed the bed of a river which washed over it at every tide, leaving a deposit of mud, it was held, that the parish could not be bound to make it good, if from the nature of

(5) 2 M. & S. 558, *R.* v. *Hasling-field.*
(6) 1 Hawk. c. 76, s. 4.
(7) 3 B. & Ald. 193, *R.* v. *Tippett*; S. C. 1 Russ. C. M. 317.
(8) See the highway act 5 & 6 Will. 4, c. 50, s. 85, 86.
(9) 5 & 6 Will. 4, c. 50. s. 20.
(1) Id. s. 82.
(2) Sect. 20.
(3) 2 Ld. Raym. 1169. *R.* v. *Stretford*; S. C. 11 Mod. 56.
(4) 1 Salk. 359; 6 Mod. 163.

things the repair would be ineffectual, but the jury thought otherwise, and found a verdict of guilty (5).

Fences.] The fences adjoining to a road must be repaired by the owners of land, and trustees who had turned a road through an enclosure, and had repaired the neighbouring fences for many years, were held not liable to continue such repairs (6). If no such fences previously existed, the parish is not liable to be called to account for not putting up guard fences, upon an allegation that the king's subjects could not pass, "as they were wont to do" (7).

Proceedings.] It has been sufficiently apparent from the matters already laid before the reader, that the proceeding by indictment is the more ordinary remedy employed to compel a parish to repair. But an information may likewise be applied for (8), and the court will grant it under certain circumstances. As, where there is a difficulty in procuring persons to take necessary steps against the parish. So, again, where the grand jury refused to find a bill for the non-repair of a road (9). But the grand jury must be shewn to have been guilty of gross misbehaviour in not finding the bill, and, therefore, where it appeared that the road in question was but of little value to the public, the court refused an information (1). And, per cur. "There is another reason why the court ought never to give leave to file an information for not repairing a highway, unless it be a case of great enormity, namely, that the fine set on a conviction upon an information for not repairing a highway, cannot be expended in repairing the highway, whereas, the fine set on a conviction upon an indictment for not repairing a highway, is always to be expended in the repair of the highway" (2).

So, again, where the trustees of a road exceed their power, although not from corruption or partiality. And here the information will go not to punish them criminally, since the fine would be nominal, but for the purpose of making them rectify the mistake (3).

The 94th and 95th sections of the new act (4), however, have pointed out a method of compelling the repair of highways. For by sect. 94, in case of a want of reparation, the surveyor or other person liable is to be summoned before the justices at special ses-

(5) 1 M. & Rob. 393, *R.* v. *Landulph.* "Where two parishes are separated by a river, and there is no positive evidence of the boundary line between them, it is to be presumed to coincide with the middle line of the channel." By Patteson, J., 1 M. & Rob. 393.

(6) 2 T. R. 232, *R.* v. *Llandilo;* S. P. 3 Yo. & Jer. 308, *Winter* v. *Charter.* See also 7 C. & P. 208, *R.* v. *Whitney.* With respect to highways at the end of bridges, see post *Bridges.* See further as to highways, 1 Hawk. c. 76.

(7) 7 C. & P. 208, *R.* v. *Whitney.*

(8) See 2 Barnard. 54, Anon.

(9) W. Kel. 63, *R.* v. *Walbourne.*

(1) Say. Rep. 92, *R.* v. *Steyning.*

(2) Id. 93.

(3) 2 Ld. Keny. 373, *R.* v. *Rogers* & others.

(4) 5 & 6 Will. 4, c. 50.

sions (5), and the justices may convict such surveyor or other person, and proceed accordingly to order the repairs. But by sect. 95, if the obligation to repair be disputed, the justices may order a bill of indictment to be preferred at the next assizes or sessions, and the necessary witnesses to be subpœnaed, and the costs shall be directed by the judge or justices to be paid out of the highway rate—provided, that such indictment may be removed into the court of king's bench by certiorari (6).

Sometimes, though very rarely, the court of chancery has interfered. As where the attorney-general filed an information in that court in order to settle a right. The lord chancellor, upon this, directed that proceedings upon an indictment should be stayed, until the question as to the right had been determined in chancery (7).

Indictment for Non-Repair against Parish.] It is usual in an indictment against a parish to state that there was and is a common king's highway leading from A. towards and unto B. for all persons to pass with their horses, coaches, carts, and carriages. It then alleges that a portion of this way is out of repair, stating the length and breadth of the bad road, so that the horses, &c., cannot pass without danger; to the great damage, &c. (8). The indictment concludes by averring that the parish of C. ought to repair and amend the same.

In observing for a moment upon this form, it may be said, that the highway need not be alleged as having existed from time immemorial (9). But it is of consequence to state the termini of the way with much correctness, if, indeed, it be judged right to mention them at all, for, strictly speaking, as a highway is infinito, the omission of termini would not be fatal (1). Still, having set them out, a misdescription may be dangerous. It has been held, that an indictment for stopping a way at D., leading from D. to S. was faulty, because D. was excluded by the word "from" (2). So the words "from Roxeth-place house to Stroud gate," exclude both these places (3). So, where the road was stated as leading from Hatley towards and unto Gamlingay, the court made the rule absolute for arresting the judgment against the inhabitants of Gamlingay (4). It is true, that in a much more modern case than the above, Lord Tenterden declared, that his mind was not satisfied with the decision of the court in *R.* v. *Gamlingay* to the effect that the words "from" and "to" were necessarily exclu-

(5) Who, as it seems, must be the surveyor of the district, or some person so locally connected. See 1 M. & Ry. 176, *R.* v. *Fylingdales*.

(6) The court will not grant this writ, however, upon an affidavit that difficult questions of law may arise at the sessions; 5 Dowl. N. P. C. 123, *R.* v. *Leeds*. Some specific difficulty must be pointed out; 1 Nev. & P. 28, *R.* v. *Jowl*; S. C. 5 Dowl. N. P. C. 435.

(7) 9 Mod. 273.

(8) Not of all the inhabitants, but of all the king's liege people; 1 Mod. 107, *Thorowgood's* C.; Cro. El. 148, *Hayward's* C.

(9) Say. Rep. 167; 3 T. R. 365.

(1) See 1 Russ. C. M. 329; 3 T. R. 514, Lord Kenyon.

(2) 2 Ro. Ab. 81, Latch. 183, *Halsey's* C.; S. C. Noy. Rep. 90.

(3) Per cur. 4 Burr. 2092, in *R.* v. *Harrow*. And in the same case it was deemed no good objection that the indictment described the way as leading from a *hamlet*, instead of from a vill or town.

(4) 3 T. R. 513, *R.* v. *Gamlingay*; S. C. Leach, 528.

sive (5). But, nevertheless, a speculation upon the probable opinion of future judges would hardly justify the hazard of departing from the usual accuracy required in indictments of this nature. The case just referred to was where a culvert had been damaged, and the statement was, that the culvert passed along the highway in the parish of S. opposite to S. mill, in a certain king's common highway there, leading from S. to H. It was contended, that it did not sufficiently appear that the road obstructed was in the parish of S., and *R.* v. *Gamlingay* was relied upon. But the court said, that here was a distinct allegation of the nuisance having been committed in the parish of S., and to construe "to and from" as exclusive in this case, said Lord Tenterden, "would be to make an allegation inconsistent and insensible, which otherwise is perfectly consistent and sensible" (6). On the other hand, it has been again holden on the circuit, that the words "from and through" exclude the terminus (7).

Again, to pursue the subject of variance where the termini are expressed in the indictment. A road was described as leading from D. to C. and thence to R. But the proof was that a person must turn back a quarter of a mile from C. before he got into the road indicted, so that the way in question did not lead from D. and C. to R., and accordingly the defendants were acquitted (8). So where it was alleged that a gate had been erected, thereby obstructing a way "from the town of C. to a place called H.," and the obstruction was charged to have been "between the town of C. and H.," it was held that the words from and between excluded the town. Consequently, as the locus in quo was within the limits of the town of C. the indictment could not be sustained (9). But where A. was one terminus and B. the other, it was not considered a valid objection that the road turned backwards at an acute angle, though the part from A. to the angle was an immemorial way, and that from the angle to B. recently dedicated (1). It must, nevertheless, be understood, that if the same description will apply to more than one highway, advantage only can be taken of the circumstance by a plea in abatement. As where the road indicted was stated to lead from H. towards and unto U. It was said, that many roads might as well have been stated as leading from Hammersmith to Uxbridge. "But is it not true," said Lord Ellenborough, "that it does lead from H. to U., as alleged: had there been five other roads to which the description would have equally applied, you should have pleaded in abatement: the objection cannot be taken under the plea of not guilty. (2)

County.] Some county should be mentioned, although it need not be shewn in which of two vills of a parish the nuisance

(5) 7 B. & C. 415. See also 2 Anstr. 572, *Phillips* v. *Davies*, where the court of exchequer held that "from" might be taken inclusively; 12 Mod. 109.

(6) 7 B. & C. 413, *R.* v. *Knight* & ors.

(7) 6 C. & P. 133, *R.* v. *Upton on Severn*.

(8) 6 Esp. 136, *R.* v. *Great Camfield*.

(9) 8 C. & P. 612, *R.* v. *Fisher*.

(1) 4 Adol. & El. 232, *R.* v. *March. of Downshire*: S. C. 5 Nev. & M. 662.

(2) 1 Stark. 357, *R.* v. *Hammersmith*.

exists (1). Upon an indictment for stopping a road leading from S. to M. in the county of D. the court quashed the indictment because it did not appear in what county S. was, as the county of D. referred to M. only (2). But where upon a charge for erecting a gate at Hornsey, in Middlesex, in a highway leading to Highgate, it was not added that Highgate was in Middlesex, the court said that the venue in the margin, which was Middlesex, should extend to Highgate (3).

Highway.] The place must be called a highway, not a horseway (4), although it need not of necessity be designated a *common* highway (5).

Nature of the Way.] The indictment proceeds to describe the nature of the way. And here again, whatever may be the course of procedure in actions for obstructing a private right of way (6) it seems that the omission of the particular right claimed, as for horses, &c., would not be fatal, and more especially if it be a general right (7). Whilst, on the other hand, an incorrect description may be productive of a fatal variance. As where the allegation was of a right to pass on foot, or horseback, and in carriages, and the evidence disclosed a right to a footway only; there being no separate count for obstructing a *footway*, the defendants were acquitted (8). And this case differs entirely from *Allen* v. *Ormond*, referred to above, because in that case there was a claim of a foot and horseway unto and into a certain public king's highway, and there was a general verdict for the plaintiff, and the court deemed the terminus ad quem sufficiently proved, because here was a public highway for foot passengers (9). So again, where a way was mentioned as one for carriages, and the proof was that persons on horseback had gone along it, but there was no proof as to carriages having gone along the whole length, the defendants were acquitted upon a verdict of "not guilty as to carriages," because there should have been a count for horses in order to have supported the indictment (10). The same parish was again indicted, and the road was called a pack and prime way, in corroboration of which statement the evidence shewed a right for carriages to pass along, but this proof was insufficient, and the defendants were acquitted (11).

(1) Say. Rep. 119, *R.* v. *Blower.*
(2) Noy. Rep. 122, *Raymond's* C.,
(3) 1 Bulst. 203, *R.* v. *Springal.*
(4) Cro. El. 63, 4 Leon. 121.
(5) 10 Mod. 382. *R.* v. *Hammond*, S. C. Str. 44. Formerly a party was discharged for want of the word "*king's*" highway, 4 Leon. 121, *Keen's* C.
(6) See 8 East, 4, *Allen* v. *Ormond.*
(7) Co. Temp. Hardw. 316, *R.* v. *Hatfield.* "I do not remember any authority," said Lord Hardwicke, "that holds it necessary to say it is highway, for this or that particular carriage; for, if it is a common highway, it is a highway *for all manner of things*," Ibid,—not merely for carriages; for it had been objected, that it ought to have been shewn whether the way were a footway or for carts, or horses, &c. Ibid.
(8) Say. Rep. 169, *R.* v. *Burgess.*
(9) 8 East, 4. Though it was added that such a description might be bad upon special demurrer, as not pointing out with certainty what sort of a highway was meant. Ibid.
(10) 5 C. & P. 579, *R.* v. *St. Weonard's.*
(11) 6 C. & P. 582, *R.* v. *St. Weonard's.*

An indictment for obstruction charged that the way interrupted was for *all* the liege subjects, &c., to go, return, &c., with their horses, coaches, carts, and carriages, in and along the way. It turned out, however, that the road passed under an archway nine feet broad and ten feet high, through which carts of a particular description, loaded in a particular way, could not pass. Upon objection taken, Littledale, J. expressed a doubt on account of the generality of the word "*all*," but allowed the case to proceed, and a verdict of guilty was found. Upon motion, the court held that the indictment was well sustained, for it was not alleged that there was a way for *all* carriages, and the rule was refused (1).

Length and Breadth.] Then as to the statement of the length and breadth, it seems not now to be necessary (2), although it is usual to mention these facts, and it might likewise be added, that such precision only would be required in such a statement as might acquaint the parish with the nature of their supposed liability.

"*Was and still is at the Parish of A. very ruinous,*" *&c.*] It must be stated that the way in question is within the indicted parish, otherwise the parish is not bound to repair (3). But the court will not quash the indictment (4).

The indictment concludes by naming the inhabitants in particular who are bound to the reparation of the way, and here care should be taken to mention rightly the persons liable. For where the inhabitants of part of a parish only were charged because the parish was situate in two counties, and those persons only were proceeded against in whose county the want of repair existed, the court held that the rule for arresting the judgment for the crown must be made absolute, the whole parish being responsible (5).

Where a road lies in two parishes, the indictment should charge the proportionate repair required to be *ad medium filum viæ*. So that a count, stating a road three miles long and fifteen feet broad to be out of repair, was held insufficient where it turned out that the road was situate in two parishes (6).

(1) Ry. & Moo. N. P. C. 151, *R.* v. *Lyon* and another; S. C. 1 C. & P. 527; 5 D. & Ry. 497.

(2) Say. Rep. 98, *R.* v. *Smith*; Id. 167, *R.* v. *Brookes*; Id. 301, *R.* v. *East Lidford*, overruling Ca. Temp. Hardw, 105, *R.* v. *All Saints*, and other more ancient decisions. See also Id. 316, where Lord Hardwicke said that the length and breadth must be ascertained in indictments. Formerly the court would estimate the fine according to the length and breadth of the road out of repair, which occasioned the necessity of setting out these matters.

(3) Cowp. 111, *R.* v. *Hartford*.

(4) 2 Keb. 221, *R.* v. *Shelderton*.

(5) 5 T. R. 498, *R.* v. *Clifton*. Id. 500, *R.* v. *Cripplegate*, cited there, overruling *R.* v. *Weston*, 4 Burr. 2507.

(6) Peake, N. P. C. 219, *R.* v. *St. Pancras*. It is hardly necessary to advert to the omission of contrà pacem. After verdict, outlawry, confession, default, or otherwise, no judgment shall be stayed on this account, 7 Geo. 4, c. 64, s. 20. It used to be holden that in the case of a non-feasance, contrà pacem was not necessary, but where there was a misfeasance it ought to appear, Godb. 59, *Lady Gresham's* C., for setting up a gate in Osterley Park. S. P. Cro. Car. 584, *Leyton's* C. Setting up a dam.

Indictment against a Township, or Hamlet, or Tithing, &c., for Non-Repair.] The indictment against a particular division of a parish differs principally from that against the parish itself in the statement of the obligation, which in the case of the township or other division is said to be immemorial by virtue of a prescription or custom. For it is not enough to say, that the inhabitants of the district ought to repair and amend, but that they are bound to do so by reason of this custom or prescription (7). Wherefore it it is that an averment is universally introduced, alleging that the inhabitants of the district indicted have been from time whereof the memory of man is not to the contrary used and accustomed to repair, &c. An extra-parochial hamlet was indicted for non-repair, but no immemorial obligation was mentioned, nor was it alleged that the hamlet did not form part of a larger district, the inhabitants of which might have been bound to repair. The court accordingly reversed the judgment against the hamlet upon a writ of error brought, for all the facts contained in the indictment might be true, and still there might be a larger district, including the hamlet, liable to repair the road in question (8).

It is also said that an advantage may be gained by alleging a general custom within the parish for each subdivision to repair, as well as a custom simply for the individual subdivision indicted to repair its own roads, since evidence thereof is admitted in support of the general custom (9). However, should there be any exceptions to the rule, they should be alleged, and having made the exception it becomes necessary to show further that the highway in question is not such an exception (1). The corporation of Liverpool were indicted for not repairing a highway, and an immemorial usage was laid in the township of Liverpool to repair all ways within their township, except such as ought to be repaired according to the form of the several statutes in that case respectively made. The second count included the highways and public streets. The third count charged the liability as being within the town and parish of Liverpool. The fourth count charged the corporation by virtue of their tenure of an ancient port. (2). The fifth count was for repair ratione tenuræ of lands (2). And the sixth contained a similar allegation in respect of a market (2). All these counts contained the same exception mentioned in the first, but in not one of them was it averred that the highway indicted was not within the exceptive clauses of the acts of parliament. And for this cause judgment was arrested. And besides, it was not distinguished whether these statutes were public or private, for if they were the latter, it was necessary to have pleaded them specially (3). But the court did not decide upon this point, deem-

(7) 5 Burr. 2700. Andr. 276, *R.* v. *Marton*, 2 T. R. 514.

(8) 2 B. & C. 190, *R.* v. *Kingsmoor*; S. C. 3 D. & Ry. 398.

(9) Stark. Cr. Pl. 698 in the note.

(1) The pleading, however, need not go on to state by whom the excepted way ought to be amended, 1 Stark. 395, *R.* v. *Ecclesfield*.

(2) But inhabitants cannot be charged as holding lands by tenure, 2 B. & C. 166.

(3) See 1 M. S. 435, upon this point.

ing the other objection to be quite fatal (1). So when a plea charged the inhabitants of seven townships with the repair of a highway, and went on to say, that part of the way was in Great Broughton, and the residue in Little Broughton, and that the respective portions ought to be repaired by Great and Little B. independently of the rest of the parish, a special demurrer showing for cause that the plea had failed to distinguish what part of the highway lay within Great B. and what part within Little B. was allowed (2). So where an indictment charged three townships with an omission to repair a way situate in a fourth township, (all being in the same parish), it was held faulty, and the judgment was arrested for want of showing that the road was not within the defendants' district (3). But it was not deemed a good objection that the inhabitants of the three townships were jointly indicted (4). There would have been another objection—that no consideration was laid, the law being, that it is not competent to charge a parish or township with the amendment of a road not within the respective boundary of either without laying such a consideration (5). So, likewise, it must be stated that the road is one which but for the custom the parish would be bound to repair (6).

Trustees.] An indictment will not lie against the trustees of a turnpike road (7).

Indictments Ratione Tenuræ, Clausuræ, &c.] The indictment against A. ratione tenuræ concludes by saying, that A. (8) "by reason of his (9) tenure of certain lands situate, &c., ought to repair the said highway, &c." The tenure, therefore, is a necessary ingredient, (10) and the charge must be in respect of some property (11). But a title of prescription need not appear in case of a liability by tenure, there being a plain distinction between tenure, and inhabitancy, or residence (12). And the nature of the estate is also immaterial (13), although it was once said that lessee for years would not be liable (14). If several parties be indicted for non-repair as for not keeping the road amended before their doors, the charge must be several and not joint (15). In an indictment for encroachment, the

(1) 3 East, 86, *R.* v. *Liverpool.*
(2) 11 East, 304, *R.* v. *Bridekirk.* But leave was given to amend.
(3) 1 Adol. & El. 744, *R.* v. *Bishop Auckland*; S. P. 6 C. & P. 133, *R.* v. *Upton.*
(4) 1 Adol. & El. ut supr.
(5) See Ibid.
(6) 1 Nev. & P. 193, *R.* v. *Eastington*; S. C. 5 Adol. & El. 765. See as to non-repair of a road under an inclosure act, Stark. Cr. Pl. 698.
(7) 2 B. & A. 183, by Abbott, C. J.
(8) It should be said, late of ——, &c. Noy. Rep. 87, *Lucy's* C.; but see Cro. El. 148.
(9) "His" is not now an indispensable word as it was formerly. 1 Str. 187, 1 Ventr. 331, overruling Noy. Rep. 93, 11 Mod. 302; *R.* v. *Corrott.*
(10) Sty. 400.
(11) Godb. 400.
(12) 2 Saund. 158, note (9).
(13) 1 Salk. 357, 7 Mod. 55.
(14) 3 Salk. 182. See the note by Evans. An award made under a submission by a tenant of the premises cannot be received as an adjudication, being binding only upon the party making the submission, nor as evidence of reputation, being *post litem motam*, 3 Campb. 444, by Dampier, J., *R.* v. *Cotton.*
(15) Mar. 45, pl. 71.

defendant was charged with having, at the township of W., at a highway *there*, leading from a highway, &c., towards L. by a wall *there*, encroached, &c. It was objected that the indictment was not sufficiently certain, but the court were of opinion that the words "*there*," and "*said*," could only be referred to the highway first mentioned, and the judgment was affirmed (1). It has been made a question, whether upon an indictment of this nature, it is sufficient to aver that the inclosure was made whilst the party was in possession of the land assigning (2).

Pleading.] Under the general issue, the parish can only affirm that the place mentioned in the indictment is not a highway, or that there is no foundation at all for the charge, as that there has been sufficient repair done, or that the highway is not in the parish. But a township or particular division of a parish may give evidence of the obligation of other places, or particular persons, under not guilty. And so likewise may an individual indicted for non-repair by reason of tenure or encroachment (3). It follows, that if a parish will seek to deliver its inhabitants from the burthen, there must be a special plea, shewing in particular who ought to repair (4), and so if a township choose unnecessarily to plead special matter, instead of being contented with the general issue, the plea will be void, if it do not specify the persons liable in lieu of such township (5).

Moreover, the special plea must conclude with a traverse of the party's own liability, in the case of a township or particular individual. But a parish should not traverse in this manner, because it would be to traverse matter of law. So, where Sir N. S. was presented for not repairing by reason of the tenure of lands he was said to have encroached upon and inclosed, it was held sufficient for him to traverse his liability by tenure; for had he traversed the encroachment, it would have been matter of law, the tenure being the principal matter (6).

(1) 1 Adol. & El. 434, *R.* v. *Wright* in Error; S. C. 3 Nev. & M. 892.

(2) 3 Nev. & P. 502. *R.* v. *Mawgan.*

(3) 2 Saund. 159, note 10.

(4) Which confesses, of course, the fact of the highway, so that the defendant cannot give evidence after pleading thus, that the l. i. q. is not a highway. 11 Mod. 173, *R.* v. *Brown.*

(5) See 2 Saund. ut supra.

(6) 2 Saund. 158, *R.* v. *Stoughton.* As to the competency of inhabitants, trustees, &c., to give evidence in cases connected with the repair of highways, see 5 & 6 Will. 4, c. 50, s. 100; 3 Geo. 4, c. 126, s. 137; 4 Geo. 4, c. 95, s. 84; Collectors, 3 Geo. 4, c. 126, s. 59. A witness happening to be in court was held bound to answer questions upon an indictment for stopping up a footway, although it were in the form of a civil proceeding. 4 C. & P. 218. *R.* v. *Sadler* & others. It is to be observed that a submission upon a matter relating to an indictment for non-repair is revocable at common law, the 9 & 10 Will. 3, c. 5, & 3 & 4 Will. 4. c. 42, s. 39, applying to civil proceedings only. 1 Nev. & P. 74, *R.* v. *Bardell;* S. C. 5 Ad. & El. 619. The court will not grant a new trial in cases of misdemeanors, unless it be for a misdirection of the judge; and, therefore, where the defendants had been acquitted upon an indictment for a nuisance, the court refused the rule moved for on the ground of the verdict being against evidence. 4 M. & S. 337, *R.* v. *Mann;* 5 M. & S. 332; *R.* v. *Burbon;* 5 B. & Adol. 52, *R.* v. *Sutton;* S. C. 2 Nev. & M. 57;

View.] On an indictment for not repairing a highway, the court cannot grant a view by consent, though a private person prosecutes (7).

Costs.] Under the general act for regulating highways (8), the court before whom any indictment shall be preferred (9), shall award costs to the prosecutor, to be paid by the person indicted, if it shall appear to the court that the defence made to the indictment was frivolous or vexatious. And the court of king's bench may, under this section award costs incurred before the removal of the indictment, if it appear to the judge that the defence has been frivolous or vexatious (10). By sect. 95, the costs of the prosecution are to be paid from the highways rate. And it seems imperative upon the judge to make the order (11); but Patteson, J., refused to do so, in a case where the defendants were acquitted on the ground of there being no highway as charged in the indictment (12). The writ of certiorari, is, however, saved to the defendant by this latter section (13). After much expense had been incurred in carrying forward a prosecution at sessions, the defendant who had previously sued out this writ, gave notice of his having done so, and likewise notice of trial, upon which the prosecutor applied for the sessions' costs under section 98 above. But the court were unable to comply with the motion, although these costs had been rendered useless by reason of the defendant's conduct (14). But a procedendo was subsequently awarded in this case (15). However, where one inhabitant had removed the writ by certiorari, and entered into the usual recognizances to pay costs, the other inhabitants were not allowed to plead guilty (16).

see 1 Wils. 298; 1 Stark. 516; 1 Ch. Rep. 354. But the judgment in favour of the defendants may be stayed. See post.

(7) 1 Sess. Ca. 87. *R.* v. *Kingsmill*; see id. 180, *R.* v. *Tradgeley* & others.

(8) 5 & 6 Will. 4, c. 50, s. 98. Costs at the discretion of justices are given by other sections, in cases within the jurisdiction of such justices.

(9) Application need not therefore, of necessity, be made to the judge who tries the indictment, as formerly. 5 T. & R. 272, *R.* v. *Chadderton*. A certificate that the defence was frivolous has been deemed sufficient, without expressly awarding the costs. 6 T. R. 344, *R.* v. *Clifton*. And a rule for arresting the judgment will not retard the operation of the certificate. 6 M. & S, 130, *R.* v. *St. John's, Margate*. See also, 2 B. & Adol. 136, *R.* v. *Salwick*.

(10) 7 Dowl. P. C. 593, *R.* v. *Preston Inhabitants*; see 2 East, 413, *R.* v. *Upper Papworth*. Alderson, B., had refused these costs at the assizes, thinking that the court where the indictment was preferred, which was the court of quarter sessions, had the sole power of giving costs. 2 Moo. & Rob. 137, S. C.

(11) 9 C. & P. 218, *R.* v. *Yorkhill*.

(12) Id. 285, *R.* v. *Chedworth*.

(13) The rule for this purpose is nisi in the first instance. 5 D. P. C. 123, *R.* v. *Leeds*. The prosecutor was always considered to be entitled to his writ of certiorari, even without affidavit or recognizance. Cowp. 78, 2 Str. 1209. But see now 5 & 6 Will. 4, c. 33, s. 1, which requires that the prosecutor shall have the leave of the court for this purpose. But the crown whether prosecutor or defendant is entitled to it: see Say. Rep. 128.

(14) 5 D. P. C. 375, *R.* v. *Higgins*.

(15) 5 Ad. & El. 594; S. C. 1 Nev. & P. 50.

(16) 1 D. P. C. 527, *R.* v. *Luxborough*.

Costs, Certiorari.] Then, with regard to costs upon the writ of certiorari, the prosecutor is a party grieved within the statute of 5 Will. & M. c. 11, in this respect: as the constable of the manor within which the highway was situate (8). Or inhabitants who have suffered inconvenience from the circumstance of their way being out of repair (9). Or a justice of peace (1). But where the prosecutor did not apply for these costs until two years after judgment, and so far from having used the way, he declared he did not care about it, the court refused him costs as a party grieved under 5 Will. & M., although the prosecution had been at his instance and expense (2). Again, persons dwelling near a steam engine, whose smoke had caused them considerable annoyance, were considered to be parties grieved, so as to be entitled to their costs under this statute of William and Mary (3). The writ of certiorari, however, cannot be had after conviction. The defendants must not take their chance of succeeding at the sessions, and then come to the court for the purpose of objecting to the indictment (4). In the case of a private road, it seems that the court cannot entertain the writ, even with consent (5).

Staying the Judgment.—Judgment.—Consequences of Judgment as to the Record of Conviction and Acquittal becoming Evidence for and against the Parish and others.] It having been found the rule not to grant a new trial in cases of an acquittal for misdemeanor, and it being much doubted whether, even in cases of misdirection, such a proceeding can be adopted (6), the court of king's bench has resorted to the expedient of suspending the judgment in favour of the defendant. As where the county of Middlesex was indicted for the non-repair of a bridge, and the corporation of Kingston were also indicted for the same non-repair. Both cases stood for trial at the same time, and the indictment against the corporation was taken first. The indictment on the one hand, however, and the plea on the other, alleged an immemorial obligation on the part of the bailiffs of Kingston, who were modern officers, so that the corporation were acquitted on their indictment, and the county found guilty on theirs. Had the verdicts been respectively entered up, they would have concluded the county, and therefore the court suspended the judgment until a second indictment against the corporation could be tried. And upon this latter indictment the corporation were convicted (7). So, where the inhabitants of Wandsworth were charged with the non-repair of a highway, and a verdict was

(8) 3 M. & S. 465, *R.* v. *Taunton.*
(9) 7 T. R. 32, *R.* v. *Williamson*; 3 M. & S. 465, *R.* v. *Taunton.*
(1) See 2 T. R. 47; 5 T. R. 33, *R.* v. *Kettleworth.*
(2) 1 M. & S. 268, *R.* v. *Incledon.* The prosecutor was, moreover, a minor when the obstruction commenced, and his name was not on the back of the indictment. See 4 M. & S. 203, *R.* v. *Commerell* & another.
(3) 16 East, 194, *R.* v. *Dewsnap* & another.
(4) 1 B. & C. 142, *R.* v. *Pennegoes.*
(5) 4 Burr. 2522, *R.* v. *Micklethwaite.*
(6) See ante, 336, note.
(7) 1 B. & Ald. 64, note, *R.* v. *Middlesex.*

found in their favour, entirely at variance with the weight of evidence, the court suspended the judgment, in order that the prosecutor might try the question again, without the balance of a judgment against him (1). They, however, imposed a condition upon the prosecutor, that the inhabitants of Wandsworth should be examined at the next trial (2).

Again, the judgment will sometimes be suspended if the verdict be adverse to the parish or county. As in the case of an indictment for the non-repair of a bridge, where the plea of liability on the part of Mr. Marsack ratione tenuræ, was not maintained (3). But Lord Ellenborough added, that the county must repair without prejudice to their case before the second trial, if the public should require it, and Le Blanc, J., said that the county might proceed to indict the parishes they considered liable (4).

The judgment is that the defendants should pay a fine. And the amount of this fine must depend upon the opinion which the court entertain of the state of repair in which the road is, or is likely to be in a short time. For as there cannot be more than one fine upon each indictment, the prosecutor must have recourse to writs of distringas, or to another indictment, if the way be not put into repair (5). Should the court be assured of the repair, they will set a nominal fine (6). Otherwise there will be a *distringas in infinitum* until such amendment be certified (7). And one of the tests of repair is that the repaired way is ascertained to be in a condition to stand the winter (8).

It would seem from an old case, that an accident on the bad road, as the loss of a horse in consequence of the want of repair, might operate in aggravation of the fine. And thus Roll, C. J., set a fine of 20*l.*, observing that the county suffered by the neglect of the convicted parish (9). Moreover, in cases of inclosure, the court will give judgment to abate the encroachment until the ancient way be sufficiently repaired (10).

The application of the fine imposed after a conviction is declared to be towards the repair of the highways in the indicted parish. It is to be levied by and paid into the hands of such persons residing in or near the parish as the justices or court shall order. These persons are to account for the money thus delivered to them, or, in default, to forfeit double the sum received. And if any fine, &c.,

(1) Id. 63, *R.* v. *Wandsworth*. But this, as Lord Ellenborough observed, was indirectly granting a new trial. Id. 65, S. C., 2 Ch. Rep. 282.

(2) 1 B. & Ald. 66.

(3) 16 East, 223, *R.* v. *Oxfordshire*; S. P. 2 Ch. Rep. 215, *R.* v. *Southampton*; 5 B. & Adol. 52, *R.* v. *Sutton*; S. C. 2 Nev. & M. 57. It was refused in *R.* v. *Chigwell*; 1 B. & Ald. 67, note.

(4) 16 East, 225.

(5) 4 B. & Ald. 470, note, R. v. *Old Malton*.

(6) See 6 Mod. 163. Sty. 163. But they will not *quash* an indictment. The defendants must come in and plead guilty. 2 Ch. Rep. 214, R. v. *Lincomb*; 3 Smith, 575, R. v. *Loughton*, over-ruling Palm. 389. And upon a conviction for not repairing ratione tenuræ, the court would not set a small fine until the prosecutor's costs had been paid. 1 Sir Wm. Bl. 602, R. v. *Wingfield*.

(7) 6 Mod. 163, *R.* v. *Cluworth*; S. C., 1 Salk. 358.

(8) 5 D. P. C. 728, *R.* v. *Witney*.

(9) Sty. 366, *R.* v. *Stoneham*.

(10) 1 Keb. 894, *R.* v. *Hillarsden*.

s hall be levied on any inhabitant of such parish, he may complain to the justices at a special sessions, and the justices shall make an order upon the surveyor for the payment of the same to the applicant out of the highway rate, within two months after the service of the order(1). An application for relief should, however, be made in a reasonable time by the inhabitants. For where eight years had been allowed to elapse before a mandamus was applied for commanding the justices to make a rate for reimbursing certain persons, the court observed that the lateness of the application was fatal to the claim (2). This decision was come to, notwithstanding that applications had been made to the magistrates during the interval, that they had ordered an account of the money expended upon repairs only one year before the application, and that it had been the opinion of the justices that the parish had been improperly indicted (3).

The record of a conviction against the parish is binding upon the parish (4), unless fraud should have intervened, or some other circumstance which would imply that the parish had been surprised. Thus, where the parish of E., consisting of three townships, were indicted for the non-repair of a highway, and C., one of the townships, pleaded an immemorial custom for each township to maintain its own roads, it was held, that C. might adduce evidence to shew that upon a former trial and conviction of the parish for not repairing ways in A. township and B. township, pleas of not guilty by A. and B. were pleaded generally for the whole parish, with the privity of the inhabitants of C. Subject, however, to this evidence denying knowledge on the part of C. records of convictions against the parish of E. were deemed sufficient primâ facie evidence to disprove the custom claimed by the township of C. There was a verdict of guilty (5).

But a record of acquittal is not such conclusive evidence, although it is a millstone, to use the words of Lord Ellenborough, the weight of which it is impossible to resist (6). For other parties might indict the parish, and these persons cannot be bound by the former record. The acquittal, indeed, might have proceeded upon the want of proof that the road was out of repair (7).

Non-repair—Bridges.] The non-repair of public bridges being a nuisance, is an indictable misdemeanor, and the county is liable in the first instance (8); and each county in which a bridge is situated stands in the same position with reference to the repair of

(1) 5 & 6 Will. 4, c. 50, s. 96; see Dougl. 420, *R.* v. *Townshend* & another.
(2) 12 East, 366, *R.* v. *Justices of Lancashire.*
(3) Ibid.
(4) Peake, N. P. C. 220, *R.* v. *St. Pancras.*
(5) 2 Campb. 494, *R.* v. *Eardisland.*
(6) 1 B. & Ald. 63, *R.* v. *Wandsworth.* And therefore it was that the court suspended the judgment, in order that the prosecutor might go to a second trial without prejudice.
(7) Mann. Ind. 215.
(8) 13 Rep. 33; 2 Inst. 700.

bridges, as the parish with reference to highways within its limit. Consequently, if a bridge be out of repair, the county cannot discharge itself without shewing that it is not a public bridge, or that it has not been built in a proper manner, in conformity with the provisions of 43 Geo. 3, c. 59, or that some other body of persons or an individual is liable to the reparation demanded. And so strict is this principle, that although trustees be empowered to make and repair bridges, laying out their tolls for this purpose, yet the common law liability attaches no less upon the county, so that although there may be a remedy against the trustees, the county must repair in the first instance (9).

These exceptions, on the part of a county, may be made available, either by way of defence, or at once by indictment against the persons liable.

What a public Bridge.] Hence it follows, that a main test of the liability to repair, consists in the public nature of the bridge. And in order to satisfy this term of general utility, it is of course necessary that the place in question should be actually a legal bridge. So that if there be no flumen or cursus aquæ, this definition of bridge cannot be sustained, and the county or other persons charged cannot be liable. As where certain supposed bridges mentioned in an indictment appeared to be arches in a causeway adjoining to Chislehampton bridge, and that the arches were more than 300 feet from the main bridge. It was contended for the crown, that the additional arches thus indicted as bridges, were necessary to carry off the floods, and that water needed not at all times run under such arches in order to make them bridges. But the court directed that a verdict should be entered for the defendants. The arches might have been erected, not to improve the passage along the road but to benefit the owners of the adjoining land. And it was not found as a fact that the arches were built as a highway. Had they been erected at the same time as the main bridge, or had the inhabitants of the county repaired 300 feet beyond these arches, there might have been a strong ground for believing that the arches were part of the main bridge. Judgment for the defendants (1). From this, it appears, that the term "bridge," will be satisfied by a flow of water at certain periods, as during floods, or otherwise. The case was however brought forward again, when it appeared that there were five arched openings. Two of these were within 300 feet of the bridge, and the county had always repaired them. But the other three were beyond that distance, and these last were the arches concerning which the dispute had arisen. These were of value to the road, by reason of their carrying off the floods, but they were placed over low meadow ground, in a line with the main bridge. The court, again, gave udgment for the defendants. They said that the rule ought to be to hold the words, "flumen vel cursus aquæ," to be water flowing

(9) 4 B. & C. 194, *R.* v. *Oxfordshire*; S. C. 6 D. & Ry. 231; S. P. 2 East, 342, *R.* v. *West Riding*.

(1) 1 B. & Ald. 297, *R.* v. *Oxfordshire*, cited.

in a channel between banks, more or less defined, although such channel might be occasionally dry. This was not the case with the arches in question, which adjoined low meadow ground, and, accordingly, the verdict was entered in favour of the county (2). It is, therefore, a question of fact in each case, whether an arch thrown over the cursus aquæ be a bridge or not. The want of parapets to the arch will not prevent its being considered as a county bridge (3).

Again, a bridge will not be the less a public bridge, because its utility is confined to certain periods of the year. As if it be necessary to keep such a structure in repair, during times of flood (4). So when a bridge was only used with carriages in times of flood, or frosts, when it was unsafe to pass though the neighbouring river, Lord Ellenborough said, it was not necessary that the bridge should have been open at all times, in order to support the indictment. There might have been a highway through the ford, and the people might have gone upon the adjoining land, to the great detriment to the owner when the road was bad. The bridge, therefore, might have originated in the convenience and for the protection of an individual, but still it may be of public right (5). So where there were a causeway and bridge, which were only used in case of floods, but which nevertheless were always open to the public, Abbott, C. J. held, that the county must repair. The bridge had neither parapets nor rails, nor did not appear that, for the sixty or seventy years of its existence, it had ever been repaired. In very high floods the bridge itself as well as the ford was impassable. Verdict guilty (6). Moreover, a change of situation, or of size, or of the nature of the bridge, will not destroy the liability to repair. On the contrary, in some cases, if the alteration should have tended to the convenience of the public, it will rather induce that liability; and even if a bridge altogether new were erected, it was formerly the law, that if such a bridge contributed to the public convenience, the county must repair it. This rule, however, has been altered by an act of parliament, to which we shall presently invite attention.

Certain townships enlarged a foot bridge to a horse bridge (7), and soon afterwards to a carriage bridge at their own expense. The West Riding, however, was indicted for the non-repair of this bridge. It had never been repaired by the West Riding, and there was another bridge which served for the same road; the issue was, whether these townships had immemorially repaired a carriage bridge, and the jury found for the defendants. But the court

(2) 1 B. & Ald. 289, *R.* v. *Oxfordshire.*

(3) 4 Nev. & M. 594, *R.* v. *Whitney*; S. C. 3 Ad. & El. 69; S. C. 7 C. P. 288. If a judge at nisi prius be asked whether a particular structure is a bridge, and he say, that according to *his view of the facts*, he is of opinion that it is not, the verdict cannot be impeached, on the ground of misdirection, if that opinion be incorrect. 3 Ad. & El. 69.

(4) See 4 Campb. 189.

(5) 2 M. & S. 262, *R.* v. *Northamptonshire.*

(6) Ry. & M. N. P. C. 144, *R.* v. *County of Devon.* See also, 2 Campb. 455, *R.* v. *Surrey.*

(7) It seems, that an ancient horse and foot bridge, is a bridge which comes within the general obligation to repair. 13 East, 95, *R.* v. *Salop.*

granted a new trial, for the townships could never be said to have repaired immemorially a carriage bridge, which was of modern construction. And by Buller, J., It is true, that by enlargement, a party may not extinguish his liability, but he shall only repair pro ratâ, otherwise the county must repair all bridges of public utility (8). So again, where a parish had been liable by prescription to repair an ancient wooden foot bridge, and the trustees of a turnpike road had built a bridge of brick in its room, which had been used by carriages ever since, it was held that the county could not set up a plea of immemorial repair by the parish of this bridge, and a verdict passed against the county (9).

Even where it was pleaded by the inhabitants of a riding, that a township had immemorially repaired a certain foot bridge till it was taken down, and that they had since repaired the new bridge erected in lieu thereof, which new bridge was the subject of the indictment, judgment was given for the king against the inhabitants of the riding. For the bridge was of public utility, and constantly used by all persons passing by that road (1).

So where a bridge had been built by a private individual, whose tin works could not be carried on without the use of the bridge, but it likewise appeared that the public had constantly used it, Lord Kenyon directed the jury to find for the crown, and no motion was made for a new trial (2). So where a party was bound *ratione tenuræ* to repair a carriage bridge, but certain trustees constructed a foot bridge by the side of the carriage bridge, to which it was fastened, and by which it was principally supported, it was held that the county must maintain this foot bridge (3).

It follows, a fortiori, that the destruction of a useful bridge cannot deliver the county from its obligation. Queen Anne built a bridge at Datchet in lieu of a ferry, and the crown repaired this bridge till 1796. It was at length taken down, and the materials were converted to the king's use (4). The county of Bucks was then indicted for the non-repair of this bridge, and the court were clearly of opinion that this was a public bridge, and as such repairable by the inhabitants of the shire (5).

It being admitted then, without reference to any bridge in particular, that it is of public utility, and it being shewn, moreover, that a limited user according to the season, or a change in its nature, size, or situation, will not make it the less a public structure, but that on the contrary its enlargement or other improvement will rather have a tendency to throw the burden of repair upon the community who use it: we will proceed to set forth what, in reality, may be successfully urged as a defence to an indictment against the county, and, afterwards, who shall be said

(8) 2 East, 353, note. *R.* v. *West Riding.*

(9) 2 Camp. 455, *R.* v. *Surrey.*

(1) 5 Burr. 2594, *R.* v. *West Riding;* S. C. 2 Sir Wm. Bl. 685. The *Glusburne Bridge* case, S. P. *R.* v. *Lancashire,* cited; 2 East, 352.

(2) 2 East, 356, *R.* v. *County of Glamorgan,* cited; S. P. Id. 342, *R.* v. *West Riding;* 1. Salk. 359.

(3) 3 B. & Ald. 201, *R.* v. *Middlesex.*

(4) See 6 East, 154.

(5) 12 East, 192, *R.* v. *Bucks.*

to be the inhabitants of such county subject to the reparation in question; and, lastly, what is the nature of the repair required.

By 22 Hen. 8, c. 5, s. 1, the condition of bridges in the highways was placed under the oversight of justices at their general sessions, who were to take care that the same were reformed, and that the parties liable to repair should be pointed out (6). By sect. 3, where it cannot be known what hundred, town, parish, or person ought to repair, the inhabitants of the county shall repair, unless the bridge be within a city or town corporate, in which case the city, &c. shall repair. If part of the bridge be in one shire, or city, &c., and the other part in another, the respective shires, cities, &c. shall repair within their several limits. (7). The statute 1 Anne, s. 1, c. 18, confirms this act of 22 Hen. 8.

By 14 Geo. 2, c. 33, s. 1, justices may, at their sessions, agree with any person for the purchase of land, in order the more conveniently to enlarge or rebuild a bridge, provided the purchase do not extend beyond one acre of land. The charge (8) is to be defrayed from the county rate. Similar provisions will be found in 43 Geo. 3, c. 59, s. 2, together with a provision for impannelling a jury, and assessing compensation in case the owners of such land cannot be treated with; and by 54 Geo. 3, c. 90, s. 1, the powers of 43 Geo. 3, c. 59, were extended to any buildings which might be necessary to be purchased for the purposes of the act.

By 43 Geo. 3, c. 59, s. 5, no bridge thereafter to be erected at the expense of an individual, private person, or corporation, shall be deemed to be a county bridge, or bridge which the inhabitants of a county are liable to repair, unless it be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or other person appointed by justices at their sessions (9).

This act of 43 Geo. 3, is extended by 54 Geo. 3, c. 90, to bridges

(6) See 2 Inst. 701, 702.

(7) See Tho. Raym. 384, *R.* v. *Essex*. It was a new provision, that a hundred could be charged by prescription. By Powell, J., 2 Ld. Raym. 1251. Where a new district was added to a city, it was held, that the inhabitants of the city generally must, nevertheless, repair the bridges in the new district; 2 Ld. Raym. 1249, *R.* v. *Justices of St. Peter's Liberty, York*. In this case, the writ of mandamus was quashed, because the rate for repair was not rightly made by the justices of the particular district. It ought to have been made by the justices of the city generally. See 2 Inst. 697. It seems, also, that if there be no bridge within the limits of a corporation, they may be charged towards the county repairs. 1 Keb. 687; Skin. 254. See 1 Hawk. c. 77, s. 25. If a bridge be partly within a franchise, and the residue be within a gildable, the repair shall be done in proportion, and so mutatis mutandis. 2 Inst. 701. Supposing that a corporation were dissolved, it has been said, that if the inhabitants were named, the lands would still be chargeable. 2 Keb. 43, *R.* v. *Colchester*, indicted for non-repair of a bridge. The rest of this act relates to the mode of taxation, to the process, and the costs and charges.

(8) Not only the purchase money of the land, but likewise the contingent expenses of an abstract of title, the draft of conveyance, &c. By Buller, J., 4 T. R. 596.

(9) The 7th section excepts bridges repairable by reason of tenure or prescription, from the provisions of the act; and adds, that nothing in the act shall alter or affect the right to repair roads or bridges liable to that obligation.

and roads at the end thereof, repairable by the inhabitants of hundreds and other general divisions in the nature of hundreds, in like manner as if the same were repairable by counties (1). Taking a view, therefore, of these statutes, it appears that more than one line of defence is open to a county indicted for the non-repair of a bridge.

It may, however, be observed in passing, that the statute 22 Hen. 8, was, for the most part, only declaratory of the common law, and, consequently, if any bridge were not to come under the provisions of that act, and were not excluded by 43 Geo. 3, c. 59, it would still be indictable at common law.

No surer mode of defence could be suggested than that the bridge indicted is not a public way. (2) And since the 43 Geo. 3, c. 59, it is an equally good ground of defence that the structure has not been erected under the superintendance of a competent authority. It is, nevertheless, very evident that the statute contemplated new bridges only. Certain trustees built a bridge across a stream, where a culvert would have sufficed. They widened it after the passing of 43 Geo. 3, c. 59, and upon an indictment against the county, it was contended, that this alteration in the width had created a new bridge, so that the intervention of the county surveyor became necessary. But Lord Tenterden remarked, that the case of a bridge widened did not appear to have occurred to the legislature, and the rule prayed for to shew cause why a verdict of acquittal should not be entered was refused (3). So where a county bridge, which had been washed away, was rebuilt, since the 43 Geo. 3, partly with the same materials, and in the same line of passage as before, without notice to the county surveyor, the court held that it was not a new bridge, and that the county must do the repair (4). Trustees having built a bridge, it was contended, that they could not be considered as individuals or private persons within the 43 Geo. 3, c. 59, but the court entertained a different opinion, and the county was convicted (5).

Another ground of discharge might be, that the bridge in question is absolutely unnecessary, or that there is another bridge equally commodious, although this line of defence would be viewed with jealousy. But where a bridge had been made where a culvert would have been sufficient, the court would not discharge the county, especially as it appeared that the bridge was better for the public (6).

But the chief topic of defence on behalf of a county is the obligation which another body of persons or another individual has

(1) See post. 52 Geo. 3, c. 110; 55 Geo. 3, c. 141.

(2) Although the bare fact of the bridge having being repaired by private persons, it is not of itself entitled to much weight. 2 M. & S. 262, *R.* v. *Northamptonshire.* "It might, however, be a link in the evidence, to shew that the passage over the bridge was not of public right, but of sufferance." Id. 265.

(3) 2 B. & Adol. 813, *R.* v. *Lancashire.*

(4) 2 Nev. & M. 212, *R.* v. *Devonshire.*

(5) 3 B. & Adol. 147, *R.* v. *Derbyshire.*

(6) 2 B. & Adol. 813, *R.* v. *Lancashire.*

encountered to repair the bridge. No one can be compelled to make a bridge where none existed before (7), unless it be by act of parliament. But there may be an immemorial liability to repair it when built; and thus a section of a county, as a hundred, may be charged; or a township, by a similar obligation. Or an individual *ratione tenuræ*. It was said, indeed, upon one occasion, that a hundred was a limited district, and, therefore, not liable by prescription; but the court paid little attention to this objection. It was added, however, that a township was annexed by statute to the hundred of Oswestry in the time of Hen. 8, (which was the district indicted,) so that the unity being broken, it could not be affirmed that the hundred was liable immemorially. The court, however, repudiated this objection also, for the statute which annexed the township directed that the inhabitants thereof should do every thing which the inhabitants of the hundred were bound to do. Judgment was accordingly given for the crown (8).

If an abbot and his predecessors have, time out of mind, repaired a bridge, of alms, they are liable to repair (9). The lord of a manor may be chargeable by prescription, or by reason of tenure (1). And if the lands of the manor come to be divided into several parcels, each alienee, being a tenant of the demesnes or services is liable to the whole charge in the first instance, although there shall be contribution afterwards (2). A corporation may be liable by prescription, or ratione tenuræ (3). But it is scarcely necessary to observe that the respective tenements must be immemorial. Where documents were produced in evidence, showing that a mill, in respect of which the obligation to repair a bridge was said to have arisen, did not exist before the reign of Hen. 8, Tindal, C. J. directed an acquittal (4).

A person or company may, moreover, be chargeable under an act of parliament. As, where the proprietors of a navigation were permitted by a special statute to amend and alter any bridges or highways which might hinder their navigation, provided they should leave in the room thereof others as convenient. Forty years since they accordingly destroyed a ford across the river, and built a bridge; and it was contended on their behalf, that as this bridge was of public utility, they could not be held liable to rapair it. But the court were of a contrary opinion, and ordered that a verdict should be entered for the county, for the condition originally

(7) Magna Charta 9 Hen. 3, c. 15; 2 Inst. 701.

(8) 6 M. & S. 361, *R.* v. *Hundred of Oswestry*. See 1 Str. 177, *R.* v. *Norwich*.

(9) 10 Ed. 3, 23; 44 Ed. 3, 31; 13 Rep. 33.

(1) 1 Salk. 358, *R.* v. *D. of Buckingh* & others; S. C. 2 Lord Raym. 792, 804, nom. *R.* v. *Bucknall*; S. C. 7 Mod. 55.

(2) 1 Salk. 358; S. P. Sir William Jones, 273, case de *Loddon Bridge*. And the lord cannot discharge those who purchase of him from the obligation due to the public, although he himself may be bound. 1 Sall. 358.

(3) 2 Inst. 709. 14 East, 348, *R.* v. *Mayor, &c. of Stratford-upon-Avon*. A corporation may be bound by usage and prescription, being local, and having a perpetual succession; but a private person cannot be bound by the act of his ancestor without a lien or binding and assets. 2 Inst. 700.

(4) Moo. & M. 401, *R.* v. *Hayman*.

imposed upon these proprietors was a continuing condition. They could not leave another convenient passage in the highway without making and keeping up a bridge (5).

The case of *R.* v. *Kent* was forthwith acted upon. A canal company was authorized by act of parliament to make the river Bain navigable, and, amongst other works, to build bridges. They deepened a ford in pursuance of these plans, and thereby rendered a bridge necessary, which they built at their own expense. They repaired the bridge in the only instance in which it needed repair, and the county had never done any repairs to it. The court, upon an indictment being preferred against the county, could not distinguish this case from *R.* v. *Kent*, and a verdict was entered for the county (6). The act, it was observed, only authorized and empowered the company to execute works, it did not compel them (7); and they were likewise enabled to *discontinue* any bridge, amongst other things; whence it at once followed, that the inhabitants of a county could not have by law a permanent burthen thrown upon them to repair a bridge of which they had not the permanent use and enjoyment secured to them (8). Upon a similar occasion it was contended on the part of the defendants, that in *R.* v. *Kent* and *R.* v. *Lindsey* it had been found that the respective companies had first built the bridges in question, whereas, in the present case, it did not follow that those who made the act, although for their own benefit, had likewise built the bridge. Moreover the act then under consideration neither mentioned bridges nor conditions, but, on the contrary, supposed that the concern might not be beneficial to the undertakers, by reason of the words "in case they they shall undertake the same" being introduced. But the court gave judgment for the crown upon an indictment against an individual for non-repair (9); for if occasion required that a public highway should be cut through, the duty of those who interrupted the way was to furnish a substitute to the public by means of a bridge (1). Indeed, the case might be said to be stronger in favour of the county, for here the highway itself had been cut through, whereas in *R.* v. *Kent* the inconvenient ford had been exchanged for a good bridge, but what benefit does the county derive from passing over a bridge instead of the solid highway (2)? The defendant in the last case had been convicted upon a former trial for the non-repair of this bridge, but the judgment against him was reversed upon error for defects in the indictment which we shall have an opportunity of noticing hereafter.

A distinction, however, was at one time supposed to exist upon this head with reference to cases where the public convenience coincided with private benefit, independently of any act of parliament. And it was thought that if the benefit were continuing, the private person would be liable. As, if one should make a cut

(5) 13 East, 220, *R.* v. *Kent.*
(6) 14 East, 318, *R.* v. *Lindsey* in Lincoln.
(7) Id. 322.
(8) Ibid.
(9) 3 M. & S. 526, *R.* v. *Kerrison.*
(1) Id. 531, Lord Ellenb.
(2) Id. 532, Bayley, J.

for the use of his mill, and build a bridge (3). The party might have been guilty of a nuisance in making the cut, which the public might have prevented; but as he continued it for his own benefit, he must be held liable to repair (4). Still it was said, that if the public lie by without objecting, and use a bridge, it is evidence of their being willing to adopt it as their own; so that, if it were of public benefit, the burden of sustaining it should be public likewise (5). But it is now settled that the repairs of a bridge built by a private person without reference to 43 Geo. 3, c. 59, shall be borne by the county. A miller, about 40 years before the trial, erected a mill, by which he deepened the ford. The miller subsequently built a bridge. The ford was inconvenient and even unsafe before the building of the mill, and the water rather increased after the building. The public used the bridge as soon as the miller had built it. And the court held, upon these facts, that the county was liable. Here was no act of parliament, and the authorities were uniform that if a private person build a bridge, which afterwards becomes of public convenience, the county is bound to repair it (6). The court, moreover, cited the case mentioned by North, Att. Gen. in an old case to the same effect, with approbation (7). It is evident, nevertheless, that if a bridge be not of public utility, or if it be erected in a place where a solid highway or another useful structure existed before, the burthen of repair or of any extra improvement must not rest on the county, but upon those who have caused the innovation.

The liability of a county may be suspended under the provisions of an act of parliament. As where trustees were authorized to take down and rebuild a bridge over the Tone, taking tolls in respect thereof, which tolls were to cease as soon as the purposes of the act should be fulfilled. It was held that the county could not be liable to the repair of the bridge during the continuance of the powers of the act, which vested the bridge in the trustees (8).

Consideration.] The question of consideration sometimes arises in the case of bridges as well as of ordinary highways. No consideration need appear in the case of those who are bound by a primary obligation, as a county, or a hundred or a township where the liability has arisen beyond time of memory, because the hundred and township stand in the situation of the county in a legal view. But an individual must be charged by virtue of some consideration which appears on the record, or by a legislative enact-

(3) 2 East, 350, citing 1 Ro. Ab. 368.

(4) 2 East, 350, Lord Ellenb.

(5) Id. 348, Lord Ellenb.

(6) 2 M. & S. 513, *R.* v. *Kent*, where the court said they had referred to the record mentioned in Rolle's Abridgment, and found it had no relation to the right of the mill-owner and the public, as supposed by Lord Rolle. See an extract of the record, 2 M. & S. 520.

(7) In *R.* v. *Wilts*, 1 Salk. 359.

(8) 16 East, 305, *R.* v. *County of Somerset*. "If the trustees are dilatory in executing the powers of the act, I am inclined to think that the court, upon application, would lend its aid to expedite their functions." Id. 308. By Lord Ellenborough.

ment which must be set forth. Inasmuch, however, as the obligation in all these instances extends no further than to repair such bridges as are within the county or township, a consideration must be shown if it be sought to impose on them the amendment of a foreign structure. Therefore, where the inhabitants of two parishes were indicted for not repairing a bridge in Wales, and an immemorial obligation by reason of tenure was set forth, it was objected upon a writ of error brought to reverse the judgment against these inhabitants, that there was no averment in the indictment of the bridge being within the town, or that the inhabitants being charged by reason of tenure were a body corporate; and the objection was holden fatal. For first, here was no special consideration, supposing that the bridge were without the town; and next, if the bridge were *within* the town, the defendants could not be liable in their character of inhabitants, by reason of the tenure of lands (1).

Who are inhabitants liable to repair (2).] Every person dwelling in any shire, riding, city, or town corporate, and having lands, &c. where the bridge is, is a person liable to contribute to the repair of it (3). So if he dwell in a foreign county, but have lands in the county where the bridge is situate (4). So any corporation or body politic residing in any county, or having lands in a county where the bridge is (5). So the husband of a feme covert (6). So an infant who hath house or lands by descent or purchase (7). But this must be interpreted as in the person of his guardian in socage, who is liable if he be in possession (8).

Nature of the Repair required.] The power of justices at sessions, as the representatives of the county in matters of this nature may be considered with regard to the common law and the statutes which have been made concerning the repair of bridges. First, as to changing the situation of the bridge, there might at common law have been an ad quod damnum writ to do this, or it might have been altered by authority of parliament, but the justices could not effect it by virtue of their authority until the 14 Geo. 2, c. 33 (9).

At common law the county is not even obliged to widen an ancient bridge. Lord Kenyon, indeed, mentioned a case in Cumberland, upon the consideration of which the court strongly intimated, that a bridge, though formerly adequate to the purposes intended, ought to be widened, if the public exigencies required its enlargement (10). The case then went to the House of Lords, but Macdonald, C. B., who delivered the opinion of the judges, said, it must be presumed, after verdict, that the over

(1) 2 B. & C. 166, *R.* v. *Machynlleth & Pennegoes.*
(2) Inhabitant is the largest word of the kind. 2 Inst. 703; 4 B. & C. 778.
(3) 2 Inst. 703. See 4 B. & C. 778.
(4) 2 Inst. 702.
(5) Ibid.
(6) Ibid.
(7) Ibid.
(8) 5 Nev. & M. 353, *R.* v. *Sutton*; S. C. 3 Ad. & El. 597. See likewise 8 Ad. & El. 516. If the guardian be not in possession—quære?
(9) See 6 Mod. 307; 5 T. R. 283.
(10) 6 T.R. 194, *R.* v. *Cumberland.*

narrowness of the bridge had been occasioned either by some addition having been made to the inside of the battlements, or from some other cause, by which the ancient width of the bridge had been contracted, and, consequently, the general question of liability to widen a bridge could not be entertained upon that record (1). However, this obligation to widen was discussed and decided in the negative upon a later occasion; and the court noticed, that the only authority in favour of the proposition was the dictum of Lord Kenyon: Bayley, J. also observing, that, as in *R.* v. *Stretford*, the inhabitants of a parish could not be compelled to enlarge a way, so the inhabitants of a county were under no obligation at common law to widen a bridge. Judgment was therefore given for the defendants (2).

However, although this widening is not compulsory, we have seen that the st. 14 Geo. 2, c. 33, speaks of enlarging and rebuilding bridges. And Buller, J. observed, upon that act, that it impliedly gave the power even of altering the position of a bridge to suit the convenience of the public (3). And by 43 Geo. 3, c. 59, after placing the county surveyor of bridges on the same footing with the parish surveyor of highways with respect to his power of getting materials (4), it was enacted by sect. 2, that wherever any bridge repairable by the county should be found to be narrow and incommodious, the justices at quarter sessions might order and direct such bridge to be widened, improved, and made more commodious; and that where any bridge should be found so much decayed as to render the taking of it down expedient, the justices might order it to be rebuilt, either on the old site or elsewhere, provided it were contiguous to or within 200 yards of the former bridge The 7th section excepts bridges repairable by any person or corporation by reason of tenure or by prescription. The stat. 54 Geo. 3, c. 90, s. 2, extends the powers of the act 43 Geo. 3, c. 59, to bridges repairable by the inhabitants of hundreds, and other general divisions in the nature of hundreds, except in respect of bridges thereafter to be erected and built. Further, by 55 Geo. 3, c. 143, after giving power to the surveyor to take stones for materials, under certain restrictions, (sect. 1,) and regulating the summoning of juries in case of inability to treat (secs. 2, 3, 4), it is enacted by sect. 5, that justices may contract for the repair of any county or hundred bridge for seven years, but not for less than one year, and may order sums of money to be paid for such repair accordingly, without giving public notice at their sessions of such intention to contract; and although no presentment of insufficiency, decay, or want of repair shall have been made. Nevertheless, before any such contract be made, the justices shall cause notice to be given in some public paper circulated in the county, city, riding, hundred, division, town corporate, or liberty, of their intention to contract (5).

(1) 3 Bos. & P. 354, *The County of Cumberland* v. *The King*, in error. See 2 Campb. 457.

(2) 4 B. & C. 670, *R.* v. *County of Devon*; S. C. 7 D. & Ry. 147; S. P. Id. 676, *R.* v. *Lincoln*, cited.

(3) 5 T. R. 283.

(4) See also sect. 3.

(5) See also 12 Geo. 2, c. 29, s. 14; 52 Geo. 3, c. 110, s. 5; see also Id. s. 2, 3, 4, as to the superintendance of the repairs, and payment

By 7 & 8 Geo. 4, c. 27, s. 17, when any bridge upon a turnpike road ought to be repaired by any particular person, body politic or corporate, by reason of tenure or otherwise, or where any composition has been entered into or made in lieu thereof, such bridges shall be repaired, or composition paid in such manner as the same were respectively maintained and kept in repair, or paid before the passing of 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95, or under the provisions of any local turnpike act.

Highways at the end of Bridges.] The next point to which we invite attention is the repair of that portion of the road which adjoins a bridge at either end of it. Three hundred feet of road at each end are repairable by the county (6), or other parties liable to repair the bridge itself, and not by the parish, in the case of all bridges erected before the passing of the late highways act, 5 & 6 Wm. 4, c. 50.

This provision of 22 Hen. 8, c. 9, was only declaratory of the common law (7). It was, indeed, endeavoured upon one occasion, on the part of the West Riding of York, to deny this liability (8); and the case was carried up to the house of lords, the court of king's bench having given judgment against the riding, but, after considerable argument, the judgment below was affirmed (9). Indeed, all the statutes recognize this liability, as pointed out by 22 Hen. 8, c. 9. Thus the act 1 Ann. st. 1, c. 18, speaks of the highways at the ends of bridges. The 12 Geo. 2, c. 29, unites the highways adjoining bridges to the mention of bridges. The 43 Geo. 3, c. 59, speaks of roads at the ends of bridges. So, likewise, the 52 Geo. 3, c. 110. The 54 Geo. 3, c. 90, has similar words. And the 55 Geo. 3, c. 143, takes in these roads at the ends of bridges. It is, in fact, an intendment of law, in the absence of evidence to the contrary, that the liability extends to 300 feet (1). So that a party who is by prescription liable to repair a bridge must likewise repair the highway at each end to the extent of 300 feet. And it was held to make no difference that the party had only repaired the fabric of the bridge, and that the commissioners under a turnpike act had done the only repairs which had been known (2). This obligation rests upon the county where the bridge is, although the end of the road may be in another county. But it is worthy of remark, that if a new bridge were built upon the three hundred feet of road in the stranger county, the same liability which compelled the repair of the road would not attend to the bridge. There was a bridge in Dorset, and, as it divided that county from Devon, the inhabitants of Dorset repaired the 300 feet on the Devon side. About 150 feet from this bridge, however, was a ford, and an individual built a small bridge over the ford, which was considered as having been adopted by the county of Devon, and as soon as it required

of the money required for them, which is to be paid out of the county rate. 12 Geo. 2, c. 29, s. 1; see 4 T. R. 595.

(6) 22 Hen. 8, c. 22, s. 9; see 2 Inst. 705.

(7) 43 Ass. pl. 37.

(8) 7 East, 588, *R.* v. *West Riding.*

(9) 5 Taunt. 284; S. C. 2 Dow. 1.

(1) 3 Nev. & P. 273, *R.* v. *Mayor of Lincoln*; S. C. 8 Ad. & El. 65.

(2) 8 Ad. & El. 65; S. C.

repair, the inhabitants of Devonshire were indicted for the omission. But they said that it was an appendage to the bridge in Dorset, and that as Dorset repaired the one, they must take this also, as being within the 300 feet of road. The court, however, were clearly of another opinion, and a rule for setting aside a verdict for the crown was refused (3). And Lord Ellenborough said, that in this case each bridge was a substantive bridge in a different county. While the place continued to be a road, it was repairable as part of the old bridge [in Dorset], but as soon as a substantive bridge was built on the Devonshire side it became, according to the statute, repairable by the inhabitants of the county in which it was situate (4).

This liability resembles that of highways and bridges in almost all other respects. Thus, a township, when liable from time immemorial to repair this amount of road, stands in the same light as a county; so that no consideration need be stated upon the record. It was once attempted to impeach a plea by the county casting the burthen upon a township, on the ground of there being no averment of consideration. But the court was quite clear upon this point, and judgment was given in favour of the plea, and for the defendants (5). By the new act respecting highways (6), however, this obligation is removed from the county or hundred, or township, &c., and placed upon the parish. By sect. 21, if any bridge shall hereafter be built, which by law may be repairable by the county, or by any part thereof, all highways leading to, passing over, and next adjoining, shall be repaired by the parish, person, or corporation, or trustees of a turnpike road, who were before bound to repair the highways. Then follows a proviso, that nothing therein contained should discharge any county, or part of any county, from repairing, or keeping in repair, the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof.

Hence it follows, that whilst the hundred or township becomes exonerated, as well as the county, from these repairs, a person liable *ratione tenuræ*, or otherwise, or a corporation, remains under the obligation. Were it otherwise, a party who ought to repair a portion of ground by reason of his tenure would have been enabled to relieve himself of a liability for which a consideration originally existed, and impose it upon the parish.

Proceedings.] The usual proceeding against defendants for non-repair of bridges is by an indictment, or a presentment (7). But presentments are at an end with respect to all bridges except county bridges, the highways act having expressly abolished that mode of proceeding against inhabitants, or other persons, on account of any highway or turnpike road (8). And in should be noticed, that the interpretation clause (9) of that statute includes

(3) 14 East, 477. *R.* v. *County of Devon.*
(4) Id. 478.
(5) 4 B. & Ald. 623, *R.* v. *West Riding.*
(6) 5 & 6 Wm. 4, c. 50.
(7) See 2 Inst. 701.
(8) 5 & 6 Wm. 4, c. 50, s. 99; see 3 Nev. & P. 502, *R.* v. *Mawgan*; S. C. 8 Ad. & El. 496.
(9) 5 & 6 Wm. 4, c. 50, s. 5.

bridges (except county bridges) within the term highways. It might certainly be made a question, whether the words "county bridges" would comprehend such bridges as a hundred or township standing in the place of a county by virtue of immemorial usage ought to repair. Probably the legislature intended that the hundred or other division should be included, and if it be so, the presentment would chiefly be in force in the case of corporations and private individuals.

As to the indictment, it may still be entertained at common law. Moreover the statute 5 & 6 Wm. 4, c. 50, s. 95, enacts, that justices shall direct a bill of indictment to be preferred where the duty or obligation of the repair of a highway is denied. And as the interpretation clause includes bridges, except county bridges, within the term "highways," those which are repairable by persons or corporations will seem to come within this 95th section.

An information will also be granted by the court of king's bench under particular circumstances (1).

But an action will not lie (2). The plaintiffs brought an action against the county of Devon for an injury done to their waggon by reason of the non-repair of a bridge, which the county ought to have repaired, but the defendants demurred, and the court, after hearing the argument of counsel, gave judgment for them (3).

The high constable sometimes presents a public bridge as being out of repair. If, however, he do so, he must go before the grand jury, and give his evidence upon oath. He is not like a justice, whose presentment has, by statute, in some cases, the force of a presentment by a grand jury. Therefore, although it was stated upon affidavit that this practice had prevailed upon the western circuit for forty years, the court made a rule absolute for quashing a presentment made without oath (4). A writ of prohibition to justices, commanding them not to pull down an old bridge until the completion of the new, is not a proceeding which the court will sanction. Although it was stated that much inconvenience would ensue from such a removal of the old structure under the circumstances mentioned, the court refused a rule, for there was a remedy by indictment, and they put the case of an order of the magistrates, directing a new bridge to be built on the old site, when the old bridge could not have been continued (5).

By 22 Hen. 8, c. 5, s. 5, supposing the bridge to be in one shire, and the persons or lands charged in another, or if the bridge be in a city or town corporate, and the persons liable are not within such city or town, the justices of the shire, city, or town may hear and determine such annoyances, if within the limits of their commissions. And if the annoyance be presented, they may

(1) See 3 Mod. 119, *R.* v. *Surrey*; 1 Str. 177, *R.* v. *Norwich*.

(2) Vaugh. 340.

(3) 2 T. R. 667, *Russell* v. *The Men of Devon*.

(4) 7 B. & C. 514, *R.* v. *Bridgwater and Taunton Canal Company*, for a nuisance by erecting a swing bridge across the highway; S. C. 1 M. & Ry. 272; nom. *R.* v. *Justices of Somerset*.

(5) 15 East, 594, *R.* v. *Dorset Justices*.

make process into every shire within the realm against such as should repair, and act in every respect as though the persons or lands chargeable had been in the same shire, city, or town where the annoyance existed.

The matters necessary to be presented are, that the bridge is a public bridge, and that it is out of repair, which must be shewn in the order for the rule (1). But where the liability to repair cannot be fixed conveniently, it is said that inquiry should be made by the great inquest for the body of the county at the general quarter sessions, and then, if no person in particular be found liable, a general presentment that the bridge is in decay may be made (2).

Indictment.] It is usual to say, upon indicting a public bridge, that a certain bridge called ———, &c., in the highway leading from A. to B., being a common highway for all the liege subjects, &c., with horses, carts, and carriages to pass and repass, &c., at their free will and pleasure, on &c., was and still is in great decay, so that the liege subjects, &c., cannot pass and repass as they have been accustomed, to the great damage, &c. (3), and that the inhabitants of the county are liable to repair the bridge in question. If the prosecution be against an individual *ratione tenuræ*, it must be alleged that the bridge has existed from time immemorial (4), and that the person charged by reason of his tenure (5) of certain lands lying in A., in the said county, is bound to repair and amend the same (6).

The words, "at their free will and pleasure," must be omitted or modified, if the right to pass over the bridge be qualified. As where a bar across a bridge was kept locked, except in times of flood. It was attempted by the counsel for the prosecution to justify the indictment, because the words "at all times of the year" were not introduced, and these words, "at their free will and pleasure," must mean when need and occasion required. But Lord Ellenborough was clearly of opinion, that as the public had only a right to use the bridge in times of flood, the statement contradicted the right proved. The meaning of "free will and pleasure" was, that the public might, at all times and seasons, prefer crossing the bridge with their carts and carriages to crossing the ford. The defendants were, consequently acquitted (7). This is very different from the case where the bridge was *open at all times* to the public, but they only used it during floods. In this case the county was held liable (8). However, it does not seem necessary to say that the bridge is in the highway (9), nor that it is a common highway (10). Although the county where

(1) Andr. Rep. 285.
(2) 2 Inst. 703; see also 1 Ann. st. 1, c. 18, with respect to the order of justices for making a rate; Andr. Rep. 101, 285, *R.* v. *Middlesex*.
(3) See 2 Leon. 183.
(4) See 2 East, 353, note, *R.* v. *West Riding*.
(5) These words are necessary, Godb. 346.
(6) See Stark. C. P. 701.
(7) 4 Campb. 189, *R.* v. *Marquis of Buckingham* & others.
(8) Ry. & M., N. P. C. 144, *R.* v. *Devon*.
(9) Sty. 108, *Spiller's* C.
(10) 6 Mod. 256, note (a); see id. 255, *R.* v. *Saintiff*; S. C. 2 Ld. R. 1174.

the bridge is situate must be stated (1), and the nature of the passage, as for horses, carts, or carriages, should be mentioned (2). For if the indictment describe the bridge as a public carriage bridge, and likewise for persons to pass and re-pass on foot, and the proof be that although passengers may use the way on horseback and on foot, they cannot do so with a carriage, the defendants cannot be convicted (3).

The ruinous condition of the bridge forms an essential averment (4). But the length of way out of repair is not of so much consequence. So that where the indictment charged that half of the bridge was out of repair, the court held it sufficient without saying so many feet in length and in breadth (5).

From the sketch above set out it may be collected that a county may be charged as of common right, but that a hundred, parish, or other section must be stated as under an immemorial obligation to repair. Care must be taken not to encumber this immemorial allegation with facts of modern creation. As a new office (6) or a bridge of different character from the old one (7). But no other ground of liability than immemorial usage need be brought forward against a parish (8), and no consideration need appear upon the record unless it be in the case of a corporation or private person, or where the bridge is not within the county or division charged with the repairs.

If a person be charged by virtue of a private act of parliament, it seems proper to set forth the act (9).

In pleading to an indictment, it becomes necessary to shew who in particular is bound to fulfil the obligation demanded(10); and if a bridge lie in two parishes, it is of course necessary to cover the whole of the bridge in the plea tendered. Where the county of Essex, therefore, pleaded, that a bridge in D. was out of repair, and that Sir T. F. had been convicted for not repairing it, it was held that judgment must pass for the crown, because the indictment charged the non-repair in two parishes, whereas the plea stated the bridge as being in one parish only. Sir T. F. might, indeed, be bound to repair so much of the bridge as lay in D. parish, but the county might have been bound to the other part (11).

(1) Sty. 108, *Spiller's* C.

(2) Ibid., 2 Ld. Raym. 1174, *R.* v. *Saintiff*, S. P. And in the same case it was added, that if Sir H. Spiller was charged with repair ratione *manerii*, there should have been an averment of his having been the owner of the manor.

(3) Stark. on Ev. St. 4, p. 316, *R.* v. *Lancashire.*

(4) Godb. 346, *Bridges & Nicholls'* case.

(5) 1 Salk. 359, *R.* v. *Sainthill*; S. C. 2 Lord Raym. 1174. See where there there is a limit as to the extent of repair upon the same bridge, 1 Str. 177, *R.* v. *Norwich.*

(6) 1 B. & Ald. 64 note, *R.* v. *Middlesex.*

(7) 2 Campb. 455, *R.* v. *Surrey.*

(8) 4 B. & Ald. 628, *R.* v. *Hendon.*

(9) 1 M. & S. 435, *R.* v. *Kerrison.*

(10) Cro. Car. 365, case of *Langforth Bridge*, 2 Lev. 112, *R.* v. *Nottinghamshire.*

(11) Tho. Raym. 384, *R.* v. *Essex.* As to the evidence see Stark. on Ev. Ratione tenuræ, see 3 Nev. & P. 569, *R.* v. *Sutton*; S. C. 8 Adol. & Ell. 516; Presumption of repair, 8 Adol. & El. 65, *R.* v. *Lincoln.* With respect to witnesses see 5 & 6 Will. 4, c. 50, s. 100. Likewise, sect. 5 of the same statute. Moo. & Malk. 401, *R.* v. *Hayman.* 1 M. & Rob. 286, *R.* v. *Bishop Auckland.* A county having been indicted for non-repair, and wishing to throw the burden on a parish, the court would not compel

Certiorari.] The statute 1 Ann. stat. 1, c. 18, s. 5, has taken away the writ of certiorari from defendants in the case of county bridges, and with regard to this prosecutor he must now apply to the court for leave to sue out this writ under 5 & 6 Will. 4, c. 33, s. 1. We have said that this abolition of the certiorari applies to county bridges only, for it has been determined that where a private person or parish is charged, and the right to repair will come in question, the act 5 & 6 Will. & M. c. 11, has allowed the granting of such a writ (1). And after much argument and consideration the court of king's bench upon another occasion gave judgment that the statute of Anne had not taken away the writ from the prosecutor (2), and their opinion upon this point was subsequently confirmed by the house of lords (3). But by 5 & 6 Will. 4, c. 50, s. 107, the certiorari in cases of highways is taken away, except in certain cases (4), and the interpretation clause of that act, declares that "highways" shall include "bridges," except county bridges, so that the writ may here be said to be at an end in this instance unless where it is saved by the 5 & 6 Will. 4.

Verdict.] If more than one be indicted, and the verdict pass against one only, it shall be sustained. As where Sir T. F. and others were charged ratione tenuræ, and the verdict was, that Sir T. F. only ought to repair (5). So where the issue was whether the county should repair a bridge, and the jury found that they ought to repair two arches and a-half only, the verdict was held good according to 43 Ass. Pl. 37, although it was suggested that a bridge was an entire thing (6).

Judgment.] The judgment is a fine for non-repair (7), which will be proportioned according to the prospect which the court sees of the fulfilment of the obligation. It is to be paid to the treasurer of the county, and applied by the justices towards the building or repairing the bridge (8). But one fine only can be imposed upon the same indictment. An order of sessions was made, increasing a fine to the amount of 200*l.* beyond that which had been before imposed. Upon this, a rule was moved for to quash the order, and the court held that the power of sessions was at an end after the first fine, and *R.* v. *Old Malton* (9), where the same point was determined with reference to a highway was referred to, and the order was quashed (10).

Consequences of Judgment.] A judgment against the county will

the inhabitants of that parish to allow their parish books and bridge documents to be inspected by the county, 8 B. & C. 375, *R.* v. *Justices of Buckingham*; S. C. 2 M. & Ry. 412; see 5 B. & Ald. 902, *R.* v. *E. Cadogan*; S. C. 1 D. & Ry. 559, and likewise the case of *Dr. Purnell*, 1 Sir Wm. Bl. 37.

(1) 2 Str. 900, *R.* v. *Inhabitants of Hamworth.*

(2) 6 T. R. 194, *R.* v. *Cumberland.*

(3) 3 B. & P. 354; S. C. 2 Dow. 1; see also 6 Mod. 191, 1 Salk. 146, 1 Str. 183, Burns' Justice, ed. 1820, vol. 1, p. 380.

(4) Sect. 95.

(5) 1 Ventr. 331, *R.* v. *Sir T. Fanshaw.*

(6) Poph. 192.

(7) Vaugh. 340.

(8) 1 Ann, st. 1, c. 18, s. 4.

(9) 4 B. & Ald. 470, in the note.

(10) Id. 469, *R.* v. *Macnhylleth and Penregoes.*

be nearly conclusive evidence against them upon another occasion. So, likewise a judgment against a hundred or parish would have a similar effect, and, therefore it was, that where a plea had been tendered by a county, throwing the onus of repair upon a person *ratione tenuræ*, but which plea was irregularly set forth, and consequently unavailable, the court decided to stay the judgment upon payment of costs, in order that the county might have an opportunity of bringing forward their case (1). But by Lord Ellenborough, the county must repair, without prejudice to their case, if the public exigency require it (2), and Le Blanc, J., remarked, that the county might proceed to indict the parties whom they contended to be liable (3). But if reasonable speed be not used to try the second indictment judgment will be entered up upon the verdict, and therefore the court will not suspend the judgment generally, but only until they shall make further order (4).

Fraud or surprise will form an exception to the rule as to this almost conclusive evidence. As where an information was moved for against a county, and it appeared that a parish had obtained a verdict against the county for not repairing a bridge, but though a surprise: the court made the rule absolute for discharging the information. The charge against the parish was that they had immemorially repaired the bridge, that they had been fined for not repairing, and had acquiesced under the charge for many years, and the proof of this was to be found by certificates and other records of the sessions (5).

Costs.] By 5 & 6 Will. 4, c. 50, s. 95, costs are expressly awarded in cases of indictments directed by justices. The judge of assize or the justices at quarter sessions may direct them to be paid out of the highways' rate. But this clause does not extend to county bridges, which are excepted by sect. 5 (6). Moreover, by sect. 98, the court before whom any indictment shall be preferred for not repairing highways (7), shall award costs to the prosecutor, to be paid by the person indicted, if it shall appear to the said court that the defence made to such indictment was frivolous and vexatious. The costs, upon the removal of an indictment by certiorari, are payable by virtue of 5 & 6 Will. & M. c. 11.

So, in the case of an information, the court of king's bench can direct the payment of costs (8).

Contribution.] It is a general principle, that where several are liable to a burthen, and one or more are charged with the expenses, they shall have contribution from the rest. Therefore, where a manor is held by the service or tenure of repairing a bridge, the tenants who have any portion of the demesne lands in possession are liable to the public for the whole, and are contributory amongst themselves (9). And we have seen that the lord cannot discharge

(1) 1 Salk. 358, *R.* v. *D. of Bucklugh*; S. C. 6 Mod. 150.
(2) 16 East, 223, *R.* v. *Oxfordshire.*
(3) Id. 125.
(4) Ibid.
(5) 2 Chit. Rep. 215, *R.* v. *Southampton.*
(6) 8 Mod. 119, *R.* v. *Surrey.*
(7) See also sect. 111.
(8) Subject to the exception of county bridges, see sect. 5.
(9) And see further as to costs, 5 & 6 Will. 4, c. 50, s. 97; 1 Smith, 168, *R.* v. *New Windsor.*

the tenants as far as the public are concerned although he may bind himself (1). But the ancient freehold tenants and copyholders are not under this obligation, for nothing is part of the manor but the demesnes and services, and not the lands of the tenants (2). The contribution attaches upon persons holding lands at any time during the continuance of the charge in proportion to the value of the lands. It was held in a late case where an action of assumpsit was brought to recover this contribution (3).

Obstructions to Bridges.] It is an indictable offence to obstruct the passage of public bridges in like manner as it is an offence to interrupt a highway. And any one may abate, or if the matter be brought into court, the judgment will be that the nuisance shall be destroyed (4). And there may, moreover, be a fine upon such an occasion.

Ferry.] The same doctrines may likewise be applied to the obstruction of a public ferry.

Obstructions to Docks and to Navigation in general.] Again, an obstruction to navigation is an indictable nuisance. So, likewise if a dock or harbour be invaded, the defendant is liable to be punished for the intrusion. As where a person brought a large ship of 300 tons burthen into Billingsgate dock. It was objected that if this were a common dock, it would not be a nuisance for a great ship to come there, a common dock in its nature being free for all ships. But the court thought there might be a common dock for small ships, as there may be a common pack and horseway, and they refused, according to the usual rule, to quash the indictment being for a nuisance (5). With regard to obstructing a navigation, it is not easy to find an excuse or defence for such an act, the case being very strict in preserving the public right, and very reluctant to admit any allegation in answer to a charge for interrupting the public passage. For a navigable river is a common highway for all the king's subjects, so that unless the change be by the authority of parliament, or from some natural cause, it would be very difficult to conceive an occasion where the right would be deemed capable of extinguishment. And it must be a matter of rare occurrence (6) to discover a ground for abridging or modifying these rights, even although the public convenience might be enhanced by the alteration in some other respect. So that it is not surprising to find several occasions where prosecutions have been successfully instituted for this nuisance of obstructing navigation.

There are various acts which disturb the course of navigation. Diverting the accustomed stream ; throwing improper lumber into it; neglect to place buoys; erecting wharfs so as to narrow the river; mooring barges, so as to obstruct the channel, &c. And it

(1) Ante. p. 345.
(2) Hard. 131, *Rich* v. *Barker* & others.
(3) 6 Nev. & M. 494, *Dimes* v. *Arden*.
(4) See Vaugh. 340.
(5) 6 Mod. 145, *R.* v. *Leech*.
(6) As a casualty, or a successful appeal to the writ ad quod damnum.

has been said that the improper diversion of a water-course is a transgression which the king cannot dispense with (7). A defendant was charged with building locks on the Thames, and by Holt, C. J., to hinder the course of a navigable river is against magna charta (8). That statute, indeed, forbade the erection of wears throughout England excepting on the sea coast. And the 25 Ed. 3, s. 4, c. 4, prohibited the enlargement of mills, wears, and other such annoyances, which obstructed the common passage of boats and ships in great rivers. These provisions were followed up by other acts of parliament (9). All banks, again, which were not defences in the reign Hen. 2 were declared illegal by magna charta (1). And in construing the statutes above-mentioned concerning wears and mills, the court came to the conclusion that such mills only as had been made in the reign of Ed. 1, or since, were within the prohibition. Unless, indeed, the mills built before that reign had been increased, and in that case they also might be corrected and amended. And it was likewise held, that magna charta extended only to *kidels*, or open wears for taking fish, and, moreover, that the statute of sewers 23 Hen. 8, had not repealed these acts of Ed. 3 and Hen. 4 (2). Wears, locks, and banks are, therefore, in general, obstructions to navigation. However, where a lock is made by the king's licence, and for the public benefit without any modification or abridgment of the general right, but, on the contrary, with a result beneficial to navigation, it is not a nuisance, although toll may be demanded for passing along the river in consequence of it (3). The distinction seems to be where the erection causes an obstruction, and where it advances the public interest without abridging the highway. For no grant from the crown, however legal in itself, can make a nuisance legitimate (4).

There are several other nuisances. As the erection of a wharf. Where the corporation of London had let a space of ground between high and low water mark for the purpose of wharfage, by which certain public conveniences in the river Thames were considerably interfered with, Abbott, C. J., directed the jury that the public could not be deprived of the benefits they had always enjoyed for the sake of mere private convenience, and a verdict was returned against all the defendants, excepting Lord Grosvenor (5). So again, a staith, or collection of piles, built for the purpose of lowering and raising coal waggons, became the subject of an indictment for a nuisance; and although the verdict passed in this case for the defendants, in consequence of the direction of Bayley,

(7) Vaugh. 340.

(8) 12 Mod. 615, *R.* v. *Clark*. See Cro. Car. 132, post.

(9) See 4 H. 4, c. 11; 1 H. 5, c. 2; 12 E. 4, c. 7.

(1) 9 Hen. 3, c. 16.

(2) 10 Rep. 138, case of *Chester Mill*; S. C. 13 Rep. 38; see 2 Inst. 38.

(3) Cro. Car. 132, *Juxon* v. *Thornhill*.

(4) See 3 Nev. & P. 606, *Williams* v. *Wilcox*, 1 Geo. 1, st. 2, c. 18; 6 & 7 Wm. 3, c. 16, s. 1.

(5) 2 Stark. 511, *R.* v. *Lord Grosvenor* & others. See also 6 B. & C. 572, the *Sutton Pool* C. cited there; Id. 573; *Att. Gen.* v. *Owners of Wharfs in Portsmouth Harbour*. Id. 579. *Att. Gen.* v. *Brittain*.

J. with reference to a point of law, yet, as Lord Tenterden decidedly dissented from this opinion, and one judge gave no opinion, the point may not be considered as finally decided. The case was, that by reason of this staith, an abridgment of the right of passage in the river Tyne occurred, but, on the other hand, the public reaped an advantage by the facility of dropping the coal waggons into the ship and rearing them again. And the direction of Bayley, J. was, that if the erection in question produced a public benefit, and were in a reasonable situation so as to leave sufficient room for navigation, the jury should acquit the defendants. And the learned judge pointed out as the results of the staith, with respect to the coals, their better condition and cheaper value. Lord Tenterden, without denying the public advantage which might have accrued, on concluding that a verdict ought to be entered for the crown, said, he could not think that the point of public benefit could be taken into consideration upon the indictment under discussion. The chief justice held the question to be whether the navigation and passage of vessels on the river had been injured. And if the attention of the jury had been simply drawn to the necessary obstruction occasioned by the transfer of coals from the river to the sea, and the erection of the staith left in that light, the verdict for the defendants might well stand. But the matter of public benefit having been also presented to the jury, it was the opinion of Lord Tenterden that there should be a new trial. Holroyd, J., however, agreeing with Mr. Justice Bayley, the rule for the new trial was discharged (6). So a floating dock, though used for the pupose of repairing ships, has been deemed a public nuisance (7). And private stairs from houses standing by the Thames are said to come under the same denomination (8). So the mooring of barges in a public dock is an obstruction (9). And in a recent case, the opinion of Lord Tenterden above expressed in *R.* v. *Russell*, seems to have been adopted. The defendant was indicted for erecting an embankment in the water-way of a harbour, and the jury found that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit. It appeared on the one hand, that the navigation was less free, but, on the other, that the landing of passengers and goods was facilitated, that boats could be better launched in foul weather, and that protection could be more easily afforded to small boats at certain periods. It was held, that this finding amounted to a verdict of guilty (1).

(6) 6 B. & C. 566, *R.* v. *Russell* & others; S. C. 9 D. & Ry. 566. It was agreed in this case, when the judge began to sum up, that if a verdict should pass for the defendants, the prosecutor might move for a new trial on the ground of misdirection.

(7) 1 Russ. C. M. 340, Anon.

(8) Id. citing 5 Bac. Abr. Nuisance, A. But cuts made in the banks for timber are not nuisances if they be no annoyances to the river. Ibid.

(9) 4 M. & S. 101; see also 1 Esp. 252.

(1) 4 Ad. & El. 384, *R.* v. *Ward*; S. C. 6 Nev. & M. 38.

It follows, a fortiori, that if the erection of buildings which in some measure tend to the public advantage are nuisances, actual interruptions and positive injuries without such benefit must of necessity be deemed such. As if one should cut down the banks of a public river (1); or put several loads of bricks upon the soil of a navigable stream (2); or place logs of timber there (3); or throw ballast into havens, roads, and channels, or elsewhere, if the navigation be thereby obstructed (4). For an offence may not be the less a misdemeanor at common law, as in this case of throwing ballast, because statutes inflict pecuniary penalties in respect of it. Again, dividing the course of the river is a nuisance (5); and so is a neglect to cleanse it on the part of those who are liable, for in this respect it may be likened to a highway out of repair. Those who have ease and passage along the stream are said to be liable in the first instance, and in default of such an easement, those who have the piscary are answerable (6). And it is not merely an obstruction to navigation which may happen through a want of cleansing, for the lands of the neighbouring vill may be overflown through the accumulation of mud or other nuisance, and the public health might, moreover, be endangered in consequence of a similar omission (7). Neglect to repair a bank or wall, *ratione tenuræ*, is indictable in like manner (8).

Neither, again, can a public canal navigation be obstructed, although the act done may be extensively beneficial elsewhere. So that an embankment made by the defendants which, in times of flood, caused the land water to damage the canal banks and obstruct the navigation, was deemed to be a nuisance, although in the event of removing the fenders complained of, several hundreds of acres would be again exposed to inundation (9). And a distinction was taken between an act of this kind and the right of embanking against the encroachments of the sea as a common enemy (10). To say the least, the defence in the one case would be to keep out the water from coming where it had never before come; in the other, the land water is restrained from passing in the way in which, when the occasion happened, it had always been accustomed to pass (11). But a venire de novo was subsequently awarded upon error brought in the exchequer chamber, the judges thinking that the jury ought to have found—whether the raising of these fenders were an ancient and rightful usage—or whether they had had their beginning since the construction of the canal—whether the

(1) 2 Show. 30, *R.* v. *Stanton.*
(2) Andr. 137, *R.* v. *Haddock.*
(3) 1 Russ. C. M. 340; citing 5 Bac. Abr. Nuisance, A.
(4) See 2 Burr, 656.
(5) Noy. Rep. 103; 1 Hawk. c. 75, s. 11.
(6) 37 Ass. pl. 10; 1 Hawk. c. 75, s. 13.
(7) 12 Mod. 510, *R.* v. *Wharton* & others. See also 13 Rep. 33; 8 B. & C. 795; 2 Chit. Rep. 658.
(8) 5 B. & Ald. 902, *R.* v. *Earl Cadogan.* But the court would not allow the prosecutor to inspect the court rolls of the manor of which the defendant was lord, in order to make out a case for the prosecution.
(9) 1 B. & Adol. 874, *R.* v. *Trafford.*
(10) 1 B. & Adol. 899; 8 B. & C. 355, *R.* v. *Com. of Sewers for Pagham.*
(11) 1 B. & Adol. 888, Lord Tenterden.

course of the floodwater were not the ancient course—and whether the raising of the fenders had not been occasioned by the construction of an aqueduct (12).

We have said, that but few defences are available to answer an indictment for obstructing the course of a navigable channel, and that the extinguishment of such a right is far more difficult than a partial abridgment of it. An act of parliament, however, may accomplish both these results; and, likewise, a writ of ad quod damnum, or a natural cause.

The defendants were indicted for a nuisance in cutting a trench across a highway, under pretence of the way in question being a public navigable stream. It turned out, however, that the road thus interfered with had existed so long as to prevent the state of the channel where the road was made, from being correctly ascertained, and the jury found a verdict of guilty. A new trial being moved for, the learned judges were of opinion that the public right had been destroyed by a natural cause in the present instance, a deposit of silt and mud having blocked up the channel, and they discharged the rule (1). And it was agreed that such a public right might likewise be put an end to by an ad quod damnum (2), or by an act of parliament, or by commissioners of sewers (3), whose authority rests upon the statute law. And Lord Tenterden some time afterwards remarked, that the want of a writ of ad quod damnum would not be conclusive against a defendant (4); whence it follows, that other circumstances may exist capable of creating a change in the public interest. Where, however, an act of parliament and the right of the public can coexist, the former will not operate as an extinguishment of the highway. As where part of the river Wye was vested in private persons, and an action was given them for damages done to their rights, but, nevertheless, it was found by a special verdict that the Wye was navigable. In this case judgment was given for the crown against the defendant for cutting down the banks of the river, and thus diverting the watercourse (5). So where the public had always enjoyed a towing path on the banks of a navigable river; and, subsequently, an act of parliament converted the river in that part into a floating harbour, so that the path could be used at all times of the tide, it was held, that the right of the public could not be extinguished because other persons had been furnished with an authority to render its exercise more easy and beneficial, and judgment was given for the crown (6). Power likewise is given by the highways' and turnpike acts to get materials from any river or brook, provided that the surveyor do not interrupt nor divert the course of the stream, nor get the same within the distance of 150 feet above or below any bridge

(12) 8 Bingh. 204, *Trafford* v. *The King*; S. C. 2 Cr. & Jer. 265; S. C. 1 Moo. & Sc. 401. See 3 Bligh. 414.

(1) 4 B. & C. 598, *R.* v. *Montague* & others; S. C. 6 D & Ry. 616.

(2) See 6 B. & C. 579, *Att. Gen.* v. *Brittain*, cited.

(3) 4 B. & C. ut supra, n. (1), per Bayley, Holroyd, and Littledale, Js.

(4) 6 B. & C. 600.

(5) 2 Show. 30, *R.* v. *Stanton*.

(6) 3 B. & Ald. 198, *R.* v. *Tippett*. See also Dougl. 441, *R.* v. *Smith* & others.

nor within the like distance of any dam or wear (1). But the surveyor must not take the sea-beach, where the removal of it would cause any damage or injury by inundation to the lands adjoining, or increased danger of encroachment by the sea (2). All pits or holes made in such rivers or brooks must be filled up by the surveyors, under certain penalties for omission (3).

Again, there may be an excusable abridgment of this right through a casualty. As where a vessel was sunk by an accident, so that the passage along the Thames became obstructed, Lord Kenyon at once took the distinction between misconduct and casualty, and held that the indictment could not be sustained. Perhaps, said his lordship, the expense of removing the vessel might have amounted to more than the whole value of the property. An acquittal was directed (4).

In a late case, upon an indictment for placing planks in a harbour, where the jury found that through the defendant's works the harbour was in some extreme cases rendered less secure, the court were of opinion, that the consequences were too slight to create a nuisance (5). And, of course, temporary repairs cannot be said to be an obstruction (6). But the exercise of a right of fishery will not be a defence. The right of fishery is subservient to the purposes of navigation (7). And it will be remembered as a general principle, that no length of time can legitimate a nuisance (8).

Proceedings.] The proceedings for these obstructions may be said to consist of indictments, informations at law and in equity (9), and presentments. They may also be abated, and an injunction is sometimes applied for to a court of equity (10). But the court will not grant an information where much time has been allowed to pass without objection to the encroachment, unless a grand jury has refused to find a bill of indictment. Therefore, when fourteen years had elapsed without an application, the court refused the rule (11).

Indictment.] The count for obstructing a navigable river states, that the l. i. q. is an ancient river for the king's subjects to navigate, sail, row, &c. at their will and pleasure, without impediment. The indictment then sets forth the obstruction, describing it accurately, and avers its continuance, and then concludes by stating

(1) 3 Geo. 4, c. 126, s. 97; 5 & 6 Will. 4, c. 50, s. 51.

(2) 5 & 6 Will. 4, c. 50, s. 52.

(3) 3 Geo. 4, c. 126, s. 99; 5 & 6 Will. 4, c. 50, s. 55.

(4) 2 Esp. 675, *R.* v. *Watts.* The owner of the sunken vessel, however, ought to place a buoy there. 1 Camp. 515.

(5) 1 Nev. & P. 719, *R.* v. *Tindal*; S. C. 6 Ad. & El. 143.

(6) See 4 Mod. 447; 1 Lord Raym. 386.

(7) See 1 Camp. 517, note; 3 Burr. 1768.

(8) See 2 B. & Ald. 662; 2 Br. & Bing. 403.

(9) 2 Anst. 603, *Att. Gen.* v. *Richards*; S. C. 1 Dow. 316; see also Id. 607, *Att. Gen.* v. *Philpot.* Id. 608.

(10) 2 Wils. Cha. C. 87, *Att. Gen.* v. *Johnson*, for choking up the bed of the Thames at Millbank.

(11) 1 Lord Keny. 379, *R.* v. *Green.*

that the river is straightened by the obstruction complained of, to the common nuisance of the king's subjects (1). It must not be said, to the common nuisance of the inhabitants (2).

The termini need not be set out (3), for highways have no bounds (4), and the court will take notice of the river Thames (5).

Judgment.] The judgment is fine, together with abatement of the nuisance complained of, and the measure of the fine will be enhanced or mitigated according to the condition of the place where the obstruction has happened. So that if a defendant exhibit a willingness to repair the evil he has occasioned, his conduct will weigh with the court when they come to apportion the penalty. And although a nuisance is a matter of fact, and so is commonly left to the consideration of a jury, yet if the crown should exhibit an information for a purpresture, and should prove a right to the soil, the court will give judgment to abate a nuisance without the intervention of a jury (6).

Obstructions to public Fisheries.] Lastly, there may be an obstruction to a public fishery, although it must be borne in mind that the fishery must yield to the superior claim of navigation, if there should be a collision between the two rights. However, setting this point aside, it is not competent for a person to invade a public right of piscary; and, therefore, where Lord Lonsdale and the corporation of Carlisle erected stells in the Eden, whereby all the fish were stopped in their passage up the river, the court held, that these stells were illegal, and a public nuisance (7). These obstructions must be abated, as well as those which concern navigation, and some statutes give power to justices to exercise a very summary jurisdiction in cases of obstruction by banks, dams, stanks, nets, &c.

It would not appear to be necessary to state the number of fish lost or injured by an obstruction. It was held in case of stealing carp, that such an enumeration need not take place (8).

LIBEL AND SLANDER.

Another fruitful source of public inconvenience is the publication of libellous matter and slander. This act is an indictable misdemeanor at law. It is likewise the subject of a criminal information at the discretion of the court.

In treating of libel and slander with reference to criminal pro-

(1) See also 6 Wentw. Ind. putting putts in the river Severn.
(2) 1 Mod. 107, *Thorowgobd's* C.
(3) Andr. 137, *R.* v. *Haddock.*
(4) Id. 145, per Lee, C. J.
(5) Id. 150, by Chapple, J. See likewise 2 Bulst. 119, *Sorill's* C.
(6) 2 Anstr. 615, *Att. Gen.* v. *Richards.*
(7) 7 East, 199, cited by Lord Ellenborough.
(8) 1 Lev. 203, *R.* v. *Wetwang.*

ceedings, we will consider, first, what is, if published, a libel. Secondly, What shall be said to constitute the offence—as publication, evil intention, &c. Thirdly, What shall be called an indictable slander; and, fourthly, what are the usual defences which have been resorted to in answer to charges of the description above mentioned.

1. *What a Libel.*] Libels are writings whose tendency is to produce a disturbance of the public peace. And there is in the nature of such writings a union of private injury to the party libelled or to his representatives, with a public wrong, so that whilst the offence redounds to the general inconvenience, the ingredient of ill-will is likewise discovered in the composition which is the subject of complaint. Libels are recognized as against the christian religion,—(and it will be remembered that he who speaks evil of christianity maligns also the Divine Being, who is the author of that creed)—against morals,—which are founded upon the law of God—against the monarch—the two houses of parliament—the constitution generally—the government for the time being—the magistracy and the administration of justice, (for he who libels the executive reflects upon the officers of justice)—against foreign potentates and ambassadors, and persons of distinction abroad—and, lastly, against individuals. All libels concerning these persons, or matters, have a tendency, directly or indirectly, to disturb public tranquillity, and each of them, again, is more or less tainted with malice or ill-will towards the person or thing libelled.

Now, with regard to publications in derogation of the christian faith, and likewise as to those which have reference to public morals, we have already touched upon the law of libel in respect of those two subjects (1). So, again, we have treated of libels against the crown and government, the legislature, and constitution, in the section which speaks of misdemeanors against the public welfare (2). And when we come to the class of misdemeanors against public justice, we shall include libel amongst those offences. Libels against foreign persons and governments, and against individuals, will, therefore, form the subjects of this division. It is true, that all libels are productive of public inconvenience, and that they are, consequently, against the policy of the law to which we have made such frequent reference in this section, but as several of them are likewise in opposition to religion, to morality, to the public safety, and to the due administration of justice, which are subjects forming separate heads in this undertaking, and are treated of in other places, there remains for consideration those only to which we have just made allusion. And they comprise a rather extensive catalogue, as well as embrace many questions of law, which must be noticed in order.

Libels in disparagement of Individuals.] The first point which we proposed for consideration was the nature of the libel. And this

(1) See ante, s. 4, of this chapter. (2) Ante, sect. 1, of this chapter.

may be treated of both with respect to the matter of the writing itself as well as the manner of preparing it for publication. The matter is said to consist in defamation, expressed either in printing or writing, signs or pictures; and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule (1). Thus, it appears, that not only are the characters of the living the subjects of libel, but those also of the dead. For the publication is calculated to provoke a breach of the public peace. "It stirs up others of the same family, blood, or society, to revenge (2), by provoking them to vindicate the memory of the deceased, and to wipe off that stain which the reflections on the ancestor may cast upon them" (3). As where the defendant in giving an account of Sir C. Nicoll's death, stated, that "he could not be called a friend to his country, for he changed his principles for a red riband, and voted for that pernicious project, the excise." This Lord Kenyon conceived to be a libel, being done with a view to vilify the memory of the deceased, and to injure his posterity (4). But there must be a tendency of this nature, and it must be so laid in the indictment, or judgment will be arrested (5). To confine ourselves then to libels upon the living, it may be remarked, that a direct calumny is, of course, a ground for indictment. As to write of a man that he has the itch (6). So where it was stated in a ludicrous paragraph, that a nobleman had married an actress, and appeared with her at the theatre (7). So to impute a want of courage to an officer in the navy is a libel, or to designate him as a man of an incendiary disposition (8). So to write of a man as having been guilty of hypocrisy and falsehood (9). So to impute to a protestant bishop an attempt to convert catholic priests (10). So to write ill things of a person who had been unsuccessful in a lawsuit (11). The mayor of Northampton sent to Lord Halifax a licence to keep a public house, and this act was deemed libellous towards a person of quality (12). So it is libellous to impute criminal conduct to any one (13), as that he has insulted persons in a scandalous and barefaced manner (14). So to publish any thing in derogation of a man in his trade or business (15). As that an apothecary had counterfeited a physician and had taken fees (16), or that the prosecutor had been guilty of cheating (17).

(1) 1 Hawk. c. 73, s. 1, 2.
(2) 5 Rep. 125. Case de libellis famosis.
(3) 4 T. R. 128, by Lord Kenyon, and see 1 Hawk. c. 73, s. 3; 4 Taunt. 364, Mansfield, C. J.
(4) 4 T. R. 128, 129. *R.* v. *Critchley*, cited: 3 Esp. 21, *R.* v. *Walter*.
(5) 4 T. R. 126, *R.* v. *Topham*.
(6) 2 Wils. 403.
(7) 1 Sir Wm. Bl. 294, *R.* v. *Kinnersley*.
(8) Holt on libel, 224, *R.* v. *Smollet*; 1 Sir Wm. Bl. 269.
(9) 4 Taunt. 355. See also Poph. 139: Sir *B. Hickes's* C.; S. C. Hob. 215.
(10) 5 Bing. 17.
(11) 2 Barnard. 84. See 2 B. & Ald. 685.
(12) 1 Str. 422, *Mayor of Northampton's* C.
(13) 2 Burr. 980, *R.* v. *Benfield* & another.
(14) 9 B. & C. 172, *Clement* v. *Chivis*; S. C. 4 Man. & Ry. 127.
(15) W. Kel. 58, *R.* v. *Pownell*. Rule to shew cause why an information should not go for writing a letter, and designating the complainant as a scoundrel in the execution of his office.
(16) Andr. 229, *R.* v. —— cited.
(17) Tho. Raym. 201, *R.* v. *Sanders*.

So where the defendant wrote to the mayor of Richmond, concerning the town clerk, that his consummate malice and wickedness against the defendant and his family would make him do any thing ever so vile (1). So where persons in general are advised to be cautious of the plaintiff, a gunsmith, since he never made the experiment he proposed, except out of a leathern gun, (thereby intimating that the plaintiff had been guilty of a falsehood), the court held the advertisement to be a libel (2). So where the printer of a newspaper represented the bishop of Kerry to be a bankrupt, the court granted an information (3). So where the defendants employed a man to carry about a placard containing the words, "Beware of mock auctions, of swindlers, and pick-pockets," the court granted an information at the instance of the owner of the auction room, being satisfied that the auctions were properly conducted, and that the plaintiff could not have an impartial trial by indictment (4).

Every individual affected by a libel need not be mentioned. As in a case, where certain trustees of a parish prosecuted the defendants for libel, it was held sufficient to specify some of the parties (5). And it is even enough to mention one person belonging to a company, (as an East India director), in order to warrant an information (6). So where it was imputed to the clergy at Durham, that through their agency, none of the bells of the churches there tolled upon the occasion of the death of queen Caroline, the court made the rule for an information absolute, although it was urged that this was the application of an unknown private procecutor, and there was no affidavit that the publication was untrue (7). Indeed, the rule goes further, and will not permit a body of men to be libelled as a nation. For where an account of the Jews was printed tending to make people believe them so barbarous as to burn a woman and her child, because it was begot by a christian, an information was granted by the court (8). But where a writing inveighs against mankind in general, or against a body to whose detriment no particular prejudice can reasonably arise, or against a class at large, as men of the gown, it is not a libel (9). And if the indictment state the libel to have been published to the disparagement of certain liege subjects, &c. to the jurors unknown, judgment will be arrested, for the jurors not knowing the persons who are affected by the libel, it cannot be said to be prejudicial to any one in particular (10). So if an advertisement be published in a newspaper bonâ fide, and for the purpose of obtaining informa-

(1) 1 Wils. 22, *R.* v. *Waite.*

(2) 2 Str. 898; 1 Barnard. 289; Fitzg. 121.

(3) 1 Russ. C. M. 228, *R.* v. ——, Hil. 1812.

(4) Collyer's Stat.. 365, n. ex parte *Genese.*

(5) 7 Mod. 197, *R.* v. *Griffin* & others; S. C. 2 Barnard. 368; 7 Mod. 401; 1 Sess. Ca. 257.

(6) 7 Mod. 400, *R.* v. *Jenour.* "Whereas an East India director has raised the price of green tea to an extravagant rate," &c. See also 2 Barnard. 114, *R.* v. *Knut.*

(7) 5 B. & Ald. 595, *R.* v. *Williams*; S. C. 1 D. & Ry. 197.

(8) 7 Mod. 401, *R.* v. *Osbourne*; The *Jews'* C. cited; S. C. 2 Barnard. 138, 166; S. C. Wm. Kel. 230. See also 1 Russ. C. M. 229, note (z); 2 Swanst. 503, note .

(9) 3 Salk. 224, *R.* v. *Alme* & another.

(10) 1 Ld. Raym. 486, *R.* v. *Orme* & another.

tion, it is not a libel, although it convey an imputation injurious to an individual (2). A printer cannot be convicted of a libel for publishing a writing at the request of a husband for the purpose of reclaiming his wife (3). And that is not a libel which is not so without the help of an innuendo (4).

But this rule concerning unpleasant imputations is not to be carried so far as to fetter society in the exercise of that rightful freedom which enables men to sift the character of their fellows without malice. And, therefore, where a paper was exhibited at a club room, stating that the plaintiffs were excluded from the room as persons whom the proprietors and annual subscribers did not think it proper to associate with, the court gave judgment for the defendants upon demurrer. For here was no impeachment of the plaintiffs' moral character, nor any imputation beyond the fact of the defendants not deeming the plaintiffs proper persons for their society (5). So where a person was expelled from a quaker's meeting, the reason being assigned in writing in the books of the society, it was held, that no libel had been thereby published (6).

Again, if a fair comment be made upon a place of public amusement, it is no libel. Or upon a literary work (7), provided that the writer do not step out of his way to defame or vilify the author's character, in which cases the ordinary doctrine of libel will apply (8). Nor is it libellous to criticise a painting, although the word "daub" be used, if the comment be made with honesty and without malice (9). Nor is matter of history published without slanderous intention a libel, as where in ancient times, a clergyman represented one G. as a perjured person, who had great plagues, and who was killed by the hand of God; whereas, in truth, G. had never been plagued, and was himself present at the sermon (10). Again, the interests of society are so united as to make it of importance, that the due temperate investigation of a fact should not be deemed libellous. And therefore an advertisement inserted bonâ fide by the defendant respecting the plaintiff, in order to discover if he had another wife living when he married, was held by Lord Ellenborough to be no libel, and the more especially as the publication was at the instigation of the plaintiff's wife (11). So a confidential communication, respecting the character of a servant is not a libel (12), unless it be tinctured with malice (13). Nor such a communication to parties, charging the plaintiff, a solicitor, with mismanagement of the concern entrusted to him (14). Subject to the same rule are explanations, when made bonâ fide, of an event which has taken place, or of a charge made against a person. As where a paper praying for redress, and containing an imputation of fraud against a

(2) 4 Esp. 191, *Delany* v. *Jones*.
(3) Say. Rep. 122, *R.* v. *Masters*.
(4) Id. 280, *R.* v. *Alderton*.
(5) 1 Price, 11; 5 Esp. 109.
(6) 1 Sir Wm. Bl. 386, *R.* v. *Hart*; S. P. 2 Burr. Ec. L. 779, *R.* v. *Hart*.
(7) See 1 Campb. 355; M. & M. 74.
(8) Selw. N. P. 7th ed. 1041.; 7 C. & P. 621.
(9) Moo. & M. 187, *Thompson* v. *Shackell*.
(10) Cro. Jac. 91.
(11) 4 Esp. 191. See Andr. 229, *R.* v. *Elms*, cited; 4 Bing. 162.
(12) 1 T. R. 110; Bull, N. P. 8; and see 5 Esp. 13.
(13) 3 B. & P. 587.
(14) 1 Campb. 267. See 2 Stark. 297.

captain, was directed to certain officers: it was held, that as there was no intention to asperse the prosecutor, the representation of an injury, drawn up in a proper way, could not afford grounds for a charge of libel (1). So if A. make an affidavit, and B. deny it by affidavit, saying that A. has sworn falsely against him the said B., it is not a libel, for there must of necessity be a contradiction (2). So where a person wrote a volume which had for its object the redress of grievances at Greenwich hospital, the defendant was held dispunishable, although there were sharp reflections in the book upon some public officers, and upon Lord Sandwich in particular (3). And letters sent to a father respecting the faults of his children, or expostulations in private letters to a friend concerning vices, are not libels (4). It must, however, be always understood, that such communications or letters as the foregoing must not contain abusive or provoking language, for that at once creates a tendency to disturb the public peace; and, moreover, it is apt to induce the party to disclose it to his friends, and thus produces, to use the words of Lord Bacon, a compulsory publication, for which the defendant must answer (5).

Again, no presentment of a grand jury can be a libel, nor articles of the peace exhibited before a justice, for it would be a great discouragement to suitors to subject them to public prosecutions in respect of their applications to a court of justice (6). Nor an affidavit exhibited in a court of justice by a defendant in his own excuse (7). So where the president of a court martial in delivering a judgment of acquittal, declared that the prosecutor in falsely calumniating the accused had been guilty of conduct highly injurious to the service, Mansfield, C. J., at once nonsuited the plaintiff, and his lordship's direction was held right (8). Again, the publication of proceedings in our courts of justice is, in the main, allowable. But the account given must be fair and honest, and if the writer should think fit to add or prefix to the statement any comment or expression of his own, he must do so at his peril. Therefore where the defendant thought fit to head his relation of an action with these words, "shameful conduct of an attorney," it was held, that his pleas of justification were insufficient, because he had not confined himself to that which actually passed in court, and judgment was given for the plaintiff non obstante veredicto (9). So where false copies of a prohibition to the bishop of Chichester were dispersed throughout the kingdom by one W. a churchwarden, the court held the act in question to be a most seditious libel (10). But the rule goes yet further. We have seen (11) that a defendant was convicted of publishing a blasphemous libel, although she only professed to give an account of her husband's

(1) 5 B. & Ald. 647, *R.* v. *Bayley*; cited as from 3 Bac. Abr. Lib. A. 2; S. P. 5 B. & Ald. 642; 4 B. Moore, 363.
(2) 2 Burr. 807.
(3) 1 Russ. C. M. 232; citing Holt on Libel, 172, *R.* v. *Baillie*.
(4) See 2 Brownl. 151.
(5) Poph. 140; 1 Lev. 139, *R.* v. *Summers* & another; S. C. 1 Sid. 270; See 12 Rep. 35.
(6) 1 Hawk. c. 73, s. 8.
(7) Say. Rep. 112, *R.* v. *Lediard*.
(8) 2 New Rep. 341.
(9) 3 B. & Ald. 702.
(10) 2 Mod. 119; 8 T. R. 297; S. P. 3 B. & C. 556; 6 Bingh. 213.
(11) Ante, p. 256.

defence to an information for a similar offence. Whence the principle may be obtained, that if any publication of the proceedings of courts of justice be wantonly made, so as to produce an injury to the morals of others, or a disturbance of the public peace, it must be considered as a libel. And the same doctrine will apply to the case of defamatory matter unnecessarily published with reference to particular individuals. It is true, that some doubt at one time existed, whether the fact of the proceedings in question having actually happened in court, were not of itself a sufficient defence (1), but this point has been since canvassed. Lord Ellenborough and Grose, J. declared, upon one occasion, that the common notion of publishing every thing which might transpire in a court of justice must be taken with some grains of allowance (2). "It often happens," said Lord Ellenborough, "that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect; and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice" (3). And Bayley, J., subsequently said in another case, "It has been argued, that the proceedings of courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest" (4). The learned judge then put the question of blasphemous matter, the reiteration of which might be injurious to the public mind. The case of Mary Carlile followed this direction, where a criminal information was granted against the defendant for publishing, amongst other things, her husband's defence (5). And by Abbott, C. J., "there can be no doubt in the mind of the court, or of any person acquainted with the law of the country, that, if in the course of a trial it becomes necessary for the purpose of justice, that matters of a defamatory nature should be publicly read; it does not, therefore, follow, that it is competent to any person under the pretence of publishing that trial, to re-utter that defamatory matter (6). These observations of the chief justice seem to be general, and calculated to embrace not only blasphemous publications, but any writing whose tendency is unnecessarily injurious or defamatory. It should seem likewise that a want of jurisdiction in a particular court will not make an absolutely groundless prosecution the less a libel, although there have been opinions to the contrary (7). Ex parte proceedings, *à fortiori*, must not be unadvisedly published. As where the printers of the Sussex journal published the evidence connected with a transaction between an excise officer and a smuggler, previous to the trial of the former for murder in shooting the smuggler. The attorney-general having filed an information against the printers, Heath, J.,

(1) See 1 B. & P. 525; 8 T. R. 298; 4 B. & A. 605; 3 B. & C. 582.
(2) 7 East, 503.
(3) Ibid.
(4) 1 M. & S. 281; S. P. by Tindal, C. J.; 6 Bingh. 213.
(5) 3 B. & Ald. 167, *R.* v. *Carlile*.
(6) 3 B. & Ald. 168.
(7) 1 Hawk. c. 73, s. 8.

refused to allow their counsel to urge this kind of publication as a defence, for it was ex parte, and made by the prosecutor only. And the learned judge held, that the mere publication of ex parte evidence, before a trial, was of itself highly criminal (1). "The necessary tendency of [such a] libel [is] to traduce and defame the prosecutor (2), and to prejudice him in the minds of his countrymen, and to cause it to be believed that he is guilty of the [crime] (3) laid to his charge, and to deprive him of the benefit of an impartial trial (4). So an extrajudicial affidavit must not be promulgated without due consideration, and the magistrate's clerk who writes out the affidavit will be answerable for the consequences (5). So again, a scandalous affidavit, containing imputations upon an individual, or a scandalous petition to the house of lords, ought not to be published, seeing that they tend to a breach of the public peace (6). But simply to state the charge, and the result of the examination, as that the justice directed the defendant to enter into recognizances, is not libellous; for here there is no statement of evidence, nor any comment, but merely the history of the proceedings (7). So, again, during a trial, if the judge think fit to interdict the publication of evidence, the defendant may be fined for a contempt of the court (8), and there can be but little doubt that such publications would be libellous, if they contained reflections upon an individual. So where the defendant published certain evidence given during the sitting of a coroner's jury, together with comments unfavourable to the accused parties, the court did not hesitate to make the rule for a criminal information absolute (9).

We now come to a very important class of privileged publications, which are those connected with the houses of parliament. This subject, it is sufficiently well known, has of late undergone no inconsiderable discussion, and the result has been an act of parliament, which we will presently lay before the reader. But the right of free publication of these proceedings by order of the house in cases where their publicity would have the effect of throwing discredit upon an individual, seems to have been allowed on some occasions, although questioned at other times. In the days of James II., indeed, a former speaker of the house of commons was compelled to pay no less a sum than 10,000*l.* for publishing Dangerfield's Narrative (10). But this decision was commented upon by some modern judges with great severity (11), and its authority was at an end. And it had been held previously that

(1) 5 Esp. 123, *R.* v. *Lee* & another; S. P. 2 Campb. 563, *R.* v. *Fisher* & others. And if the matters complained of be not brought before the magistrate in his judicial character, there is still greater reason for calling the publication a libel. 3 B. & C. 24. See 7 East, 493; 4 B. & Ald. 605.

(2) Of the indictment for libel.

(3) An assault.

(4) 2 Campb. 571, by Lord Ellenborough.

(5) 3 Campb. 212; by Wood, B. See 8 C. & P. 444. But voluntary affidavits are now forbidden in most cases, by 5 & 6 Wm. 4, c. 62, s. 13.

(6) 1 Ld. Raym. 341, *R.* v. *Salisbury*.

(7) 3 B. & C. 556.

(8) 4 B. & Ald. 218, *R.* v. *Clement*.

(9) 1 B. & Ald. 379, *R.* v. *Fleet*.

(10) 2 Show. 471, *R.* v. *Williams*; S. C. Comb. 18.

(11) By Lord Kenyon, 8 T. R. 296; and Grose, J., Id. 297.

the printing of a false and scandalous petition to the house of commons, which reflected upon the character of an individual, and delivering copies of it to the members of the committee, was not the subject of the action of libel, though had the delivery been to others than members it would have been otherwise (1). During the time of Lord Kenyon, the question was again raised, upon the application of Horne Tooke for an information against the defendant, who had published a report of the committee of secrecy of the house of commons, which contained imputations upon Tooke's character. And although it was attempted to be argued that the house of commons had no authority to order such a publication as the present, the judges discharged the rule, without calling upon the counsel against it (2). Then followed some observations of Lord Ellenborough, in *R.* v. *Creevey*, where the lord chief justice remarked that he was not prepared to say that to circulate a copy of that which was prepared for the use of members was legitimate, and that it could not be made the ground of prosecution if it contained matter of injurious tendency to the character of an individual (3).

The learning, however, upon this point was exhausted in the late famous case of *Stockdale* v. *Hansard*. There the defendant pleaded that the defamatory matter charged was part of a document which had been laid before the house by their order, and had thus become part of the proceedings of the house, and which was subsequently printed and published by the defendant under the like order. He likewise stated a resolution of the house, that the power of publishing any of its proceedings which it might deem necessary or conducive to the public interest, was an essential incident to the constitutional functions of parliament, and to the commons in particular. But the court gave judgment for the plaintiff upon demurrer, and they deemed themselves quite competent to determine whether the plea could by supported by virtue of the privileges claimed (4). And now, by 3 Vict. c. 9, s. 1, any defendant in any civil or criminal proceeding in respect of any report, paper, votes, or proceedings of either house of parliament, as such house of parliament may deem fit or necessary to be published, and so published by such defendant, or his servant, under the authority of parliament, may bring before the court where such proceeding has been commenced, or before any judge of the same court, (if one of the superior courts at Westminster,) first giving twenty-four hours' notice to the prosecutor or plaintiff, a certificate under the hand of the lord chancellor, or lord keeper, or the speaker of the house of lords, or the clerk of the parliaments, or the speaker of the house of commons, or clerk of the same house, stating that such report, or other proceeding, was published by the defendant, or his servant, by order or under the authority of the house of lords or commons, to-

(1) 1 Saund. 131, *Lake* v. *King*; S. C. 1 Mod. 58.
(2) 8 T. R. 293, *R.* v. *Wright*.
(3) 1 M. & S. 278.
(4) 9 Ad. & El. 1; 2 Per. & D. 1; S. C. at nisi prius, 7 C. P. 731.

gether with an affidavit verifying such certificate, upon which the proceedings shall be forthwith staid, and every writ and process determined. The second section affords the like protection to the publication of a *copy* published in like manner. The third section enables any person to give in evidence under the general issue such report, &c., in answer to any proceeding for publishing an extract from, or abstract of, such report, and to shew that such extract or abstract was published bonâ fide and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant. The fourth section contains a proviso, that nothing in the act contained shall be construed, directly or indirectly, by implication or otherwise, to affect the privileges of parliament in any manner whatsoever. This statute, however, it will be observed, does not authorize a publication of reports or papers independently of the authority of parliament. And, therefore, a person who ventures upon the publication of proceedings without such order will do so at his peril; and if he spread abroad defamatory matter, or remarks calculated to prejudice an individual, he will stand in jeopardy of a prosecution for libel.

By the same rule, a member of the house cannot publish his own speeches without risk, if he have reflected upon character in his address, although within the walls of the house he is protected by his privilege, subject to the rules of that assembly. And thus it was held that Mr. Creevey, who was found guilty upon an indictment for libel for publishing a speech delivered in the house of commons, and reflecting upon the prosecutor as an informer, could not justify his act, nor mitigate it upon the pleas of having given a correct account and of having done so in consequence of an incorrect statement in his speech in other newspapers. He was subsequently fined 100*l.* (5). The same doctrine attaches to a speech delivered in the house of lords. Lord Abingdon sent the copy of a speech he made in that house to several of the public papers, and had it printed at his own expense. That speech reflected very much upon the professional character of an attorney, and an information being filed against that nobleman for a libel, he was convicted, and sentenced to fine and imprisonment, and no attempt seems to have been made to disturb the verdict (6).

Libels in Disparagement of Foreigners of Distinction.] There does not appear to be any authority for saying that a writing which reflects upon a private individual, being a foreigner, and residing in a foreign country, is a libel punishable by our law. But the principle seems to be, that if persons abroad were liable to be libelled here with impunity, the pacific relations which should exist between neighbouring states would be in danger of interruption. And Lord Ellenborough laid it down generally, that independently of the consideration above mentioned; to vilify and

(5) 1 M. & S. 273, *R.* v. *Creevey.* (6) 1 Esp. 226, *R.* v. *Lord Abingdon.*

defame foreigners of distinction must be held libellous (1). Thus, again, to represent a foreign potentate as a tyrant is within the rule just suggested (2). So a writing imputing ignorance to the French ambassador at the British court, and with having used arts to prejudice the interests of the defendant at Versailles, was deemed libellous, and the defendant was convicted (3). And, again, where the Queen of France was represented as the leader of a faction, and other severe reflections were passed upon her conduct, the court held that the writer was guilty of libel (4).

Manner.] The manner of preparing the libel for publication has likewise occasionally come into question, as well as the matter. As if one should copy out a libel, being neither the contriver nor the composer, such a person is guilty equally with the original maker (5). And a sign or picture has even been deemed as offensive a libel as though the abuse had been in writing (6). Or a type or figure (7). Or the expression of a name by one or two letters, so that no one can mistake the person meant (8).

So an allegory, a publication in hieroglyphics, a rebus or anagram may be libellous, and the court shall be allowed to judge of the meaning of such writings, as well as other persons (9). And words shall be taken not in too lenient a sense, but in that meaning which properly belongs to them, and which they were intended to convey (10).

But the principal topic of discussion has been whether merely writing a paper which, if published, would be a libel, is of itself a libellous act. And it certainly appears to have been the inclination of the mind of Abbott, C. J., when giving judgment in *R.* v. *Burdett*, that it would be so (11). The point, indeed, came in question upon that occasion, and was fully discussed, but it became unnecessary to decide it. Holroyd, J., forbore from expressing any opinion upon this difficult question (12). And Bayley, J., likewise concluded his judgment by carefully abstaining from saying more than that he should be prepared to give his opinion whenever such an exigency shall arise (13). It is not, however, to be supposed that the matter had not undergone much previous discussion. A case is cited by Lord Coke, where a party was convicted of making a libel in writing, and in the same place the expressions "a libeller, *or* publisher of a libel," are to be

(1) Holt on Lib. 78, *R.* v. *Peltier*.
(2) 1 Russ. C. M. 233; *R.* v. *Vint*, 1801.
(3) 1 Sir W. Bl. 510, *R.* v. *D'Eon*.
(4) 1 Russ. C. M. 233, *R.* v. *Lord G. Gordon*.
(5) 2 Salk. 417, 419; 4 B. & Ald. 656.
(6) See 1 Hawk. c. 73, s. 2; 2 Campb. 511. If a picture be referred to in the letter press, the printer is liable, though another hand than that of the printer composed the picture. 7 C. & P. 369.
(7) By Lord Ellenborough, Holt. on Lib. 114.
(8) 1 Hawk. c. 73, s. 5; *Hurt's C.* And an affidavit of some friend should state that he has read the libel, and understands and believes it to mean the party.
(9) 1 Russ. C. M. 210, citing Holt on Lib. 235, 236.
(10) See 5 East, 463.
(11) 4 B. & Ald. 159.
(12) Id. 135.
(13) Id. 158; see 3 B. & Ald. 717; 4 B. & Ald. 95, where the arguments are collected

found (1), as though a plain distinction might be made between the two; and another case is likewise mentioned in 3 Inst. (2), where a party confessed to the writing, and not to the publishing, and judgment was given against him. Then, again, it was said that the contriver, the procurer, and the malicious publisher were respectively guilty of libel (3), whence it might seem that the writer would be guilty of writing as a distinct offence (4).

The next case is where a clergyman at Bristol was charged with composing, making, writing, and publishing a libel. The jury acquitted him of the publishing, and found a special verdict, stating that he was the writer, and that a person unknown both to him and to the jury dictated the libel whilst the clergyman wrote: the court held him to be guilty of libel. They said that he who dictated could not be indicted for making the libel, because he did not write it, so that if the defendant could not be punished, the crime would be without punishment (5). In another report of the same case, it is said that the making of a libel is an offence, though it be never published, but it was adjourned, and no judgment appears to have been given (6). Very speedily after this the case came again to be considered. The defendant being charged with this misdemeanor, the jury found him guilty of writing and collecting libels, and not guilty as to the residue of the indictment, which would include publishing. And it was moved to arrest the judgment, because the jury had found the defendant guilty of that which was rather a folly than a crime. But the court thought otherwise, and the defendant was fined (7). So where it was shewn that the manuscript of a libel was in the handwriting of the defendant, and the printing and publication were proved, but it did not appear that the defendant directed the publication, Littledale, J., left the matter with the jury, upon the authority of *R.* v. *Beare*, and *Lamb's* case, and a verdict of guilty was pronounced (8). Again, where the defendant, a printer's servant, assisted in composing a libel for the press, by preparing the type for printing, Raymond, C. J., directed an acquittal as to the publication, and advised the jury to convict the defendant of the printing if they believed the evidence; and he was accordingly found guilty and punished (9). And another case was cited by Holroyd, J., in *R.* v. *Burdett*, as being to the same effect (10).

Then, on the other hand, it has been said, that *R.* v. *Pain* is of doubtful authority, no judgment having been pronounced (11). And *R.* v. *Beare* has likewise been arraigned as contrary to the opinions of eminent judges, and the current of subsequent de-

(1) 3 Inst. 174.
(2) Ibid.
(3) 9 Rep. 59, *Lamb's* C.
(4) See also Mo. 813, S. C.
(5) Carth. 405, *R.* v. *Paine*; S. C. Comb. 358; S. C. Holt's Cases, 294.
(6) 5 Mod. 163.
(7) Carth. 407, *R.* v. *Bear*; S. C. 1 Ld. Raym. 414; S. C. 12 Mod. 218; S. C. 1 Salk. 417, cited by Abbott, C. J.; 3 B. & Ald. 719.
(8) 9 C. & P. 462, *R.* v. *Lovett*.
(9) 1 Barnard. 305, *R.* v. *Knell*.
(10) 4 B. & Ald. 136.
(11) Id. 100.

cisions (1), and the reasoning of the judges in that case has been said to be very unsatisfactory (2). The opinion of Lord Camden has been cited as adverse to *Beare's* case, in his judgment given in *Entick* v. *Carrington* (3). And the silence of Comyns, C. B., who must have been fully aware of the case of *R.* v. *Beare*, has been relied upon as shewing that he did not adopt the doctrine, that bare writing, without publication, is a crime (4). *R.* v. *Knell* has been said to fail in the proof required from it, because in that case the libel had been published afterwards, though not by the defendant, and perhaps the printer might have been considered in the light of an accessory to the publication (5). The opinion of Hawkins in his definition of libel has also been mentioned as unfavourable to the doctrine now under discussion (6). And Blackstone's sentiments have been referred to as hostile to this same doctrine (7).

It is not very easy to predict the issue of a trial upon this point, although there is reason to believe that the inclination of the judges in *R.* v. *Burdett* was in favour of the decision in *R.* v. *Beare*, and, therefore, friendly to the doctrine that writing without publication is a libel (8).

Clearly, however, the clerk who draws an indictment, or the student who takes notes in court, cannot be drawn into jeopardy (9).

However, the mere possession of a libel is not, under many circumstances, an offence. As if one should take a copy of the libel in order to ground ulterior proceedings. So where the defendant's lodgings were searched by virtue of an information, and two libels were found there, the opinion of the court was, that the defendant had not committed the crime charged against him, which was, that he had caused to be framed, printed, and published a scandalous libel. For the possession of a libel and the non-delivery of it to a magistrate, were only punishable in the star chamber, unless there were a malicious publication, although in the case before us the defendant had not given any account of the libel (10).

Possession, however, of a known libel is evidence of it's having been published by some one (1). And, therefore, if a letter be written by A. to B. containing scandalous matters, A. is clearly a publisher of the libel (12).

2. *What shall be said to constitute the Offence.*] If barely writing a libel be an offence, it is clearly an ingredient in the misdemeanor of libel. But if that be not so, the most ordinary

(1) 3 B. & Ald. 719.
(2) Id. 720.
(3) Id. 727, citing 19 St. T. 1072, (Howel.)
(4) Id. ibid.
(5) Id. 728.
(6) Id. 730, citing 1 Hawk. c. 73, s. 1.
(7) 3 B. & Ald. 731.
(8) See likewise 2 Keb. 502, *R.* v. *Fitton* & another.
(9) 3 Campb. 212, Wood, B.; 2 Salk. 417, Holt, C. J.
(10) 1 Ventr. 31, *Anon.*; see 12 Mod. 220.
(11) 1 Hawk. c. 73. s. 13.
(12) 12 Rep. 35.

proof of guilt must be said to rest in publication. Now, to read a libel is not a publication, nor to hear it read, nor to laugh at it when read, but if the hearer or reader should repeat it in the hearing of others, or should read it aloud to others with a knowledge of its libellous character, he then becomes guilty of an unlawful publication. "For every one who shall be convicted ought to be contriver, procurer, or publisher, knowing it to be a libel" (1). Hawkins, however, doubts whether the repetition of a libel in merriment is not a publication, on the ground that jests are not to be endured, and that the injury to the reputation of the party grieved is in no way lessened by the merriment of him who makes so light of it (2). And if the defendant be proved to have lent or shewn the writing to another, he is guilty (3), unless he have done so by mistake (4). So if he publicly commend it (5). And it seems that there must be an openness or publicity in the transaction, which will not be satisfied by a private reading in the presence of a friend, although that is certainly a communication of the libel from A. to B. (6). The plaintiff was made the subject of a caricature, and the evidence was that a witness went to the defendant's house to see the picture, when the defendant pointed out the figure of the plaintiff, together with that of other persons ridiculed. Lord Ellenborough held that this was not a publication (7). But where a libellous picture was publicly exhibited, Lord Ellenborough admitted the declarations of spectators with reference to particular figures to prove the resemblances of those figures to the parties libelled (8).

We shall presently shew more particularly what is deemed sufficient evidence of a publication.

Evil Intention.] Another ingredient necessary to constitute the offence of libel is the wilful and evil intention of the party. This is usually a matter of inference drawn from the libel itself (9). And it is observable that the law will imply malice when the libel is without excuse. As where the defendant wrote, "It is with the deepest concern we have to state that the malady under which His Majesty labours is of an alarming description. *It is from authority we speak.*" The jury asked whether malicious intention was necessary to constitute a libel, and were answered by Abbott, C. J., that a man must be intended to do what his act is calculated to effect, upon which they pronounced a verdict of guilty, and the court upheld this ruling of the judge (10).

It would be difficult, indeed, to assume that a defendant could be innocent who wantonly and voluntarily propounds a defamatory writing. But, as we have seen, a paper might be delivered by mistake, and there are several bonâ fide communications

(1) 9 Rep. 59, *Lamb's* C.; see 5 Mod. 165; 1 Hawk. c. 73, s. 13.
(2) 1 Hawk. c. 73, s. 14.
(3) 1 Russ. C.M. 235, citing 4 Bac. Abr. Libel.
(4) 5 Mod. 167.
(5) 2 Show. 468, *R.* v. *Eades.*
(6) See 5 Mod. 165, in marg.
(7) 3 Campb. 323.
(8) 2 Campb. 512.
(9) See 5 Burr, 2667, in *R.* v. *Woodfall*; 4 T. R. 126, *R.* v. *Topham*; 4 B. & Ald. 95, *R.* v. *Burdett.*
(10) 2 B. & C. 257, *R.* v. *Harvey* & another; S. C. 3 D. & Ry. 464. See 5 M. & Ry. 251.

which, when stripped of any malicious intention, are rather praiseworthy acts than misdemeanors. A combination of malicious meaning with publication is as decisive a proof of libel as can be conceived.

3. *Slander.*] The third point for our consideration is what shall be called an indictable slander (1). It has been laid down, that an action for slander may be maintained when the words impute to a man a crime for which he is punishable by law (2). As that he has an infectious disorder: or when they speak offensively of him in his office, profession or business (3). But an indictment or information cannot be successfully prosecuted for words, unless they directly tend to a breach of the peace, as if they convey a challenge to fight (4). A magistrate may, indeed, bind over to the good behaviour a person who abuses him to his face whilst he is in the execution of his office, or he may commit him for contempt, but neither an indictment nor any other criminal proceeding can be enforced for mere words (5). And even where it is alleged that words import a challenge, or other breach of the peace, the matter must be very clear. The defendant said, "this is no justice of peace's business, you shall not try this matter, have a care what you do, I have blood in me, if I had you in another place." He was convicted upon an indictment at the sessions, but upon arrest of judgment, the court said, that these words did not convey any necessary intendment of a challenge (6). And in another report of the same case (7), it is said that judgment was arrested for another reason,—because the indictment failed to allege the charge in respect of which the defendant spoke the words in the first instance, since it might not have been a matter within the jurisdiction of justices, and then it could not be a misdemeanor to speak in depravation of their authority. Again; "your worship speaks to me here, but you dare not do so in another place." An indictment for these words was quashed on motion (8).

A magistrate is not liable to punishment for words spoken in the execution of his office (9).

4. *Defences which have been occasionally resorted to in cases of libel and slander.*] Successful defences upon legal principles to indictments for libel and slander are not very common. Many such have, however, been resorted to, but it has been far more frequently the lot of defendants to gain their acquittal through the propitious influence of juries, than through appeals to the court upon grounds of law.

(1) Slander and defamation are the same. Therefore the court would not quash a writ de ex. cap., because the charge was in the disjunctive for "slander *or* defamation." W. Kel. 132, *R.* v. *Keat.*

(2) But not an indictment. 2 Ld. Raym. 857, *R.* v. *Cave.*

(3) 3 B. & C. 33; by Bayley, J., with reference to actions, which seem in this respect to correspond with indictments.

(4) 6 Mod. 123; 2 Salk. 697; 3 Salk. 190.

(5) See post, sect. 8, as to libels and slanders concerning magistrates.

(6) 10 Mod. 186, *R.* v. *Nun.*

(7) Gilb. Ca. 36, 40.

(8) 12 Mod. 414, *R.* v. *Walden.*

(9) Lofft. 55, *R.* v. *Skinner.* But

Ignorance.] Thus, ignorance is no answer, for it is the duty of every man to be cognizant of the law. And if a printer should think fit to suffer a paper to proceed from his press, he must take the responsibility of its contents (1). So, if the libel should come from a bookseller's shop, although there be no proof of privity, knowledge, consent, approbation, or malus animus in the bookseller, the evidence against him is conclusive (2). As if a servant should sell it (3). For "nothing could be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher, would make him safe in dispersing them" (4). It is, indeed, said, that one of the ingredients of libel is the publication of it knowing it to be a libel, but the law must, of necessity, presume that knowledge on the part of the master, where a libellous paper issues forth at the hands of his servant. Although it may be added, that this liability extends only to transactions in the way of trade. So that, where a customer sent back a bill which had been made out by the defendant's daughter, who returned it with a letter in which the supposed libel was contained, the court would not set aside a nonsuit which the judge had directed. The matter did not happen in the regular course of trade, and this writing could not be considered as coming within the scope of the defendant's authority delegated to his daughter, which was to write bills, and not libels (5). There may be grounds for extenuation in a case of ignorance, but if a master so little attends to the conduct of his apprentice or servant, as to become, however innocently, the depository of a libel, he must, according to law, bear his share of the consequences. The rule is exactly the same with regard to the proprietorship of a newspaper. It had been, in the time of Lord Kenyon, the old and received law for above a century, and it was held, therefore, to be no answer to a criminal information, that the publication of a newspaper was entirely conducted by the servants of the defendant (6). So, where a proprietor of the Morning Journal lived at a distance of one hundred miles from London, and took no part in the publication of the newspaper, and was in fact confined to his house by illness when the paper complained of appeared, Lord Tenterden held him criminally answerable, and he was found guilty together with others (7). If, indeed, a party were shut up in close custody, so

the court will censure any intemperate language which he may happen to make use of in answering a criminal information. 1 Jurist, 657, *R.* v. *Burn*; S. C. 7 Ad. & El. 190.

(1) Lofft. 544, 780.

(2) 5 Burr. 2686, *R.* v. *Almon*.

(3) 2 Sess. Ca. 33, *R.* v. *Dodd*.

(4) 1 Hawk. c. 73, s. 10; see also *R.* v. *Dodd*; 2 G. 2, 2 Sess. Ca. 33; and *R.* v. *Nutt*, 1 Barnard. 306; Fitzg. 47, where the attorney-general is said to have declined, under similar circumstances, to accept a special verdict. *R.* v. *Strahan*, 5 Burr. 2689, cited by Aston, J.; also Moo. & M. 436.

(5) 8 Taunt. 42, *Harding* v. *Greening*.

(6) 3 Esp. 21, *R.* v. *Walter*; S. P. M. & M. 435, *R.* v. *Cuthell*, cited Lofft. 759, R. v. *Williams*.

(7) Moo. & M. 433, R. v. *Gutch* & others. But he was discharged upon his own recognizance. Id. 438. Ignorance may be a ground for mitigating the punishment. Lofft. 759, *R.* v. *Williams*; see post, in this section.

that he could not possibly investigate the conduct of his servants, it might, indeed, be matter of justification (1).

Author.] Another ground for appealing to the court is, that the author is prepared to give himself up in that character. This is not necessarily a discharge of the printer and publisher, but it will weigh with the court. Therefore, where an attachment was moved for against the publisher of a libel, upon his shewing a letter, whereby it appeared that one M. was the author, time was given him to make out the proof. And upon the appearance and confession of the author, the rule against the publisher, with whom the printer was joined, was discharged (2).

Former Publications.] Neither can the impunity of other publishers of the same libel be relied upon as matter of defence. It was suggested on the behalf of a defendant that persons had published a paper ten years ago, similar to that which was the subject of the prosecution; but the opinion of Lord Kenyon, C. J. and Ashurst, J., were unfavourable to the objection, whilst Buller and Grose, Js., thought they could not entertain it at all, because it did not appear upon the judge's report (3). The defendant received sentence of fine and imprisonment (4). And by Lord Kenyon, "the consequence of admitting that evidence would have been, that these persons, who were not only not called upon, but could not have had any opportunity to defend themselves against this charge, might have been pronounced to be guilty" (5).

Truth of Libel.] Neither is the alleged truth of the libel any defence to an indictment or information, for the greater appearance there is of truth in any malicious invective, so much the more provoking it is (6). So that whether the party libelled be a person of good or ill fame is quite immaterial (7). There are, in fact, but two questions in general for the consideration of the jury. 1st, whether the defendant has published the libel; 2ndly, whether the innuendos be true (8). The opinion of the house of lords upon the passing of the libel bill, was decidedly adverse to the

(1) Lofft. 780; 1 Hawk. c. 73, s. 10, note, *Woodfall's* C.

(2) 8 Mod. 123, *R.* v. *Wiatt*; S. C. Fort. 201. Where the author confessed the libel, "*errors of the press and some small variations excepted*," Pratt, C. J., admitted the evidence, saying, that he should put it upon the defendant to shew that there were material variations. 1 Str. 416, *R.* v. *Hall.*

(3) But both Buller and Grose, Js. were manifestly hostile to the objection, so that it may fairly be said to have been overruled by the full court.

(4) 5 T. R. 436, *R.* v. *Holt.*

(5) 5 T. R. 443.

(6) 1 Hawk. c. 73, s. 6.

(7) 5 Rep. 125; Hob. 253.

(8) 3 T. R. 428, note, *R.* v. *The Dean of St. Asaph*, by Ld. Mansfield; S. C. 4 Doug. 73; 3 T. R. 428, *R.* v. *Withers*, by Ld. Kenyon. This defendant who attempted to excuse himself on the ground of his having been told that the composition in question was libellous, and of his having published it in order to negative the assertion of libel, was held to have aggravated rather than mitigated his guilt. 4 Dougl. 73, *R.* v. *Shipley.*

reception of truth as a defence (1). And where the defendant wished to shew in answer to an indictment for libel, that some of the king's subjects had been killed and wounded by the dragoons in a conflict at Manchester, the bench were unanimous in their judgment that evidence of that nature was properly rejected (2). And Abbott, C. J., mentioned the case of *R.* v. *Horne*, where Lord Mansfield allowed the defendant to call witnesses, as affording no ground for continuing such a course (3), but on the contrary, said the chief justice, "such an instance can, in my opinion, be of no avail against the current of prior and subsequent practice" (4).

But it is observable, that although the tender of the truth of allegations will not answer an indictment or information, it will be a ground for refusing an information, and leaving the party to his remedy by indictment, that the charges in the libel are not denied (5). So that it is customary upon moving for a criminal information, to produce an affidavit repelling upon oath the truth of the imputations.

Copy]. We have already seen, that an attempt to justify a libel upon the plea of having copied it from another publication cannot be sustained (6), and it seems likewise, that the repetition of oral slander is not justifiable, unless there be some good and reasonable cause for so doing, and *à fortiori* not so, if the repeating proceed from a bad motive (7). And even if the name of the author be communicated at the time, the party is still without excuse, unless he have a good ground for reiterating the matter in question (8). And in this sense, with this qualification, the passage in Lord Coke should be understood, where he says, that one may justify slander, by revealing the name of the original calumniator (9).

Irony.] Again, irony is no defence. It is sufficient to say upon this point, that ironical observations of any description will not guard the offender from the consequences of his slanderous disguise. As if one who is known to be a statesman, but no soldier, should be held up as worthy of imitation for his courage, or an officer for his learning, or any other quality in precise opposition to the requisites of a soldier (10). If the defendant do not mean to scandalize the prosecutor by his irony, he should shew it at the trial (11). For if this were not a crime, the defendant might, by contraries, libel any person without punishment (12). So, where the defendant said of one H., that he would not play the Jew nor the hypocrite, it was considered to mean an ironical imputation of

(1) See 4 B. & Ald. 182.
(2) 4 B. & Ald. 95, *R.* v. *Burdett*; Id. 314, S. C. see 2 M. & Ry. 152.
(3) 4 B. & Ald. 182.
(4) Ibid.
(5) 1 Str. 498, *R.* v. *Bickerton*.
(6) Ante.
(7) See 4 B. & Ald. 614, 615.
(8) Id. 615, by Holroyd, J.
(9) 12 Rep. 134: 4 B. & Ald. 614, by Holroyd, J.
(10) See 1 Hawk. c. 73, s. 4.
(11) 11 Mod. 86, *R.* v. *Dr. Brown*; S. C. Holt's Ca. 425. The defendant gave every lord a character ironically.
(12) Holt's Ca. 425, by Holt, C. J.

vain glory against H., and the offender was fined 500*l.* (1). So, to sing songs from a paper, jestingly, to the discredit of the prosecutor's children, is slanderous, and punishable as a libel (2).

There are, however, some circumstances which will justify a person in doing that which, strictly speaking, is in law the publication of a libel. As if A. should deliver a libel by mistake out of his study, not having written it, but being merely endowed with the possession of it (3). So if A. should deliver a letter without a knowledge of its contents, or deliver one paper instead of another (4). But it lies upon the defendant to prove these facts to the satisfaction of the jury.

Proceedings.] The most open form of proceeding in cases of criminal prosecutions for libel is by indictment. That course is free to all the king's subjects. Another remedy is by information (5). But in this case it is customary for the court to require the prosecutor to deny upon oath the matter of the libel. So that where it was imputed to an apothecary that he had personated Dr. C., a physician, and had written, and taken his fee, Pratt, C. J. said that although truth was no justification, yet that as the apothecary did not pretend to deny this fact, there was sufficient cause to prevent the interposition of the court in an extraordinary manner, and the rule was discharged (6). And if the court should see cause for believing that the charge in question is true, they will probably abstain from granting the extraordinary remedy (7). But there are certain circumstances which form an exception to a rule otherwise invariable and which the court will not depart from without much reason. As if the person libelled should live abroad at a great distance (8). Or if the imputation should be general (9), or charge treasonable practices and designs against the prosecutor. As where the Duke of Richmond was represented as having opposed in his speeches in parliament any increase of the military strength of the kingdom, for the purpose of advancing the interests of France. In this case the court hesitated very much, and the matter was very fully discussed. The duke only swore that he believed himself to be the person meant in the libel, and that it contained false, scandalous and malicious aspersions and insinuations against him, but did not deny specifically the charges. The rule was made absolute(10). So, where it was said that the duke of Athol and his family were held in such general abhorrence in the Isle of Man that if he should succeed in obtaining an act then pending in parliament, a re-

(1) Hob. 215, *Hicks's* C.; S. C. Poph. 139; see 2 Str. 898.
(2) 2 Burr. 980, *R.* v. *Benfield* & another.
(3) 5 Mod. 167.
(4) 4 T. R. 127, *R.* v. *Nutt*, cited by Lord Kenyon.
(5) It will not be granted for a libel concerning disputed matters in trade, 1 Barnard. 90, *R.* v. *Roberts*. But in a case of a charge of felony it was granted. 2 Barnard. 128, *R.* v. *Lofeild*. See also id. 84.
(6) S. P. *R.* v. *Beharrel*, cited in marg.; 1 Str. 498. *R.* v. *Bickerton*; S. P. Dougl. 284, *R.* v. *Miles*; see Id. 387 (a) for other cases; also 3 T. R. 388, *R.* v. *Webster*; 1 Hawk. c. 73. s. 6, note; 1 Jurist, 52, *R.* v. *Taylor*; 2 Ch. Rep. 162, *R.* v. *Wright*.
(7) 3 Smith, 291, *R.* v. *Draper*.
(8) Dougl. 389.
(9) Id. 390.
(10) Id. 387, *R.* v. *Haswell*.

volt would be occasioned, the court held that no affidavit from the duke was necessary (1). So in the case of a letter imputing unnatural practices, although the complainant did not positively swear to his innocence (2). The court will refuse an information if it appear that slanderous words concerning the defendant have been used in the affidavit (3).

An attachment for libel likewise has been granted (4).

The rule for a criminal information in a case of libel must be moved for before the expiration of the second term after the publication, and within a reasonable time during the term, so that cause may be shown within that term. But the prosecutor may say that he had not knowledge of the libel so as to enable him to make an earlier application (5). It was held too late in a matter concerning the vindication of character to apply in January respecting a libel published in May, the person libelled not having spoken to the publisher about the matter till November, although he was aware of the libel in July (6).

A rule for a criminal information for libel being enlarged on condition of the defendant pleading immediately in the event of its being made absolute, the defendant wass deemed to be entitled to reasonable time for that purpose (7). The court will not restrain a proceeding by indictment because an information is pending for the same libel. Every copy of a libel, when published, subjects the defendant, in strictness, to a distinct prosecution (8).

Indictment.] We shall not attempt to go through the various indictments for libel. The common count charge that A. B. contriving to injure the reputation of C. D. and bring him into ridicule, with force and arms, and of malice did unlawfully write (9) a certain libel of and concerning C. D., containing the false, scandalous, malicious, and defamatory words and matter following. [Here the libel is accurately set out with innuendos if necessary] (10), which said libel A. B. afterwards sent to one E. F. to the great damage and disgrace of C. D., and against the peace, &c.

The words "with force and arms" are not necessary (11), nor need the libel be called false, for the falsehood need not be proved (12).

(1) Id. 391, note.

(2) Lofft. 148, *R.* v. *Dennison.*

(3) 2 Nev. & P. 152, *R.* v. *Byrne*; S. C. 7 Ad. & El. 190. And again, if a publication be not sworn to, although the affidavits on the other side admit the publication. 3 Nev. & P. 342. *R.* v. *Baldwin*, where a statement that the defendant did print and insert a libel in a certain newspaper, a copy of which is annexed, was held insufficient for this purpose. S. C. 8 Ad. & El. 168.

(4) 8 Mod. 123, *R.* v. *Wiatt.*

(5) 1 Nev. & M. 483, *R.* v. *Jollie*; S. C. 4 B. & Adol. 867; see Id. 869, note, *R.* v. *Hartley.*

(6) 1 Jurist, 37, *R.* v. *Murray.*

(7) 2 Jurist, 538, *R.* v. *Master.*

(8) 1 Ch. Rep. 451, *R.* v. *Carlisle.* An affidavit relating to several indictments must have as many stamps as there are cases to which the affidavit applies. S. C.

(9) It must not be said "or cause to be written," 8 Mod. 330, *R.* v. *Brereton.*

(10) But the technical expressions, "in these words," are not necessary, 1 Freem. 524; *Browne's* C. See id. 456, S. C. Part of the libel may be set out without the residue, S. C.

(11) 7 T. R. 4, *R.* v. *Burks*, where several cases were referred to in which vi et armis had been omitted Trem. 61; 2 Show. 468, *R.* v. *Tutchin*, 5 St. Tr. 527, &c.

(12) 7 T. R. ut suprà.

But the words, " of and concerning," cannot be set aside. An indictment charged the defendants with libelling the Mayor of Colchester, and the essence of the writing was, that the mayor had practised corruption in granting a license to retail beer. It was said in the prefatory part that the defendants intended to vilify the mayor, and the innuendos applied the various portions of the libel to the prosecutor, and concluded to the injury and disgrace of the mayor, &c., but the count neglected to state that the publication was *of and concerning* the said mayor. It was moved to arrest the judgment upon the authority of *R.* v. *Alderton* (1), where it had been held that the innuendos could not supply the want of the averment that the libel had been published of and concerning the prosecutors in that case. And a case in Strange was cited where a similar decision had taken place in the case of an action (2). And the court made the rule absolute, Lord Ellenborough observing that *R.* v. *Alderton* contained every thing except the material words, " of and concerning" (3). But having placed the words " of and concerning " on the record, the prosecutor will not fail if he does not express all his innuendos in the most certain manner. As where the defendant was charged with having libelled certain troops, and the only innuendo was applied to the word " dragoons," meaning the said troops—it was held sufficient without defining more particularly what troops were meant. So the court will expound a libel laid to have been published of and concerning the government, in it's plain and ordinary sense, although it be not expressly averred that any act referred to was done by the government or its order (4). And " of and concerning" is a sufficient averment that " a false and scandalous libel was published of and concerning his majesty's government and the employment of his troops," without any further allegations as to the subject-matter by way of innuendo or otherwise (5).

The libel itself must be accurately set forth, and it seems that there are two ways of doing this. One by the tenor, in which the pleader undertakes to set out the words with the greatest precision, and the libel given in evidence must agree exactly with that set out in the information; the other, by stating that the defendant made a writing containing *inter alia* (6), the words set out, in which case it would be necessary to set out those only which are material, and a variance would not be fatal unless the sense were altered (7). In this manner we must understand, as Mr. Starkie expresses himself, the meaning of Lord Holt, where he says, that if a libel be described by it's sense, exactness in words is not so material (8), and not that it is unnecessary to state the words themselves (9).

(1) Say. Rep. 280; S. C. cited more correctly by De Grey, C. J.; Cowp. 686.

(2) 2 Str. 934.

(3) 4 M. & S. 164, *R.* v. *Marsden.*

(4) 4 B. & Ald. 314, *R.* v. *Burdett.*

(5) Cowp. 672, *R.* v. *Horne;* see also 4 Bro. P. C. 368, *Horne* v. *R.* in error.

(6) Where the term " inter alia" was used, but the whole libel was set out except " finis," the court would not arrest the judgment, saying that the time for taking advantage of the objection, if, indeed, it were at all available, was at the trial. 2 Show. 488, *R.* v. *Johnson.*

(7) Stark. C. P. 127.

(8) 2 Salk. 661.

(9) Stark. C. P. ut suprà.

Therefore, although "according to the tenor and effect following" will be sufficient; to say—"according to the effect," without more, would not be good, for the court must judge of the words themselves, and not of the construction which the prosecutor puts upon them (1). Therefore, where the libel was recited with the word *nor* instead of *not*, the indictment was held faulty (2). But a single letter wrongly inserted or omitted and which does not alter the sense, will not vitiate (3). Thus, an indictment for libel so far differs from one prosecuted for slander, inasmuch as words cannot be set out according to their tenor, there being no original to copy from. Words are transient, and vanish in the air as soon as spoken, and therefore an identity is not required (4); but nevertheless, this sentence must be understood with the qualification, that certain of the words spoken must be proved and found (5). Thus, when the defendant was indicted for speaking ill words to a justice and obstructing him in the execution of his office, the count was held bad for want of adding what the words were (6), or how he was obstructed (7). And it seems, moreover, that the charge could not have been sustained unless the slander tended to a breach of the peace (8). So where the indictment charged that the defendant had said, *he* is a broken-down justice, a perjured justice, &c., but the proof was that the defendant said, "*You* are a broken-down justice," &c., the court gave judgment for the defendant, although Lord Kenyon had held at the trial that it was sufficient to prove the substance of the words. And Buller, J. added, that though there was a case in Strange in support of his lordship's opinion, it had been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits upon the same objection (9). So, where a libel began, "My sarcastic friend MΩPOΣ"—and the count omitted the word MΩPOΣ, it was held defective (10). So where a libel in a foreign language was translated, instead of being set forth in the original, the court arrested the judgment (11).

These observations, however, upon the indictment in cases of libel are not inconsistent with the rule that no more of the writing or of words need be set out than will make the charge good (12). If the defendant would rely on other passages of the publication in order to qualify it, it is for him to do so by his own evidence, and this brings us to consider the mode of introducing two different passages in the same count. This may be done by saying, "In a certain part of the said libel there was and is contained," &c., and "in a certain other part of which said libel there was and is contained," &c. (13). It is unsafe to depart from such a form as the

(1) 2 Salk. 417, *R.* v. *Bear*; 1 Ld. Raym. 415, citing *R.* v. *Fuller*, *R.* v. *Young*, and *Ford* v. *Bennet*, to the same effect; *Sacheverell's* C. 9 Ann. Stark. C. P. 124.

(2) 1 Salk. 660, *R.* v. *Drake*; S.C. 3 Salk. 224; S. C. Holt's Ca. 348, 425.

(3) Stark. C. P. 132.

(4) 3 Salk. 225.

(5) 2 Salk, 661.

(6) 2 Str. 699, *R.* v. *How*.

(7) S. C. 2 Sess. Ca. 81.

(8) Ante.

(9) 4 T. R. 217, *R.* v. *Berry*.

(10) 1 Campb. 353, *Tabart* v. *Tipper*, cor. Lord Ellenborough.

(11) 6 T. R. 162; see also 1 Russ. C. M. 242, *R.* v. *Peltier*.

(12) See Cro. Jac. 407; 8 Mod. 330; Stark. C. P. 129, 131.

(13) See 1 Campb, 353, by Lord Ellenborough.

above, for if passages not continuous in the original libel are set forth continuously in pleading, it is at the peril of the prosecutor, since any alteration of the sense would produce an acquittal (1). If the libellous quality of the writing be derived from circumstances extrinsic of the words, the extrinsic facts with reference to which the writing becomes criminal should first be stated. There should then be an averment that the libel relates to these facts, and lastly innuendos should be introduced, connecting such parts of the libel as require explanation with the introductory facts previously exhibited upon the record (2). So that where proper innuendos are introduced, the defendant may be convicted of libel although he should not have expressed himself distinctly as to the persons libelled. Thus, by the word, "bishops," the bishops of England were understood (3), and by "ministers," the ministers of the King of England (4), and by certain feigned names members of the royal family may be designated (5). The pretender was considered to be pointed at under the appellation of the "little gentleman on the other side of the water" (6). So the "young sophi" (7), or the "chevalier" (8). So the "navy" was construed to mean the "royal navy," by means of an innuendo (9).

In setting out the intent, care must be taken to make it consonant with common sense. It is reasonable to suppose that a libel directed to C. concerning B. might bring B. into discredit, but to send a writing to B. himself may not always have that result. Therefore, where the defendant was charged with sending a libel to the prosecutor with intent to injure him in his profession of solicitor, Abbott, J., held that the indictment could not be supported. The intention might have been laid to provoke the prosecutor, and excite him to break the peace, but the libel sent as this had been, direct to the prosecutor, could not have the effect of disparaging him as a professional man in the eyes of the world, who knew nothing of the publication (10). The learned judge also said, that where a libel is sent to the wife, it ought to be alleged as sent with intent to disturb the domestic harmony of the parties (11).

Where an indictment concluded in malum exemplum inhabitantium, it was adjudged ill (12).

Evidence.] We do not in general attempt to speak of evidence in the prosecution of this undertaking, but as proof of the publication of a libel is occasionally accompanied by some points of interest, it is proposed to depart from the usual course in this

(1) See 1 Campb. 353, by 1 Lord Ellenborough.
(2) Stark. C. P. 132; Cowp. 684, by De Grey C. J.; see also 8 East, 427; Stark. C. P. 134, 135.
(3) 3 Mod. 69, *Baxter's* C.
(4) Stark. C. P. 136.
(5) 1 Barnard. K. B. 304, *R.* v. *Clerk.*
(6) 11 Mod. 99; Anon. "Innuendo the Prince of Wales." Holt, C. J., thought the meaning clear without the help of this innuendo. Ibid.
(7) 1 Barnard. ut supra.
(8) 9 St. Tr. 679, *R.* v. *Mathews.*
(9) Stark. C. P. 137, citing 5 St. Tr. 528.
(10) 2 Stark. 245, *R.* v. *Wegener.*
(11) Ibid.
(12) 1 Mod. 35, *R.* v. *Baker.*

instance, and to enter briefly into the consideration of the necessary testimony. We have seen, that two material points are in issue, the publication, and the truth of the innuendos (1). If it be designed to charge the publication of a libellous letter to an individual, proof should be given of the delivery of the letter to the prosecutor (2). If there be a difficulty as to the handwriting, persons cognizant of the hand of the writer should be brought forward. But it is not competent to compare the libel in question with other writings supposed to have been the work of the same person. Comparison of hands is not evidence, although an individual accustomed to penmanship may be called for the prosecution to show that the paper tendered in evidence was the production of a feigned hand (3). However, letters may be read in explanation of other writings without proof of handwriting. As where the charge was for publishing a libellous placard: the prosecutor had received anonymous letters, and the placard was published concerning them. It was asked in this placard, whether the prosecutor had not received warning, and he understood that to refer to the letters, and said, he should not have understood the placard but for the letters. Upon this they were allowed to be read as above stated (4). Proof of the delivery of a sealed letter is evidence of publication, other circumstances being brought home to the writer, although the letter be opened in another county than that wherein it was originally delivered (5). So where a libel in the defendant's handwriting was duly traced by the post from London to Scotland, and was produced at the trial with the proper post marks and the seal broken, it was held evidence of publication (6). So where the defendant directed a letter to Berkshire, which the prosecutor received in Middlesex, the court held the publication sufficient, for the defendant having once put the paper into circulation must be taken to have published it in that place in which it was delivered to the person to whom it was addressed (7). But the Islington twopenny-post mark was held insufficient to prove that the letter had been put into the post in Middlesex, because the post mark might have been forged (8).

Proof that a libel has been stolen seems to be no evidence of publication (9).

Where the libel complained of has been published in a newspaper, the statute 6 & 7 Will. 4, c. 76, must be consulted in order to facilitate the mode of proceeding against the offender. By sect. 6 of that act, no person shall print or publish, nor cause, &c.

(1) See 3 T. R. 428, *R.* v. *Withers.*

(2) See Poph. 139, Sir *B. Hickes's* C.; 1 Lev. 139, *R.* v. *Summers* & another; 2 Esp. 624, *Phillips* v. *Jansen*; 1 Hawk. c. 73, s. 11.

(3) 4 Esp. 117, *R.* v. *Cator.*

(4) 5 C. & P. 213, *R.* v. *Fane.*

(5) 4 B. & Ald. 95, *R.* v. *Burdett*; see also 7 East, 65, *R.* v. *Johnson*, and post.

(6) 1 Cr. M. & R. 250.

(7) 1 Campb. 215, *R.* v. *Watson.*

(8) 1 Campb. 215, *R.* v. *Watson*; see, however, Russ. & Ry. 264, *Plumer's* C. And it was clearly held in the case just cited, that the words "post paid, 2*s.*" were not evidence of there being an inclosure.

(9) 3 Ch. Burn. 730. Carrying a libel to the printer seems, under some circumstances, to be no publication. Lofft. 72, *R.* v. *Eden.*

any newspaper before there shall be delivered to the commissioners of stamps and taxes, or to the proper officer at the head office for stamps in Westminster, Edinburgh, or Dublin respectively, or to the distributor of stamps or other proper officer appointed by the said commissioners for the purpose in the district where the newspaper is intended to be published, a declaration by the proprietor, setting forth the correct title of the newspaper, and of the printing house thereof, and likewise of the house where it is intended to be published, together with the true name, addition, and place of abode of the printer, publisher, and proprietor, whether such proprietor be resident here or abroad. Should there be more than two proprietors, exclusively of the printer and publisher, the names, &c. of two resident proprietors, whose interests shall not be respectively less than those of any other resident proprietor, together with the amount of their interests, must be inserted, and such declaration shall be signed by the printer and publisher, and by all the proprietors resident in the kingdom. A fresh declaration must be made whenever the proprietorship of the newspaper becomes changed so as to alter the proportionate amount of the shares; or whenever any change takes place with respect to the printer, publisher, or proprietor; or whenever the title of the paper is altered, or the printing office or place of publication; or whenever such commissioners as aforesaid shall require such a declaration to be made, signed, and delivered, after due notice to the printer, publisher, or proprietors, or at the place of printing or publication; and such declaration may be made before any commissioner or officer of stamp duties, or other person appointed by the commissioners, who are authorized to receive such declaration. To make a false declaration is a misdemeanor. By sect. 7, a penalty of 50*l.* is imposed for a default in not making the declaration above required. The 8th section directs, that the declaration shall be filed, and that a certified copy shall be admitted as conclusive evidence against the parties who have made it, unless it be proved that any such person became lunatic, or had signed a declaration of his having ceased to be the printer, publisher, or a proprietor of the newspaper, or that there had been a new declaration, in which the person sought to be affected on such trial did not join. The commissioners are to deliver the certified copies, and after the production of the declaration so certified together with a newspaper entitled in accordance with such declaration, it shall not be necessary to prove a purchase of such newspaper. The penalty for a false certificate by whomsoever given is 100*l.* By sect. 9, service of process at the printing or publishing office shall be deemed good service against any person named in the declaration as printer, publisher, or proprietor. Sect. 10 directs that the titles of newspapers shall be entered in a book, to which all persons may have gratuitous access. Sect. 12 contains a proviso exempting the printers and publishers of the London and Dublin Gazettes from making the declaration alluded to. Sect. 13 ordains, that copies of newspapers, signed by the printer or publisher, together with

the place of abode of the printer or publisher, shall be delivered to the commissioners of stamps, under a penalty of 20*l.*; and that such copies shall be evidence against the printer, publisher, or proprietor, if applied for within two years after the publication (1).

This statute supersedes the 38 Geo. 3, c. 78, which was repealed by it. Under that act of Geo. 3 it was held, that it ought to have appeared upon the affidavit that the distributor had authority from the commissioners to take it, and, in default of that proof Lord Ellenborough required evidence aliunde (2). And it should seem that similar testimony should be ready to authenticate the declaration necessary under 6 & 7 Will. 4, c. 76. It should, however, be remembered, that if it be not competent to prove the publication under the statute, the prosecutor may resort to the common law, for the act was only passed to facilitate conviction, not to shut out any other mode of proceeding. Therefore, in default of a certified copy, the original declaration, signed by the defendant, and stating him to be printer, publisher, or proprietor, may, it seems, be tendered, together with a copy of the newspaper in question, purchased or otherwise duly obtained (3).

It is no objection to urge that the particular copy offered in evidence has never been published. Though not stamped according to the act of parliament, the paper may be produced. The publisher, indeed would be liable to a penalty, but the newspaper is not the less receivable in proof of a libel (4).

It may be added, that in a late case before the new act, the rule adopted in actions was held applicable to criminal informations;—that upon the production of the stamp office affidavit (5), the newspaper, if corresponding with it in title and in the name of the printer and publisher and place of publication, might be read in evidence as published by the parties named therein, without further proof (6).

Where the place of printing was called Union-street, Castle-street, in the affidavit, and Union-buildings, John-street, in the newspaper, the court would not allow the rule to be enlarged in order to show by supplemental affidavits that the places were identical. The court, moreover, will take notice of this correspondence and connection, although the paper be not annexed to nor expressly identified by any affidavit (7).

(1) As to what shall be called a newspaper see schedule A of the act. And note that so much of the act 60 Geo. 3, & 1 Geo. 4, c. 9, is repealed by this statute as subjects any newspaper, or other paper or pamphlet to any stamp duty. As to the duties on pamphlets, not being newspapers, see sect. 21 of 6 & 7 Wm. 4, c. 76. The bond given at the stamp office for the payment of duties, was formerly the usual evidence of publication. See 4 T. R. 126, *R.* v. *Topham*. Then followed the st. 38 Geo. 3, c. 78, requiring an affidavit, which is now exchanged for a declaration.

(2) 3 Campb. 100, *R.* v. *White*.

(3) Ibid. S. C.

(4) Peake, N. P. C. 75, *R.* v. *Pearce*.

(5) And now in the declaration.

(6) 4 B. & Adol. 698, *R.* v. *Dunnison* & another.

(7) 2 Ad. & El. 49, *R.* v. *Francey*; S. C. 4 Nev. & M. 251. The rule affects the proprietor or publisher only.

The identity of the newspaper must appear. Therefore, unless the rule be drawn up on reading the newspaper, and unless the newspaper be filed, the court will discharge the rule for an information, although it may have been duly granted upon the production of a certified copy from the stamp office (8).

The delivery of a newspaper containing the libel to the officer of the stamp office is of itself a publication, for the officer would, at all events, himself have an opportunity of reading the libel. A rule for a new trial was, therefore, refused (9).

Thus far concerning the evidence required to prove libels conveyed through letters and newspapers. The particular proofs demand respectively for the conviction of different offenders vary in each case, and, perhaps, cannot be said to fall within the scope of a work not especially dedicated to evidence, or to the consideration of the subject of libel. Some, passages, however, in the progress of a criminal prosecution for this misdemeanor may, nevertheless, be useful and interesting. As where the libel had reference to riot and outrages upon property, boasting that one Gen. Ludd had done much in Nottingham and the neighbourhood, &c. In this case the king's proclamation was admitted to show that deeds of violence had been perpetrated in certain districts, and the court considered the evidence quite proper, the document referred to being an act of state. The preambles to two acts of parliament reciting those outrages and proposing to remedy them, were likewise received with equal approbation. And it was also held, that proof of the name of Gen. Ludd being that of a fictitious person was sufficient to sustain an averment that the outrages in question had taken place under the direction of a supposed and unknown person (1). So a Gazette is evidence to show that certain addresses have been presented to the king, and an averment to that effect is supported by that proof (2). But depositions taken before a magistrate in the absence of the defendant cannot be permitted to be read upon the trial of the party for the misdemeanor, for he could not avail himself of the privilege of cross-examination (3).

The libel itself must be produced and read, and if the defendant published it by exhibiting its contents, and then returning it to his own custody, parol evidence may be given of it upon his refusal to deliver it up for the purposes of evidence (4). And for the

(8) 4 P. & Dav. 137, *R.* v. *Woolmer* & another.

(9) 4 B. & C. 35, *R.* v. *Amphlitt*; S. C. 6 D. & Ry. 125.

(1) 4 M. & S. 532, *R.* v. *Sutton*. *In*, and *in the neighbourhood* of N., were held, in this case to be divisible averments, so that there was no need of proof that the outrages were committed both *in* and *in the neighbourhood*, and a distance of 14 or 15 miles, would satisfy the word "neighbourhood." The judge also said, that the jury were at liberty to refer to their own personal knowledge, if they saw any of those acts committed. And this was considered not by any means a misdirection.

(2) 5 T. R. 436, *R.* v. *Holt*.

(3) 5 Mod. 163, *R.* v. *Paine*.

(4) 1 Russ. C. M. 239; 2 T. R. 201. A., a printer, delivered a paper to his servant, who took it to the servant of the defendant, an editor. A. and his servant proved this, but it was insufficient to connect the defendant, through his servant, with the paper, in the absence of more direct proof. Peake, N. P. C. 76, *R.* v. *Pearce*.

purpose of corroboration, other libels, written by the same person upon the same subject, may be received in evidence (5).

Should it be impossible to understand a libel without reference to other papers, those other papers may be read for the prosecution, and without proof of the handwriting (6).

It is, of course, not competent for the defendant to prove the truth or falsehood of a libel upon the trial of an indictment or information, but evidence to show that the libel does not apply to the transaction referred to by the pleading is admissible. If, however, it be admitted that the transactions have happened, and that the libel related to them, the defendant cannot go into proof of the justice of the connection between the libel and these transactions, for that would be to admit the question of truth or falsehood (7).

Upon a criminal information for a libel, importing neglect of duty to magistrates during a riot, Patteson, J., refused to let the defendant prove that there was in fact a riot, and that a pistol was fired at the people (8).

Trial.] Some discussion has taken place as to the proper venue in libel. Setting aside the question whether merely writing a libel is a misdemeanor (9), it seems to be a rule that wherever the publication has taken place, the venue may be safely laid (10). Whence it follows, that if the defendant should have propounded his libellous paper in two counties, he may be proceeded against in either. A defendant's acknowledgment is the best evidence of his having published in the county where the venue is laid. As where expressions were used by the defendant in his letter denoting that he had sent certain other letters to Cobbett's Register in Middlesex. These other letters being proved to be in the defendant's handwriting, and being the subjects of the libel, it was held that the jury might find a publication in Middlesex by the procurement of the defendant (11). So where a defendant wrote a libel in one county, and consented to its publication in another (12). But owning a signature without more, conveys no proof as to the county (13). If a letter be proved to have been put into the post in the county of A. directed to a person in the county of B. it is clear, that the trial may take place in either county. As where a libel is written in London, and forwarded by post to Exeter (14). So where a libellous letter was sealed up and put into the post in Westminster, addressed to a person in the city of London, it was held (upon due proof no doubt of the posting of the letter,) that there

(5) Peake, N. P. C. 75, *R.* v. *Pearce.*

(6) 5 C. & P. 213, *R.* v. *Slaney.*

(7) 5 B. & Adol. 1081. *R.* v. *Grant* & others; S. C. 3 Nev. & M. 106.

(8) 6 C. & P. 184, *R.* v. *Brigstock.*

(9) See 3 B. & Ald. 717; 4 B. & Ald. 95. As well as the question, whether if publication be necessary as well as writing, the venue can be laid in any county except that where the publication takes place.

(10) 1 Russ. C. M. 240; citing 12 St. Tr. 354, *Seven Bishops'* C.; S. C. 12 How. St. T. 183.

(11) 7 East, 65, *R.* v. *Johnson.*

(12) 12 St. Trials, 331.

(13) 12 How. S. T. 183, *Seven Bishops'* C.

(14) 12 How. St. Tr. 332.

was a sufficient publication in Middlesex (1). And we have seen, that if the party to whom the letter is addressed should happen to receive it in the county where the venue is laid, the trial cannot be set aside because the libel was directed to another county (2). So under the old act, 38 Geo. 3, c. 78, the affidavit of names of the printer, publisher, and proprietor of a newspaper was deemed sufficient evidence that the paper was published in the county where the printing was alleged in such paper to have taken place (3). The court of king's bench, however, has gone one step further than entertaining the confession of a defendant, and the ordinary proof. They have called presumption in aid to establish the fact of publication in a particular county. Sir F. Burdett was prosecuted for a libel, and the venue was laid in Leicestershire. The letter containing the libel was dated in L. (4) and was received in Middlesex by one B. from a gentleman who was not called as a witness, and who was, moreover, not proved to have been in Leicestershire. Satisfactory proof of the defendant's handwriting was given, and it was shown that he himself was in L. about the time of the delivery of the libel in M. It was objected, that there was no proof of a publication in L. But Best, C. J., thought there was, and the jury, in obedience to the directions of the judge, found the defendant guilty. This point was fully discussed upon a motion for a new trial, and Abbott, C. J., Holroyd and Best, Js. held, that there was a sufficient publication in the county of Leicester, not only by reason of the presumptions arising from extrinsic evidence coupled with the contents of the libel, but likewise from the want of contrary evidence within the knowledge and power of the defendant, (and of which he must be supposed to be cognizant), in order to weaken or rebut these presumptions against him. Bayley, J. thought that the presumptions could not be entertained, unless the gentleman, who was not called as a witness, had appeared to have been in L. at the time, or there had been reason to suppose that the defendant or any of his agents had been instrumental in concealing the mode by which the paper had come to the hands of B. The rule, however, for a new trial was discharged, there being three opinions against one (5).

Verdict.] The charges of composing, printing, and publishing are divisible, so that there may be a verdict of guilty as to one or more, and in like manner an acquittal. As where the defendant was charged with composing, printing, and publishing in one count, and with printing and publishing, and publishing only in others. There was no evidence that he had composed the libel, and an acquittal was claimed for him on the first count, but Lord Ellenborough was quite clear to the contrary, observing that it was

(1) 2 Campb. 506, *R.* v. *Williams.*
(2) Ante, *R.* v. *Watson.*
(3) 10 East, 94, *R.* v. *Hart & another.*
(4) Which is said to be evidence of its having been written in L. 4 B. & Ald. 124, by Best, J., citing *Dr. Hensey's C.*
(5) 3 B. & Ald. 717; 4 B. & Ald. 95, *R.* v. *Burdett*, Bart. See also the case of *Sir M. Lopez*, cited by Holroyd, J., 4 B. & Ald. 141.

invariably enough to prove so much of the indictment as would show that the defendant had committed a substantive crime therein specified (2). So upon an indictment for printing and publishing, the defendant was convicted of printing only (3). So the defendant upon another occasion was convicted of composing and publishing, and acquitted of printing (4). But where the jury found Woodfall guilty of publishing and printing only, there being no other charge, the court awarded a venire de novo (5); and by Lord Mansfield, "where there are more charges than one, guilty of some only is an acquittal as to the rest;" and "clearly there can be no judgment of acquittal, because the fact found by the jury is the very crime they were to try" (6).

By 32 Geo. 3, c. 60, s. 1, on every trial by indictment or information for the making and publishing any libel where the issue is between the king and the defendant, the jury sworn to try the issue may give a general issue of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant guilty merely on the proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. But by sect. 2, the court or judge before whom the trial is had shall, according to his discretion, give an opinion and directions to the jury in the matter in issue as in other criminal cases; and by sect. 3, the jury may give a special verdict notwithstanding, as in other criminal cases. Sect. 4 enables the defendant to move in arrest of judgment, as he might have done before the passing of the act. Acting upon the second section of this statute, the judges still instruct the jury upon the law of libel, and require them to adopt the law so laid down, unless they should be satisfied that the judicial direction is wrong (7).

Judgment.] The judgment in these cases of libel may be fine, or imprisonment, or both, and the convicted person may be ordered to find sureties to keep the peace (1). But in measuring out the

(2) 2 Campb. 583, *R.* v. *Hunt.* Verdict, not guilty.

(3) 1 Barnard. K. B. 305, *R.* v. *Knell.*

(4) 2 Camp. 646, *R.* v. *Williams.*

(5) 5 Burr. 2661, *R.* v. *Woodfall.*

(6) 5 Burr. 2668.

If there be reason to suspect that a mistake has occurred when the jury have delivered their verdict, as that all had not agreed when their foreman pronounced the verdict, affidavits of bystanders may be received to explain the facts, but certainly not an affidavit of any of the jury who tried the cause. Independently, however, of such affidavits of bystanders, if the court see reason that all the jury did not in reality hear the verdict of their foreman so as to be in a condition to express their dissent, they will grant a new trial. But they will not vacate the verdict, and permit the same jury to try the cause over again; for the court has no process by which it can order the same twelve persons to be assembled again to rehear the case and reconsider their verdict. 6 M. & S. 366, *R.* v. *Wooler.*

(7) 4 B. & Ald. 115, 131, 146, 147, 183, in *R.* v. *Burdett.* See 3 T. R. 428, *R.* v. *Dean of St. Asaph*, 1784, before the statute; S. C. 4 Dougl. 73.

(1) 1 Hawk. c. 73, s. 21; see 3 Inst. 174; 3 T. R. 432, *R.* v.

punishment the court will have regard to several circumstances. It is matter of mitigation that the party lives at a distance, whilst his servant directs the publication of the newspaper in which the libel is contained, and that he takes no part in the publication (2). It is likewise a mitigating fact that the defendant actually read a statement of certain facts in newspapers, where his libel purported to have been written in consequence of his having read such accounts, but an affidavit of the truth of those facts was refused (3). And the court will receive an affidavit that the defendant believed the charges to be true, if reasonable grounds for that belief be set forth (4). So provocation may be a ground for mitigation (5). The conduct of the defendant generally after the trial, may be considered with a view to mitigation (6). So that the court will give him an opportunity of answering affidavits brought against him by way of aggravation (7), and will even advise a defendant to offer extenuating circumstances for their consideration if he attempt to justify his conduct. For they will not suffer him to urge the truth of his libel as a ground for mitigation (8). It is rather an aggravating consequence of his fault to do so, and it may be remarked that the court will hear topics of aggravation in respect of the defendant's conduct after conviction, as well as matters of excuse. So that an affidavit with a pamphlet annexed, written by the defendant after the trial, and which was more libellous than that proved at the the trial, was admitted in aggravation (9). Although care will be taken not to inflict a greater punishment than the principal offence will warrant (10). So a repetition of slander may lay a foundation for a more severe sentence. Whereas, on the other hand, an affidavit that the defendant has stopped the sale, may operate in mitigation (11). But it is not enough for the prosecutor to state in his affidavit that he heard a third person, who refused to join in the affidavit, state this, and that the defendant repeated the libellous matter to the third person. Even if the affidavit had gone on to say, that such third person was under the control and influence of the defendant, Lord Ellenborough doubted whether he should have been disposed to receive it, although such an affidavit was admitted in *Archer's* Case (12), for an assault. And both Lord Ellenborough and Grose, Js., seemed to cast doubt upon the authority of *Archer's* Case (13). Where the defendant was under a

Withers. The defendant was ordered to find sureties for his good behaviour for three years, himself in 200*l*., and two sureties in 100*l*. each. He was likewise sentenced to fine and imprisonment.

(2) See Lofft. 780; Moo. & Malk. 433, *R.* v. *Gutch* & others.

(3) 4 B. & Ald. 414, *R.* v. *Burdett*.

(4) 9 B. & C. 65, *R.* v. *Halpin*.

(5) Either by writing or by words, 7 C. & P. 395; 2 Bingh. N. C. 437. See also 1 M. & Rob. 449; 7 Ad. & El. 223.

(6) 3 T. R. 432, by Lord Kenyon.

(7) Id. 428, *R.* v. *Withers*.

(8) 4 B. & Ald. 320, *R.* v. *Finnerty*, cited 2 M. & Ry. 152, *R.* v. *Bradley*; 9 B. & C. 65, *R.* v. *Halpin*; on the authority of *R.* v. *Finnerty*. S. C.; 4 M. & Ry. 8. "In *R.* v. *Draper*, Easter term, 1809, the court received such affidavits, but I believe it was with the consent of the prosecutor." By Best, J., 4 B. & Ald. 321.

(9) 3 T. R. 428, *R.* v. *Withers*.

(10) Id. 432, by Lord Kenyon.

(11) 3 Ch. Burn. 741, citing 3 Ch. Cr. L. 877, note, *R.* v. *Hone*.

(12) 2 T. R, 203, note.

(13) 2 East, 356, *R.* v. *Pinkerton*.

recognizance to appear and receive judgment; but it was agreed that he should not be punished if he discontinued his libels, the court would not pass judgment on him with the other defendants in the absence of proof that he had published fresh libels since the recognizance (4). All persons connected with this misdemeanor are principals, and may receive judgment accordingly (5).

Judgment may be passed upon a defendant in his absence under some circumstances. As where a person was convicted of publishing a libel, and was committed to prison, but the prosecutor shewed no disposition to bring him up for judgment. The defendant then made an affidavit, setting out the circumstances, and that he was unable to procure bail, upon which a rule nisi was made upon the prosecutor, to shew cause why judgment should not be pronounced upon the defendant in his absence, unless the prosecutor would undertake to bring him up for judgment during the term. This rule was subsequently made absolute after hearing counsel (6).

A motion was made after judgment, upon one occasion, that the court would direct the original letters which had been proved at the trial, to be delivered up by the prosecutor, and deposited with the officer of the court. But the judges said that they had hardly any authority to grant such a motion, as the prosecutor was out of court, but independently of that circumstance, they deemed the motion unprecedented, and not fit to be entertained (7).

Sect. VIII.—*Of Misdemeanors contrary to the Administration of Justice.*

Misdemeanors in contravention of the due administration of justice will be found to be, for the most part, embraced by the considerations of disrespect to the course of legal procedure, of misconduct either by law officers or towards them, and of actions which have a tendency to bring the mode of obtaining justice into ill repute, or into hazard.

Bearing these decisions in mind, we will proceed to the discussion of the several misdemeanors which will form the subject of this section. And first, with reference to a want of respect to the forms of legal procedure, a fruitful source of misdemeanor has been found in disobedience to the orders of judges, of magistrates, and other officers (8).

1. *Disrespect to the Law.—Disobedience to Orders of Judges, &c.*]

(4) 8 Dowl. P. C. 511, *R.* v. *Richardson* & others.
(5) Holt's Ca. 426, *R.* v. *Drake.*
(6) 5 B. & C., 334, *R.* v. *Boltz.*
(7) 2 East, 361, *R.* v. *Cator.* See further upon the subject of libel, 1 Hawk. c. 73; Russ. C. M., Book 2, Ch. 24.
(8) Note, that a company may be indicted for disobedience as well as an individual, and the course seems to be, to remove the indictment by certiorari into the king's bench, where the defendants must plead by attorney, which they cannot do at the assizes. 9 C. & P. 469, *R.* v. *Birmingham & Gloucester Railway Company.*

Thus to set at nought the command of the judge of a court of record, is a very serious offence. Where the misdeed takes place in his presence, he will impose a fine for the contempt, or commit the party (1), and for other such neglects an attachment will frequently be issued (2). Yet there is no doubt but that the person so misconducting himself is liable to be indicted at common law.

So, in the case of magistrates, a similar proceeding is often resorted to. As where the defendant has ventured to disobey an order of sessions. So two overseers were indicted for not paying over the balance of their accounts to the new churchwardens and overseers (3). And a parish officer for refusing to receive a pauper sent regularly to his parish (4). This matter came before the court in another case, where the principal point made was whether the particular order disobeyed was not punishable by statute as a distinct offence; but no question was made as to the general law of punishment for disobedience (5). So, upon a discussion as to the power of justices to compel a person to take an apprentice, the court said, "when we allow them such a power, of necessary consequence, we must allow an indictment for disobedience to their orders" (6). So, an indictment will lie against the treasurer of a county for not paying the expenses of a witness (7). So, an indictment will lie for not paying the costs of an appeal against a poor's rate, in conformity with an order (8). So, where surveyors of the highway neglected to obey an order for repair, they were held indictable (9). So again, persons connected with friendly societies have frequently been the subjects of an indictment for this misdemeanor. So it is a misdemeanor to refuse duly to collect and pay over rates in pursuance of a legitimate order. Or to refuse the payment of the costs of prosecutions when directed in like manner. Or to neglect obedience to an order, either to receive or to deliver up a felon, as the case may be. The third offence of disobedience to the orders and regulations of the poor law commissioners, or of contempt towards them as a board, is a misdemeanor, and subjects the party to a fine of not less than 20*l.*, and imprisonment, with or without hard labour (10).

It is not, however, to be supposed, that defences may not be made successfully to indictments of the nature above mentioned.

(1) See 3 Burr, 1257.

(2) See 3 T. R. 351, *R.* v. *Smithies*; id. 352, *R.* v. *Edyvean*; disobedience to a mandamus. Id. 403, *R.* v. *Wallace*; 5 T. R. 159; bad return to habeas corpus, 6 Mod. 307; 2 Burr. 792, *R.* v. *Beardmore*. For not carrying a sentence properly into execution.

(3) 2 Burr. 805, *R* v. *Bill* & another.

(4) Say. Rep. 163, *R.* v. *Davis*; S. C., cited 2 Burr. 802; S. P. lb. *R.* v. *Boys*, cited; see also, 1 T. R. 316, *R.* v. *Fearnley*.

(5) 2 Burr. 799, *R.* v. *Robinson*; 2 Ld. K. 513; see also 5 Mod. 329, *R.* v. *Turner*; S. C. 2 Salk. 474.

(6) 6 Mod. 164. *R.* v. *Gold*; S. C. 1 Salk. 381; S. C., Ca. Sett. 135; 1 Russ. C. M. 364; citing 4 Burn. Just., verba Foster, J. See 8 B. & C. 772, *R.* v. *Shipton*.

(7) 1 Ch. Rep. 650, *R.* v. *Surry Treasurer*. Or an attachment, but not a mandamus; 3 Ad. & El. 416, *R.* v. *Jeyes*.

(8) 1 Bott. P. L. 324, *R.* v. *Byce*.

(9) Cowp. 648, *R.* v. *Balme* & another.

(10) 4 & 5 W. 4, c. 76, s. 98.

Where there is no jurisdiction, for example, on the part of the authorities making the order, the judge will direct an acquittal, even although the objection appears on the record (1). Defences are not unfrequently resorted to to try rights and obligations between different jurisdictions.

Certain defendants were indicted for disobedience in not producing the parish books of rates before some justices of the peace, appointed by their brethren. But the indictment was quashed for by Holt, C. J.: the justices cannot refer the examination of the matter to a certain number of themselves, because they are all judges of the fact (2). An order for payment of money to a surgeon has been held bad, and therefore not the subject of an indictment for disobedience (3). And where an attorney tore off the items of an order for costs, under 7 Geo. 4, c. 64, made at an assize for Anglesey, it was held that the treasurer was justified in refusing to pay the demand. The entire unmutilated order should have been exhibited, and the conviction was accordingly annulled (4).

Friendly Societies.] The rules and management of friendly societies have caused some discussion upon this point of disobedience. For accuracy is requisite in propounding orders concerning these societies, and the act of parliament (5) must be strictly adhered to. Therefore, where the indictment was for refusing to readmit a party who had been expelled, and no proof was given that the rules and regulations of the society had been enrolled at the sessions, the court made the rule for entering a verdict of acquittal absolute, for the recital of the order of justices could not be deemed sufficient (6). This same act, 33 Geo. 3, c. 54, gives justices a power to hear and determine complaints, and to make such orders therein as to them shall seem just. Certain justices upon a complaint made, ordered relief to be given to the person applying, and they further adjudged that he should be continued a member of the society. But when the proof of complaint and the order were produced in evidence, it appeared that the individual who considered himself aggrieved, had confined his story to the want of relief, and had not required his readmission to the society. The defendants being found guilty, a rule was moved for to have a new trial, and the court made it absolute, for the justices had only power to adjudicate upon the particular complaint

(1) 2 Stark. 536, *R.* v. *Hollis*; where the defendant was indicted for not having removed an encroachment, pursuant to an order founded upon the building act.

(2) 6 Mod. 17, *R.* v. *Glin* & another; S. C., Ca. Sett. 219.

(3) 1 Bott. P. L. 403, *R.* v. *Smith*; see also 2 Ld. R. 1157, *R.* v. *West*; where the defendant, although discharged by the court of king's bench, was obliged to enter into a recognizance until the validity of the order should be determined.

(4) 2 Moo. C. C. 171, *R.* v. *Jones*; S. C. 9 C. & P. 401; see also upon this subject, 3 M. & S. 62, *R.* v. *Pierce*.

(5) 33 Geo. 3, c. 54.

(6) 8 B. & C. 439, *R.* v. *Gilkes* & others; 2 M. & Ry. 454; S. C. at N. P., 3 C. & P. 52.

addressed to them (7). It is, however, no ground of defence to allege that the power of readmission resides in a committee, so that the defendants, as president or stewards, are consequently not responsible. It was, indeed, held in one case, that it ought to appear by the constitution of the society, that the defendants had the power to restore the complainant (8). But upon a late trial, Lord Tenterden observed, that if this answer were admitted, all the acts regulating these societies might be utterly evaded (9). And Taunton, J., remarked, that the decision in *R.* v. *Inge*, was before the passing of 49 Geo. 3, c. 125, an act to amend the 33 Geo. 3, c. 54 (1). Therefore, in this last case it was held no good objection to say, that it did not appear upon the evidence that the president had any power to readmit (2). It was likewise held, that an indictment stating that the society had been established under the act, and the rules duly confirmed, was not invalid because it omitted to say that such rules had been filed, the word " filing" not being mentioned in the section (3) which gave the justices jurisdiction in cases of complaint (4). Nor is it any defence that the parties have ceased to be stewards, where an order is made by justices to reinstate a person who has been excluded. It might be a ground of excuse that they had done their best to effect that object, but entire neglect cannot be justified. In such a case the court held, that if the defendants had shewn at the trial, that they had done all they could to restore the party in obedience to the order, they might have given the fact in evidence by way of excuse (5). The order must find the party to be an officer. If it be directed to A. B., steward, &c., it is not sufficient. Nor if it recite a complaint upon oath stating the fact. Nor does an order shew the applicant

(7) 3 B. & C. 857, *R.* v. *Soper* & another; S. C. 5 D. & Ry. 669. The court were also with the defendant upon another ground; the complainant having alleged, according to the indictment, that he had been deprived of the relief he had been entitled to from the stewards of the society for the time being, whereas the proof was that he had only complained of his having been deprived of relief.

(8) 2 Smith, Rep. 56, *R.* v. *Inge* & another.

(9) 1 B. & Ald. 866.

(1) Ibid.

(2) Id. 861, *R.* v. *Wade* & another.

(3) 33 G. 3, c. 54, s. 15.

(4) 1 B. & Ald. 861, S. C. as above, sect. 2 of the stat. 33 Geo. 3, c. 54, directs that duplicates of the rules should be deposited with the clerk of the peace, and filed by him. It was held no objection to urge that these duplicates should have been signed by the clerk as well as the original rules which the act expressly required to be so signed. S. C.

(5) 1 Stark. 441, *R.* v. *Gash* & another. The society's rules were confirmed in London, but they afterwards held their meetings in Middlesex. It was held that they were an ambulatory body, and thus might change their residence: so that the justices of Middlesex might well have jurisdiction over their proceedings. And it was also considered, that the word " established" in the statute 33 Geo. 3, c. 54, s. 15, did not exclusively mean the place where the society was originally brought together, but might apply to any place where they should think fit to hold their meetings. S. C.

to be a member, by reciting a complaint upon oath, in which the party called himself a member, though the order direct certain monies to be paid (6).

We have said, however, that an indictment for disobedience is sometimes resorted to, for the purpose of trying questions of law. It might in that case be considered almost in the light of a civil action. Not but that the law still looks upon the neglect charged, in the light of a misdemeanor, for some person in particular must be fixed with an obligation which exists in point of law, and he is criminally answerable for slighting it, yet it is customary, where an individual or a corporation decline to fulfil a supposed duty for the purpose of obtaining the opinion of the court as to their liability, merely to inflict a nominal fine, should the judicial decision be unfavourable. Thus, where there was a dispute between the justices of Liverpool and of the county of Lancaster, whether the former could commit to the Preston house of correction, the matter came to be tried through the means of an indictment against the governor of the house of correction at Preston, and the points raised were made the subjects of a special verdict (7). A similar dispute was brought before the court upon a special case, and was decided upon the particular provisions of a local act (8). So, where the matter at issue was whether the Liverpool justices could demand the delivery of prisoners for trial from the governor of Lancaster gaol, the matter was argued for the crown against the governor upon a special case reserved after verdict. And the principle prevailing in this, as well as in other cases of the same kind, seems to have been, that where a borough or other jurisdiction is contributory to the county rate, there is, at common law, a right to enjoy advantages legally incident to such payment. And as the old adage runs thus, "qui sentit commodum, sentire debet et onus," the sentence must be read likewise *mutatis mutandis:* "they who contribute to the burthen shall partake of the benefit" (9). The court, therefore, construed the stat. 15 Geo. 2. c. 24, which places borough magistrates on a footing with county magistrates, upon the liberal principle above mentioned, and gave judgment for the crown (1). So, the costs of a prosecution in the borough court of Liverpool, were rightly ordered to be paid by the treasurer of the county of Lancaster, there being no exclusive jurisdiction exercised by the borough, nor any distinct treasurer in the nature of a county treasurer, nor rate similar to a county rate. The borough, on the contrary, contributed as a part of the county, to the county rate (2). But where the inferior jurisdiction has exclusive power,

(6) 5 Ad. & El. 359, *Day* v. *King* and others.

(7) 5 M. & S. 300, *R.* v. *Houghton.* The statutes referred to on this case were, 3 Ann. c. 6, s. 2; 6 G. 1, c. 19, s. 2; 15 G. 2, c. 24; 53 G. 3. c. 162. And judgment was given for the crown.

(8) Id. 311, *R.* v. *Houghton.* The statutes referred to were, 51 G. 3, c. 143, local and personal, 17 G. 2, c. 5. Concerning rogues and vagabonds. Judgment for the defendant.

(9) 5 M. & S. 310, by Abbott, J.

(1) 2 B. & Ald. 533, *R.* v. *Amos.*

(2) 4 M. & S. 515, *R.* v. *Johnson.*

and raises a rate in the nature of a county rate, the case is altered, and a verdict of acquittal was ordered to be entered in favour of the treasurer of Kesteven, in Lincolnshire, under such circumstances (3). So, where the justices of Leicester borough had an exclusive jurisdiction within the borough, but a concurrent power with the county justices with reference to the liberties of the borough: upon an indictment for not delivering up a prisoner charged with felony, in that part of a parish where the concurrent jurisdiction existed, the court said they could not distinguish the case from *R.* v. *Amos*, notwithstanding an argument for the defendants, that in *R.* v. *Amos*, the borough magistrates had no exclusive jurisdiction (4).

These indictments, again, come into question occasionally upon discussions relative to the collection of the county rate. As where the justices of Somerset caused the defendant, a constable of Bath, to be indicted for not levying a sum of money within that city, for the purposes of the county rate, according to their order. The case was tried in Dorsetshire, and a verdict was found for the crown. The stat. 55 Geo. 3, c. 51, s. 1, enabled justices to tax any parish or other place within the limits of their commission. They alone had the power of trying felonies within the city of Bath. But that act exempted liberties or franchises having a separate jurisdiction, and as Bath had a separate jurisdiction, it was contended that it was excluded. But the court said, that the act must be construed to mean such places as might have a separate jurisdiction coextensive with that possessed by the county justices. Now here the Bath justices had no jurisdiction in cases of felony, and therefore, they had not an exclusive separate jurisdiction. It is true that the costs attending prosecutions for felony were ordered by 55 Geo. 3, c. 51, to be raised by a separate rate in cities, towns corporate, &c.; but those words would only provide for the expenses of the trial. The costs of maintenance in gaol, and other incidental expenses, were not provided for (5). Judgment was given for the crown (6).

So, the maintenance of the family of a substitute for a militiaman has come into consideration, upon an indictment for disobedience to a justice's order (7).

Circumstances, indeed, may happen, which entirely put it out of the power of persons to yield obedience to a magistrate's order. As where an act ordained that a poor-house should be built, and, that after the building, the poor who were under the management of the overseers, should be transferred to the care of guardians appointed by the act. The house being built, the overseers of a parish, affected by the statute in question refused to obey the order of a justice directing them to relieve a pauper. And the court held that they were right, for the jurisdiction of the magistrate was at an end. Judgment of acquittal was given upon a special verdict (8).

(3) 6 T. R. 237, *R.* v. *Myers*.
(4) 6 B. & C. 704, *R.* v. *Musson*.
(5) 5 B. & Ald. 671, by Abbott, C.J.
(6) Id. 662, *R.* v. *Clarke*.
(7) 6 T. R. 179, *R.* v. *Willis*. Upon a special verdict.
(8) 5 T. R. 159, *R.* v. *Kear* & another.

Recital of Order.] The order must be carefully recited in the indictment. Where the defendants were charged with refusing to receive a bastard child, the indictments were quashed for want of an averment of the order (1). So, in the case of an order of the poor law commissioners, the count omitted to allege that the commissioners had made an order for the defendants, who were overseers, to account to the auditor: and for this reason it was held not sustainable (2). A recital is not sufficient where such an allegation is wanting (3). So it is, again, in the case of a warrant which an overseer or other officer is bound to execute (4). And service of the order must be alleged (5). It was considered to be a decisive objection to an indictment against six persons, that it charged a contempt by six persons of an order which was stated to have been served on four only. There ought to have been personal service (6) on all to whom a contempt of the order might be imputed (7). And a request to the defendants that they would perform the duties required, was deemed insufficient to supply the omission (8). But a direct allegation of the foundation of the order is not necessary, if there be a positive averment of disobedience. The only defence in such a case is want of jurisdiction. Thus, the foundation of an indictment is the order of sessions, and until the order is shewn to be reversed, it must be obeyed (9).

Contemptuous Words of the Court, &c.] There can be but little doubt that an indictment will lie at common law for speaking contemptuous words concerning a court of justice. But we shall not enlarge upon this, because the usual course is to proceed at once against the offender by attachment, and this course has been very frequently pursued without a rule upon the defendant to shew cause (10).

If a statute, however, prescribe a particular punishment for a contempt, which would not be indictable at common law, the penalty so awarded must be adhered to; as where attornies practising in the insolvent court without a proper appointment are

(1) 2 Salk. 371, *R.* v. *Whitehead.*

(2) 2 Per. & Dav. 319, *R.* v. *Crossley* & another; S. C. 3 Jur. 675: S. C. 10 Ad. & El. 132. After verdict, an allegation stating an order to have been made by "the poor law commissioners," &c., without naming each commissioner, is good. And the words "duly sent" will suffice, without alleging actual service, S. C. But whether disobedience of an order of the commissioners within sect. 98, be indictable until the third offence, might have been a point. It was, however, not raised. 10 Ad. & El. 138, Patteson, J.

(3) 2 Ld. Raym. 1363, *R.* v. *Crowhurst*; Cald. 133, *R.* v. *White* & another.

(4) 1 Vent. 305, *Burrough's* C.

(5) Cald. 554, *R.* v. *Moorhouse*; S. C. 4 Dougl. 388.

(6) Unless a particular act of parliament, as the poor law act, should dispense with personal service. *R.* v. *Crossley*, ut supra; see 4 & 5 Wm. 4, c. 76, s. 98.

(7) 8 East, 41, *R.* v. *Kingston.*

(8) S. C.

(9) Cald. 506, *R.* v. *Mytton*; S. C. 3 Esp. 200; S. C. 4 Dougl. 333.

(10) See 1 Salk. 84; Str. 185, *R.* v. *Jones*; Say. Rep. 47, *R.* v. *Jermy*; Id. 114, *R.* v. *Kendrick*; 2 Str. 1068; 6 Mod. 43, *R.* v. *Crosse*; 1 Str. 567, *R.* v. *Unitt.*

declared to be guilty of contempt, *eo nomine*, and subject to fine and imprisonment (2).

Libel and Slander.] Cases of libel and slander against legal officers are, however, frequently treated as misdemeanors, and prosecuted accordingly (3). But the right principle seems to be, that words spoken to a magistrate are not indictable, unless they tend immediately to a breach of the peace, or are addressed to him in the execution of his office (4); and the better opinion is, that words spoken in the absence of a justice are not indictable (5). Libel stands upon a different footing, since every published writing which is calculated to bring a person into contempt, and so to injure his fair fame in the world, is punishable by indictment or information (6). Hence it follows, that some of the old cases which treat words spoken of a justice as indictable misdemeanors cannot now be looked upon with respect as authorities (7). And, indeed, scandalous expressions were not always regarded as indictable, even in more ancient times (8).

But the magistrate is not without redress where the slander is intruded upon him when he is not engaged in his office. He may have an action for such words as the law deems actionable, or he may cause the speaker to be bound over to his good behaviour (9). And for such slander uttered behind his back, it seems that suretyship for the good behaviour may be required (10).

The defendant was charged with abuse of a justice in the execution of his office, and the court said that the justice might make himself judge and punish immediately; but still, if he should think proper to proceed less summarily by way of indictment (1), he might. "The true distinction is, that where the words are spoken in the presence of the justice, there he may commit,

(2) 1 & 2 Vict. c. 110, s. 114.

(3) Lofft. 462, *Anon.*

(4) See 1 Ro. Rep. 79, *Bagg's* C.; 5 Mod. 203, *R.* v. *Crawfield*; 10 Mod. 186, *R.* v. *Nun*; 1 Str. 420, *R.* v. *Revel*; Andr. 226, *R.* v. *Leafe*.

(5) 1 Hawk. c. 21, s. 13.

(6) See Andr. 384, *R.* v. *Sharpe*.

(7) See 1 Mod. 35, *R.* v. *Baker*; 3 Mod. 139, *R.* v. *Darby*; 11 Mod. 167, note (e). Note.—That supposing it to be competent for justices to commit for contempt, the commitment must be for a time certain. 5 B. & Ald. 894, *R.* v. *James*.

(8) See Sty. 251, Hil. 1650. 1 Ventr. 16, *R.* v. *Burford*; 2 Salk. 697, *R.* v. *Langley*; Id. 698, *R.* v. *Wrightson*; 1 Hawk. c. 21, s. 13, *R.* v. *Legasley*; Id. ib. *R.* v. *Broxham*; 11 Mod. 195, *R.* v. *Shaftow*; 12 Mod. 98, *R.* v. *Glandfield*; Id. 514, *R.* v. *Lee*; 1 Lord Raym. 153, *R.* v. *Penny*; 2 Str. 1157, *R.* v. *Pocock*; S. C. 7 Mod. 310.

(9) But he may not commit for contempt, unless he be acting as a magistrate. See likewise W. Kel. 133, *R.* v. *Cotton*; S. C. 2 Barnard. 313, where the defendant was committed for contemptuous language. The court observed, that the usual course was to fine the offender, and to commit him in case of nonpayment; but they would not grant an information against the justice.

(10) 1 Ventr. 16; Holt's Ca. 331; 2 Salk. 698; 7 Mod. 29; 12 Mod. 514. But the justice who has been slandered ought not to bind the party over, but he should get one of his brethren to do it for him. 12 Mod. ut suprà, by Holt, C. J.; 1 Hawk. c. 21, s. 13.

(1) As in *R.* v. *Collyer* & another, 1 Wils. 332; S. C. Say. Rep. 44; and the death of the justice will not work the discharge of the recognizance; Id. 222, *R.* v. *Ellers*.

but where it is behind his back, the party can be only indicted for a breach of the peace" (3). So where the defendant called a magistrate a liar, and accusing him of misconduct, declared he would repeat the language, the court would not grant an information, there appearing no intention of committing a breach of the peace (4). And thus, again, where a justice had been slandered, the court denied an information, saying, that it was not the same insult and contempt as if spoken to him in the execution of his office, *which would make it a matter indictable* (5). Therefore, the point to be considered is, whether words spoken in the justice's absence might lead to a breach of the peace. One Harrison was indicted for advancing to the bar of the Common Pleas, and saying, whilst the judge was sitting there, " I accuse Mr. Justice Hutton of high treason ;" and he was severely fined and imprisoned for the offence (6). Here the judge was " giving rules and orders," and thus was in the execution of his office.

This matter was discussed in a comparatively modern case. The defendant said of one G., a justice of Middlesex, that he was a scoundrel and a liar. The words were charged in an indictment preferred against the defendant as having been spoken of the prosecutor in his character of justice, and with intent to defame him in that capacity. Lord Ellenborough interposed and said, that as the words were not spoken to the justice, they were not indictable ; and his lordship referred to 2 Salk. 698, and *R.* v. *Pocock*, 2 Str. 1157. But as the matter was upon the record, Lord Ellenborough would not direct an acquittal, but left the facts to the jury, who found a verdict of not guilty (7). Where a defendant was committed and fined at the sessions for saying, "If I cannot have justice at the sessions here, I will have justice elsewhere," Twisden, J., understood the words to savour of an appeal, and he observed, that every subject had a right to demand that privilege, but the other judges were of a different opinion (8).

But judges and magistrates are not the only persons connected with the law who may be the subjects of slander. One S. was indicted for speaking evil of a grand jury, who had presented him, imputing perjury to them, and the court held that the charge was valid (9). So a constable may indict for words spoken to him in the execution of his office, or may have the party bound over to his good behaviour, but the court will not grant an information (1).

The indictment, however, for slandering officers must set out the words, or the court will not be able to judge whether they were such as would warrant the indictment (2).

(3) 1 Str. 420, *R.* v. *Revel;* see, however, 7 Mod. 28, *R.* v. *Rogers;* S. C. Holt's Ca. 331.

(4) 4 Ad. & El. 773, exparte *Chapman.*

(5) 2 Str. 1157, *R.* v. *Pocock.*

(6) Cro. Car. 503, *Harrison's* C.; S. C. Hutt. Rep. 131.

(7) 2 Campb. 142, *R.* v. *Weltje.*

(8) 1 Sid. 144, *R.* v. *Mayo*; and the man was fined 5*l.* and discharged; 3 Keb. 508.

(9) 2 Show. 207, *R.* v. *Spiller.*

(1) Cun. Rep. 100, *R.* v. *Whitfield.*

(2) 1 Ro. Rep. 79, *Bagg's* C.; 2 Str. 699, *R.* v. *How.*

Little need be said concerning *libels* upon legal officers. They are, *a fortiori*, punishable. And they may be the subjects of indictment, upon publication, in like manner as other libels. As where the defendant printed concerning one R. T., an alderman, that he was "scandalously guilty of telling a lie in divers companies," the court granted an information (3). So where one had been indicted for perjury, and acquitted, upon which he brought an action for a malicious prosecution, and recovered heavy damages, the verdict in his favour being likewise confirmed in the Common Pleas; it was held, that an order entered in the corporation book of Yarmouth, stating that the person who had prosecuted, and against whom damages were recovered, had been actuated by motives of public justice, &c., was a libel reflecting upon the administration of the law. And the court granted an information against twenty persons, being the majority of the corporation present at the making of the order (4).

Where the indictment charged the defendant with having published a libel concerning certain magistrates, and the intent was said to defame them, and also to bring the administration of justice into contempt, Bayley, J., told the jury that if they were of opinion that the defendant had published the libel with either of those intentions they ought to convict him (5). The allegations were, therefore, divisible, according to the principle usually applicable to the statement of different intents.

2. *Misconduct by Legal Officers.*] Another class of misdemeanors against the administration of justice consists in misconduct, either by officers entrusted with the authority of the law, or towards them.

Thus, if a judge were to transgress his powers, and invade the liberty of the subject, or were to be guilty of a gross dereliction of duty, although he might be open to other proceedings, he might still be prosecuted for a misdemeanor (6).

By 1 & 2 Wm. 4, c. 56, s. 58, if any judge, commissioner, registrar, clerk, messenger, assignee, or any other officer whatsoever, shall fraudulently and wilfully demand or obtain, either directly or indirectly, any fee, emolument, gratuity, or any thing of value,

(3) Andr. 228, *R.* v. *Staples*. See other cases of libels on justices of the peace, 5 B. & Ald. 596, *R.* v. *Alderton*, cited; Id. ib. *R.* v. *Holloway* & another, cited.

(4) 2 T. R. 199, *R.* v. *Watson* & others.

(5) 3 Stark. 35, *R.* v. *Evans*.

(6) In former days the default of a judge with reference to any matter connected with his oath was thought highly of. See 18 Ed. 3, st. 4; 20 Ed. 3, c. 1; likewise 8 Ric. 2, c. 4, which enacted, that any judge or clerk who should falsely enter pleas, rase rolls, or change verdicts, so as to produce disherison, should be fined and ransomed at the king's will; the prosecution to be within two years after the default, if the party grieved were of age, otherwise within two years afterwards. See also 16 Car. 1, c. 10, 6, as to the third offence against that act [for regulating the privy council and taking away the star chamber] on the part of any chancellor, judge, or other great officer, whose names are enumerated in the act. These respective statutes still remain unrepealed.

for any thing done under that act (7), or any other act relating to bankruptcy, or under colour of doing any thing under such acts, he shall incur a penalty of 500*l.*, be removed from his office, and be for ever afterwards incapable of holding office in the same court, or otherwise serving his majesty. The like penalty is awarded by 3 & 4 Wm. 4, c. 94, s. 41, against any master in chancery, or any person holding any situation or employment in the said court, who shall be guilty of similar conduct.

The committal of a person who had used indecent and violent language towards a legal authority was visited by a prosecution by reason of an excess of jurisdiction (8). So where a magistrate is neglectful of his office, or goes beyond the authority which the law has awarded him, or becomes guilty of corruption in the execution of his employment, or acts in a wilful or tyrannical manner in opposition to justice, he may be tried upon a criminal information or may be indicted.

By 28 Ed. 3, c. 10, s. 1, and 1 Hen. 4, c. 15, the mayor, sheriffs, and aldermen of London not causing notorious errors and misprisions to be corrected, were declared to be punishable by a penalty, at the discretion of the court, and liable to treble damages at the suit of any person aggrieved by their neglect.

In 1780 the lord mayor of London was charged with a breach of duty in not resisting the outrages of the rioters of 1780. It was proved that he failed to read the proclamation ordered by the riot act; that he neither restrained nor took the proper steps to apprehend the rioters; that he did not give any order to fire on them; and that he did not make use of the military force under his command. The defendant pleaded fear, and the surprise of the attack; but the court held that no incidents which would not produce a terror sufficient to appal a firm man could be called in aid. For a magistrate has not only the military under his orders, he may likewise call all the king's subjects to his assistance, and at the time of a riot he may even repel force by force before the reading of the proclamation from the riot act. The defendant was found guilty (9). The mayor of Bristol was charged with neglect in not having done his utmost to repress the riots in that city, but he was acquitted. It was held, however, in this case that he could not be made responsible for not swearing in special constables, under 1 & 2 Wm. 4, c. 41, unless an information on oath had been previously made before him; nor could he be arraigned for an omission in not calling out the posse comitatus if he had given timely notice of the impending riot to the inhabitants. Nor need he marshal nor head the constables or the military, nor accompany the soldiers. The part expected of him is, that he should exhibit that energy which a man of honesty and of ordinary prudence, firmness and activity might reasonably be expected, under the circumstances, to possess. It would not, however, be a defence to plead honesty of intention (1).

(7) An act for establishing a court of bankruptcy.
(8) W. Kel. 133.
(9) 5 C. & P. 282, note, *R.* v. *Kennett*.
(1) 3 B. & Adol. 947, *R.* v. *Pinney*; S. C. at N. P., 5 C. & P. 254, 282.

If a justice discharge a prisoner improperly, or take insufficient bail, he is liable to an information (2). On the other hand, should he violate the liberty of the subject, he may be prosecuted (3). As if he should proceed against a party without a summons or warrant (4). So where a justice took an examination alone in order to make out an order of removal, an information was granted against him (5); and because two other justices signed the order upon that sole examination, without summoning the party or demanding security, the court awarded an information against them likewise for returning a falsehood upon the order, which recited that a complaint had been made, and that the party had been examined upon oath (6). The conviction or proceeding must, however, be removed before the court will grant an information (7). So where a justice added the name of his father to an order of removal, an information was granted (8). So where he antedated an order (9). But an information has been refused against a magistrate for denying to grant his warrant, no corruption being alleged (10).

Extortion is, of course, a ground for proceeding against a justice (11).

Corruption or favour (12) is a manifest ground for proceeding against magistrates. This matter has often come before the court, upon the point of granting or withholding licenses. The power to award the licence is discretionary with the justice, and the court will not grant an information against that officer because of his refusal to comply with the request of the publican (13), but because of the corrupt motive which actuates him. So that where the defendant withheld licenses from those voters who opposed their recommendation of candidates for the representation of Penryn, threatening that they would ruin the publicans who had so acted in opposition to their wishes, an information was readily issued by the court against them (14). So where two justices had improperly concurred in granting a licence which had previously been

(2) Say. Rep. 242, *R.* v. *Lediard*; 2 Str. 1216, *R.* v. *Clarke*.

(3) See 1 M. & Rob. 160, *R.* v. *Birnie*; 8 Mod. 45, *R.* v. *Okey*.

(4) 2 Ld. Raym. 1405, *R.* v. *Venables*; Str. 678, *R.* v. *Allington*; Andr. 238, *R.* v. *Wykes* & others; W. Kel. 125, *R.* v. *Cotton*; S. C. 2 Sess. Ca. 219; S. P. 2 Sess. Ca. 350, *R.* v. *Taylor* & another. See also 1 Salk. 181. But the appearance of the party will cure the defect of a want of summons. Str. 261, *R.* v. *Johnson*. An information has been refused against a party for executing a blank warrant; 2 Barnard. 198, *Anon*.

(5) Andr. 238, *R.* v. *Wykes* & others.

(6) S. C. diss. as to this point, Lee, C. J., because he conceived the two justices to have acted under a mistake.

(7) 2 Str. 915, *R.* v. *Heber*.

(8) 7 Mod. 307, *R.* v. *Howard*.

(9) 1 Sess. Ca. 59.

(10) 8 Mod. 336, *R.* v. *Nicholls*.

(11) 1 Wils. 7, *R.* v. *Jones*.

(12) 1 Str. 413. *R.* v. *Newton* & others.

(13) See Andr. 180, *Gyles's C.*, where a mandamus was refused, although it was a case in which great hardship and oppression appeared on behalf of the justices. Ibid.

(14) 3 Burr. 1317, *R.* v. *Williams*, *R.* v. *Davis*; see also Id 1318, *R.* v. *Baylis* & others; Id. 1716, *R.* v. *Hann* & another; Say Rep. 216 *R.* v. *Nottingham Justices*; 1 Keb. 727, *R.* v. *Temple*; 1 Ch. Burn. 100, *R.* v. *Bingham*.

refused, on the ground of misbehaviour (6), the court granted an information against one of them, who was the principal, and only discharged the rule against the other without costs, as it appeared that the latter, although deceived by his fellow-justice, was not altogether blameless in the transaction (7). And the court observed, that an information might be had as well for granting a a licence improperly as for refusing one in the same manner (8). So an information was granted against justices for refusing to relieve persons who were left out of a rate in order to prevent them from voting at elections (9). And against a justice who sat as judge in his own cause (1). But the absence of corrupt motives puts an end to the proceeding by information against the magistrates (2), and also by indictment if they have acted regularly.

Many other cases besides those of dealing with ale licences have occasionally come before the court. As where justices had interfered in an election struggle, and had granted a warrant to distrain for poor rates, in order to serve the purpose alluded to (3). So where a magistrate had committed certain players under the vagrant act, upon which other magistrates thought fit to discharge the players upon their appealing and giving bail, the court granted an information against them for having taken upon themselves to supersede a warrant of a justice of peace having competent jurisdiction, before the matter had been inquired into at all, and without having any evidence before them (4). And by Ashurst, J., "Though they have denied generally that they acted from any interested motives in this business, yet that is not sufficient, for if they acted from passion or from opposition, that is equally corrupt as if they acted from pecuniary considerations" (5). So where a false certificate as to the condition of a highway was given by justices, an indictment against them was successful (6). And there have been many other instances.

However, it should be remarked that an entire absence of corrupt motives will not discharge the justice from an indictment, although the court will not grant an information. As where a dispute happened between certain justices of London and of Surrey as to their jurisdiction in granting ale licences. The one party met legally and disposed of the business, upon which the

(6) If the licence should have been refused for cause, the party applying for the information must allege that he was innocent of the offence charged as the reason for refusal. 2 Burr. 653, *R.* v. *Athay*.

(7) 1 T. R. 692, *R.* v. *Holland* & another.

(8) Id. ibid.; S. C. Id. ibid. *R.* v. *Filewood*, cited by the court, S. P. 2 Stark. 366, *R.* v. *Merceron*.

(9) 2 Ld. Keny. 570, *R.* v. *Phelps* & others.

(1) Lofft. 62, *R.* v. *Davis*.

(2) 3 Burr. 1318, *R.* v. *Baylis* & others; 1 Burr. 557, *R.* v. *Young* & another; see also 7 Mod. 193, *R.* v. *Halford*, where an information was denied against a mayor for refusing to hold a borough sessions, there being no proof of wilfulness or corruption. Although costs will not always be awarded to the magistrate; see Lofft. 38, *R.* v. *Wallis* & another. And there are many other cases to the same effect.

(3) Dougl. 426, *R.* v. *Cozens* & another.

(4) 2 T. R. 190, *R.* v. *Brooke*, and others.

(5) 2 T. R. 195.

(6) 6 T. R. 619, *R.* v. *Mawbey* & others.

others assembled on a subsequent day for the same object, which was an illegal act, and, accordingly, the latter were held liable to an indictment for their irregularity in granting licences on the second day (7). And Ashurst, J. said, that "although the want of corruption might be an answer to an application for an information, which is made to the extraordinary jurisdiction of the court, yet it is no answer to an indictment where the judges are bound by the strict rule of law" (8).

But a justice is not responsible by indictment for acting without a qualification, inasmuch as the statute has appointed a penalty for that which was no offence at common law, so that the act is not a misdemeanor at common law, but only punishable under the statute (9).

Coroner.] There are misdemeanors which will affect a coroner. Any malversation in his office may be a ground for an information or an indictment (1). And by 6 & 7 Wm. 4, c. 89, s. 2, whenever it shall appear to the majority of jurymen at an inquest that the cause of death has not been satisfactorily explained by the evidence of the medical practitioner, or other witness at the inquest, such majority may name to the coroner, in writing, any other legally qualified practitioner, and require the coroner to issue his order for the attendance of such practitioner as a witness, and for the performance of a post mortem examination, with or without an analysis of the contents of the stomach or intestines, whether such an examination has been performed before or not; and the coroner refusing to issue such order shall be deemed guilty of a misdemeanor (2).

Serjeant or Pleader.] If any serjeant, pleader, or other, shall do any manner of deceit or collusion in the king's courts, or beguile the court or the party, he shall be imprisoned for a year and a day, or shall receive greater punishment according to the trespass (3).

Under-Sheriff.] An under-sheriff who practises as an attorney is liable to an information, but it must be shewn to the court that he did acts which would amount to such a practising (4).

(7) 4 T. R. 451, *R.* v. *Sainsbury* & another; S. P. Burr. 720, *R.* v. *Fielding*.

(8) 4 T. R. 457. As to the power of indicting justices for a false return to a mandamus without corrupt or improper motives; see 1 Dow. & Ry. 485, *R.* v. *Lancashire Justices*.

(9) Cro. Jac. 644, *Castle's* C.; see 1 Burr. 543, *R.* v. *Wright*; a particular remedy being pointed out, 1 Ld. Raym. 672, *R.* v. *Douse*; 3 Salk. 350, *Glass's* C.; see likewise 1 Salk. by Evans, 45, note (a) where the cases are collected; 3 Salk. 25; Id. 26, *Watson's* C.; Id. 27, *R.* v. *Edwards*; Id. 189; 2 Ld. Raym. 991; 6 Mod. 86; Say. Rep. 152, *R.* v. *Chatley* & another; 2 Str. 679, *R.* v. *James*, *R.* v. *Buck*; Id. 828, *R.* v. *Malland*; 1 Russ. C. M. 49; 2 Lord Keny. 274, *R.* v. *Bright*.

(1) As if only one coroner return a jury, 3 Rep. in Ch. 24.

(2) And punishable by fine and imprisonment.

(3) 3 Ed. 1, c. 29; and see 6 Mod. 137.

(4) 1 Wils. 93, *R.* v. *Bull*.

False Return to Mandamus.] An information will lie for a false return to a mandamus (1), or to a habeas corpus (2), or for disobedience to that writ (3).

Riot Act.] But it will not be granted for acting upon emergency without reading the riot act (4), nor for pretending to read the riot act (5).

Churchwardens and Overseers.] If an overseer should corruptly allow a poors' rate, an information will lie against him, or he may be indicted. But the court refused to grant an information where the overseer had made an alteration with the approbation of the justices (6). And overseers are indictable for not making a rate where it is their duty to do so (7).

Juryman.] A juryman who falsely pretends to be another person, in order that he may be sworn in, is guilty of a misdemeanor (8).

Constables.] A breach of duty by a constable is likewise in many instances punishable by indictment. As where, upon the commission of a burglary, the constable refused to make a hue and cry according to a requisition made to him. But it was deemed to be a material exception to the indictment that the place of notice to the constable was not shewn (9), and that he was not averred to be constable when the warrant was delivered (10). So a constable may be indicted for not obeying the warrant of a justice (11), or for not returning a warrant (12). So where the defendant suffered a street-walker to escape out of his custody, the judgment for a misdemeanor was confirmed (13). And where the constable failed to carry a person to prison whom the justice had committed for further examination, he was held to be indictable, although he produced his prisoner at the time of the next hearing (14). So a person may be indicted for not doing his best as constable to apprehend offenders. And a party is subject to such a proceeding for not aiding the constable when he is called upon

(1) Lofft. 185.
(2) 1 Freem. 522, *Viner's* C.
(3) 1 Sir Wm. Bl. 269, *R.* v. *Falkingham.*
(4) Lofft. 253, *Anon.*
(5) 1 Sir Wm. Bl. 2, *R.* v. *Sprigins.*
(6) Dougl. 465, *R.* v. *Parrat.* Perhaps an information might have gone against the justices; *Ibid.*
(7) Ca. Sett. 214, *R.* v. *Barlow & others.*
(8) March. 81, pl. 132.
(9) Cro. El. 654, *Crouther's* C.
(10) 1 Freem. 524.
(11) See 11 Mod. 114, *R.* v. *Pawlett.* And it is sufficient to state in the indictment that the party was in due form convicted, S. C. 1 Salk. 380, *R.* v. *Wyat*; S. C. 2 Lord Raym. 1189.
(12) Fort. 127, *R.* v. *Wyat.*
(13) 2 Burr. 865, *R.* v. *Bootle.* And it was held to be no objection that the indictment did not aver knowledge in the defendant of the party being a street-walker, and that it was not positively averred that the woman was such a disorderly person.
(14) 11 Mod. 62, *R.* v. *Johnson*; S. P. Id. 79, *R.* v. *Belwood.*

to give his assistance (1). But this rule does not apply to the case of searching for nets or engines used to take game (2). A watchman likewise may be indicted for a breach of duty (3).

Escapes by Gaolers and others.] It is a misdemeanor at common law for a gaoler to suffer an escape (4). But the indictment must shew a custody on the defendant's part as keeper of the prison (5), and that the person escaping had been legally committed. The words "*so being* such" street-walker were held to be an averment of that fact (6). But an indictment which alleged that the party had been charged with high treason was considered sufficient (7). The offence, however, as well as the authority, must appear (8). So that a yeoman warder of the tower and a gentleman gaoler were held dispunishable for an escape, as officers, not being persons known to the law in that capacity (9). Again, it is an offence at common law to permit an escape, and a person who bribes the constable is punishable (10). Again, where the defendant harboured one O., his relation, when he was under pursuit by the officers of justice, no objection was made upon general grounds; but the indictment was held not to be sustainable, because it could not be brought home to the defendant that he participated in the knowledge of his relation's guilt (11). An indictment for suffering an escape in a case of forcible entry did not state how the commitment was made, whether upon view of the force by the justices, or upon an indictment found, but by Holt, C. J., it is only inducement, and, after verdict, it shall be intended that the commitment was legal (12).

An indictment for rescue may be supported upon the certificate of the clerk of the peace vouching that an indictment for a misdemeanor has been found against A.; against whom a warrant is accordingly granted, and who is rescued upon the execution of it (13).

Escapes generally.] By 56 Geo. 3, c. 63, s. 44, the negligent escape of a convict at the penitentiary, Millbank, suffered by any officer, is punishable by fine and imprisonment. Similar provisions are ordained with a similar punishment by 1 & 2 Vict. c. 82, s. 53, with reference to the prison at Parkhurst. So also by 9

(1) See 3 Ed. 1, c. 9, which punishes a bailiff, for not being ready, with one year's imprisonment and a heavy fine, or, in lieu of his not having sufficient to pay, two years' imprisonment. And a private person is liable to a heavy fine; see likewise 2 Hen. 5, s. 1, c. 8.

(2) Comb. 309, *R.* v. *Wildbore.*

(3) 5 Mod. 393, *R.* v. *Stainford.* And the court will not quash an indictment of this kind for a supposed error, but will put the party to demur.

(4) 1 Ventr. 169, *R.* v. *Wright.*

(5) 5 Mod. 414, *R.* v. *Fells;* S. C. Holt's Ca. 280; 12 Mod. 226.

(6) 2 Ld. Keny. 578, *R.* v. *Booty.*

(7) 5 Mod. 414.

(8) Cro. El. 752, *Plowman's* C. The warrant was to two, and the arrest by one, and it was held good; 1 Str. 117, *R.* v. *Roe* & others.

(9) 2 Ch. Burn. 6.

(10) 1 Wils. 22, *R.* v. *Vaughan.*

(11) 1 Russ. C. & M. 461, *R.* v. *Buckle.* Advertisements had been published, but there was no proof to affect the defendant with notice of any one of them.

(12) 3 Salk. 93, *R.* v. *Wright.*

(13) 5 C. & P. 148, *Stokes's* C.; see also as to rescous, Mar. 67, pl. 105.

Geo. 4, c. 83, s. 34, to contrive, aid, abet, or assist at an escape, or intended escape, of any transported convict in New South Wales, or Van Diemen's Land, or their dependencies, or of any person sentenced there, is made punishable by a fine of 500*l.* or imprisonment not exceeding two years, or both, at the discretion of the court. And by an old statute, any marshal of the King's Bench Prison, who should allow prisoners for felony, robbery, or theft, who had removed their indictments into the King's Bench, to wander out, by bail or without bail, was to be ransomed at the king's pleasure, and suffer half a year's imprisonment (1).

Commissioners.] An information lies against commissioners who exceed their powers (2). But it has been refused against the commissioners of a turnpike road for irregularity. (3)

Husband disobeying Articles.] If a husband retake his wife in defiance of articles entered into by him to the contrary, he may be indicted (4).

Distresses.] To distrain beasts or sheep for the debt of the king, or any other, whilst another distress can be found sufficient to answer the demand, is a misdemeanor (5). And by the same statute, to take great and unreasonable distresses was declared to be punishable by a grievous amercement (6). By 52 Hen. 3, c. 1, no distress can be taken without an award of the king's court, upon pain of a fine, according to the trespass. By c. 2 & 4, the like punishment was ordained against such as should take a distress out of the particular bailiwick or jurisdiction, and by 3 Ed. 1, c. 16, even a more grievous punishment was ordained, if the trespass required it. Again, by 52 Hen. 3, c. 1, such as would not suffer the distresses to be replevied, or should hinder the execution of summonses, attachments, or judgments given in the king's court, were to be punished in like manner. So again, by c. 4, and 3 Ed. 1, c. 16, there is the same penalty against any neighbour for driving a distress out of the county. And by 3 Ed. 1, c. 23, to distrain any foreign person which is of this realm, "for any debt whereof he is not debtor or pledge, is punishable by the grievous punishment."

Malicious Impressment.] Malicious impressment is likewise a misdemeanor. (7)

3. *Misdemeanors committed against legal Officers.*] By 1 Ric. 2, c. 13, to procure any indictment by malice against the judges of holy church, or against any other persons meddling accord-

(1) 5 Ed. 3, c. 8.
(2) 1 Ch. Rep. 702, *R.* v. *Friar.*
(3) Lofft. 199, *Anon.*
(4) 1 Sir Wm. Bl. 18, *R.* v. *Lord Vane.*
(5) 51 Hen. 3, st. 4; 28 Ed. 1, st. 3, c. 12. Except beasts impounded damage feasant.
(6) See 1 Mod. 71, *R.* v. *Leginham*; Tho. Raym. 205, *R.* v. *Lesingham*; Sembl. S C.
(7) 1 Sir Wm. Bl. 19.

ing to law, for having cognizance in cases of tithes or other matters pertaining to the spiritual court, is an offence punishable by one year's imprisonment and grievous fine to the king, as in cases of false appeals. (1)

Amongst the various misdemeanors of this class, that of obstructing process is not uncommon. As where a sheriff's officer is interrupted in the execution of his duty (2). Or a custom house officer (3). Or a magistrate (4). But some act of obstruction must be set forth in the indictment, or the prosecution will fail (5). So obstructing a coroner in the due discharge of his office, is an offence for which an information will be granted (6). And it is likewise a misdemeanor to bury a body before the coroner's inquest shall have set upon it (7). So obstructing process for debt within certain districts, is punishable as a misdemeanor (8). Again, rescuers, whether of goods (9), or persons in contravention of law, are very frequently of the nature of misdemeanor. As where the defendants were charged with riotously and routously rising against bailiffs, and rescuing goods levied under a fieri facias (10). But the indictment in this case was adjudged ill, for want of setting forth the writ in full, and mentioning the name of the party whose goods were taken and rescued (11). So it is indictable to rescue cattle impounded by the hayward. But it is to be understood that the cattle must be in the custody of the law before the responsibility of rescue attaches. And therefore if the hayward take cattle damage feasant in the grounds of an occupier, the rescue is not indictable till the distress reaches the pound; whereas if the hayward take the cattle in a common or lane, the case is altered, for they are then immediately in the custody of the law, and not of a mere servant of the occupier, as when they are taken in a field (12).

The rescue of prisoners charged with misdemeanor is indictable as a misdemeanor (13). And the same might be said of other

(1) 13 Ed. 1, st. 1, c. 12; 2 Inst. 489.

(2) 6 Esp. 124, *R.* v. *Howe.*

(3) Id. 125, note, *R.* v. *Akers.*

(4) 2 Str. 699, *R.* v. *How.* See Gow. Rep. 138, *R.* v. *Eastaff*, where it was held, that the secretary of state's warrant to keep persons in close and safe custody, enabled a gaoler to refuse any but the visiting magistrates access to prisoners. The defendant was therefore acquitted under the direction of Park, J., for denying such access to a party, who, although in the commission, was not a visiting justice.

(5) 2 Str. 699.

(6) Andr. 231, *R.* v. *Soleguard*, & another. See East. P. C. 378.

(7) 7 Mod. 10. Anon. per Holt, C. J.

(8) By 8 & 9 Will. 3, c. 27, s. 15, by fine or imprisonment, or both, and a penalty of 50*l.*, may likewise be sued for.

(9) An indictment for rescous need not state the non-consent of the plaintiff. 12 Mod. 324, *R.* v. *Hoskins.* And the rescue cannot be returned, where the sheriff has goods taken in execution, so that the rule will go without such return. 2 Barnard. 58. It is usual to say, vi et armis, although there are authorities, both as to the necessity as well as the immateriality of these words. See Fort. 302; *R.* v. *Tucker*, Jenk. 315.

(10) 6 Mod. 357, *R.* v. *Westbury.*

(11) S. C.

(12) 7 C. & P. 233, *R.* v. *Bradshaw.*

(13) 1 Russ. C. M. 385, and is likewise punishable by attachment; 1 Str. 624, *R.* v. *Wilkins*; 5 T. R. 362. *R.* v. *Horsley*; 4 Burr. 2129, *R.* v. *Elkins.* See 2 Barnard. 7, Ca. of Prac. C. P. 88, 90.

rescues, as from the custody of one of the superior courts. But this is also a great misprision, and may be punished by the forfeiture of goods and of the profits of lands, and by imprisonment for life (1). So a rescue from bail is a misdemeanor (2). And it makes no difference if a warrant be directed to two, and the arrest be made by one only (3). Nor does it signify that the bailiff was intimidated by a comparatively harmless instrument, supposing it to have been a pistol (4).

It is likewise an indictable matter not to aid a constable, but the constable must not select the parties he calls upon to assist him. He has no power to require particular persons to attend him (5). So to aid an escape from prison for an offence less than felony is, in most cases, a misdemeanor; and a negligent escape, as of a person going to prison for an offence, would be indictable at common law (6). So an escape by the party himself is an indictable offence at common law. So a violent rescue, is, of course, an offence (7). So to facilitate the escape of a person when pursued by officers of justice for an offence in respect of which no warrant has been granted, is a misdemeanor. As where the relation of one O., who was pursued by officers for forgery, conveyed him secretly on board a vessel, and actively engaged himself in promoting the escape of O. from England in a West Indian vessel (8). So cattle when impounded for damage feasant, is an indictable offence (9).

By 1 & 2 Vict. c. 82, the act for establishing a prison for young offenders, it is by sect. 12, enacted, that if any offender shall break prison, or escape from his place of confinement, or during his conveyance thereto, or from any lands belonging to the prison, or from any person having the lawful custody of him, he shall be punishable, if under sentence of imprisonment, by an addition not exceeding two years to the term for which he was confined; and, if under sentence of transportation, in like manner as persons under sentence of transportation escaping from or breaking prison, are liable to be punished. And if any offender confined in the said prison shall attempt to break prison, or escape from his confinement, or shall forcibly break out of his cell, or make any breach therein with intent to escape, he shall upon being convicted thereof be punished with imprisonment for a term not exceeding twelve calendar months in addition to the punishment

(1) 1 Hawk. c. 21, s. 5.

(2) Peake, N. P. C. 170, *R.* v. *Butcher* & others.

(3) Ante, p. 409, n. 8.

(4) Loft 61, *R.* v. *Backhouse.*

(5) Ca. Sett. 214, *R.* v. *Wildbore.*

(6) East, P. C. 378.

(7) But the nature of the offence must be set out. Str. 1226, *R.* v. *Freeman*; and the writ described, 2 Sess. Ca. 96, *R.* v. *Westly* & others. See Keilw. 194.

(8) 1 Russ. C. M. 361, *R.* v. *Buckle.* But the defendant was acquitted, because the knowledge of O.'s crime was not proved against him. Advertisements offering a large reward for the apprehension of O. had been circulated, but there was no evidence that the defendant had ever seen one of them, nor that he was acquainted with the charge against his relation.

(9) Ante 411. See 2 Keb. 526, *R.* v. *Arnold.*

to which he was subject at the time of committing the offence of attempting to escape as aforesaid (1).

The court will intend the rescous to have happened where the arrest took place (2).

It is an indictable offence at common law to resist the execution of a statute (3).

4. *Misdemeanors, which have a tendency to bring the mode of obtaining Justice into ill-repute or hazard.—Compounding Felony.*] To compound a felony is an offence of the nature of misdemeanor, and it is a great hindrance to public justice. It is where one not only knows of a felony, but takes his goods again, or other amends, not to prosecute (4). But it is not an offence to retake goods, unless some favour be shewn to the thief (5). The misdemeanor in question is punishable by fine and imprisonment (6). To compound a misdemeanor is likewise, as it should seem, a misdemeanor (7). But, after conviction, a composition does not seem to be looked upon in the same light. For a compromise is often permitted, under such circumstances, with the sanction of the court, as when the defendant is allowed to speak with the prosecutor, before judgment is pronounced, and a less sentence is inflicted, if the prosecutor declares himself satisfied (8). So where the chairman of a quarter sessions informed a person convicted of ill treating his apprentice, that if he would pay forty guineas towards the expenses of the prosecution, he should be imprisoned for six months instead of twelve, a note given by that person was held to be valid. And upon an action brought upon the note, Lord Ellenborough said, that the overseers got no pecuniary benefit to themselves or to the parish, by taking this security, beyond the fair amount of their expenses. The giving of this note did not stifle a public prosecution, nor elude the public interest in bringing such an offender to justice, by way of example to others (9). And, of course, if the indictment state that

(1) The clause likewise makes the offence of a second escape on breach of prison, felony. By sect. 14, the trial may be either in the county, where the offender is apprehended or retaken, or where the offence is committed. And a copy of the order of commitment properly attested, shall, upon proof of the identity of the prisoner, be sufficient evidence of the validity of the commitment.

(2) Cro. Jac. 345, *Cramlington's* C.

(3) Dougl. 441, *R.* v. *Smith* & others. Whether a grand juror be indictable for making a presentment without the assent of his fellows, quære; See 2 Show. 311, *R.* v. *Bynon.*

(4) 1 Hawk. c. 59, s. 5. See Mo. 8.

(5) Id. s. 7; 3 Inst. 133.

(6) Id. s. 6. But if any harbouring or maintenance be afforded to the felon, the party so acting becomes an accessory after the fact.

(7) See 2 Wils. 349; 5 East, 298, 302, by Lord Ellenborough; contrà, 4 Com. by Christian; 133, note (3).

(8) 4 Com. 364.

(9) 11 East, 46, *Beeley* v. *Wingfield*; S. P. 7 Taunt. 422, *Baker* v. *Townsend.* Where certain assaults and a disputed right of possession, together with all matters in dispute between parties were referred. See also, Kyd on Awards, 64; Caldw. 5, *R.* v. *Rant*; *R.* v. *Coombs*; and *R.* v. *Harding*; 2 Salk. 477, which seems to be overruled by this case.

the defendant desisted altogether from prosecuting, and it turn out that the defendant did prosecute to conviction, the judge will direct an acquittal (1).

The statute 18 Eliz. c. 5, s. 4, forbids the compounding of offences under penal statutes. It declares that if any informer shall, upon any pretence whatever, make any composition, or take any money, reward, or promise of reward, without the order or consent of the court (2), he shall be for ever disabled to sue on any popular or penal statute, and shall forfeit 10*l*. He might likewise have been set in the pillory for two hours; but fine or imprisonment, or both, are now substituted for the pillory by 56 Geo. 3, c. 138. It is said, that this statute extends to penal actions, where the whole penalty is given to the prosecutor (3). But it has been held, that it is limited to cases of information before the courts at Westminster. And, therefore, where the defendant was convicted for making a composition with J. H. for an offence against the coal act, the court arrested the judgment (4).

It is, however, an offence to compound under 18 Eliz. c. 5, although no process be sued out, or information laid before a magistrate. The statute applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a court at Westminster, or without judgment or conviction (5). The same opinion has been adhered to in a very recent case, where no penalty had been incurred, nor any information laid, nor process sued out. And the court considered the words "*upon colour or pretence of any matter* of offence," to be capable of embracing all such cases (6).

Misprision of Felony.] If a felony be concealed, or if there be an attempt at such a concealment, the offence is known by the name of misprision, unless there be such circumstances in the case as will make the party accessory after the fact. Thus to observe the commission of a felony silently, without using any endeavours to apprehend the culprit, is misprision (7). So if the person robbed retake his goods, and then suffer the felon to depart, he will be guilty of misprision or concealment (8). And it is said, that the concealment of treasure trove is misprison of felony, being a kind of negative misprision; that which a man knows, but which he does not assent to (9). The judgment for this offence is fine and im-

(1) 4 C. & P. 379, *R.* v. *Stone* & others.

(2) Which cannot be had before plea pleaded. 2 Dowl. P. C. 581, *R.* v. *Collier*. Nor without the consent of the attorney-general when the crown is concerned; 3 Dowl. P. C. 345, *R.* v. *Gibbs*.

(3) 4 Com. by Christian, 133, note (9).

(4) 1 B. & Ald. 282, *R.* v. *Crisp* & others. See Hutt. 35, *Pie's* C.; 6 East, 140.

(5) Russ. & Ry. 84, *R.* v. *Gotley*.

(6) 2 Moo. C. C. 124, *Best's* C.; S. C. 9 C. & P. 368; see also 27 Eliz. c. 10; 1 Sir Wm. Bl. 443.

(7) 2 Hale, P. C. 75; 1 Hawk. c. 59, s. 2.

(8) Mo. 8.

(9) See 4 Com. 121.

prisonment (1). But by the statute of Westminster, 3 Edw. 1, c. 9, if the sheriff, coroner, or any other bailiff, for reward, or for prayer, or for fear, or for any manner of affinity, shall conceal, consent, or procure to conceal the felonies done in their liberties or otherwise will not attach nor arrest felons, or otherwise act for favour, they shall, upon conviction, be imprisoned for one year, and after make a grievous fine at the king's pleasure, if they have wherewith; and if they have not, they shall be imprisoned for three years. And by 3 Hen. 7, c. 1, justices shall take inquests concerning such concealments, and shall amerce persons guilty thereof at the sessions.

Champerty.] Champerty is said to be the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it (2). At common law it is punishable by fine and imprisonment; and being an act of maintenance, if done in the face of a court of record, may be visited by an immediate committal (3). Champerty, however, is forbidden by statute. As by the statute of Westminster 1, c. 25, which declares that no officers of the king by themselves, or by others, shall maintain pleas, suits, &c. in the king's courts (4) for lands, tenements, or other things (5) for to have part or profit thereof, by covenant (6) made between them. And the sentence is, that the party be punished at the king's pleasure. Again, by the statute of Westminster 2, c. 49, the like punishment is awarded against the chancellor, treasurer, justices, king's counsel, clerk of the chancery or exchequer, justice, or other officer (7), or any of the king's house, clerk or lay, who shall receive any church, or advowson, land (8), or tenement in fee, by gift or by purchase, or to farm, or *by champerty*, or otherwise, so long as the thing is in plea, &c. The 28 Edw. 1, c. 11, extends the prohibition to all officers and others (9). It also ordains, that no one, upon such covenant, shall give up his right to another, upon pain of forfeiture by the taker of so much of his land and goods as amounts to the value of the part which he has purchased (10) for such maintenance. And in order to obtain this, whosoever will may sue for it on behalf of the king before the justices, before whom the plea is. But counsel

(1) 1 Hawk. c. 59, s. 2.
(2) 1 Hawk. c. 84, s. 1.
(3) Id. c. 83, s. 48.
(4) The king's courts of record. 1 Hawk. c. 84. s. 3.
(5) Personal as well as real actions are included. Id. s. 5. And rent growing out of the land. Id. s. 6. But not rent granted out of other lands. Ibid. Likewise a tenant or defendant is as much within the statute as a demandant or plaintiff, s. 8.
(6) All kinds of promises and contracts, whether by writing or parol. Id. s. 4.
(7) The statute was limited to the officers named. 1 Hawk. c. 84, s. 11; but see post 28 Edw. 1, c. 11.
(8) Whether they purchase the land bonâ fide and without maintenance, or not, and whether they are or not of affinity to the disputants. 1 Hawk. c. 84, s. 12.
(9) In any action, whether real, personal or mixed, or a suit in equity, as it seems. Id. s. 15. A surrender by a lessee to his lessor is not within the act, s. 17.
(10) Whether the purchase be for money, or a lease for life or years, or a voluntary gift of land. Id. s. 16.

or pleaders are not to be restrained hereby (1), nor parents and next friends (2).

However, in reading these statutes, it must be understood, that the maintenance is the chief ingredient in the offence. So that if a grant of land in suit be made in consideration of a precedent honest debt, the matter is not tainted by maintenance, and the bargain is good (3). So if the bargain be made before the suit has been commenced, it is not within the statutes of champerty (4). But it may be an offence at common law. The delivery of a gift to an ignorant heir, together with the taking of a bond from him, in order to prosecute suits for the recovery of estates, savours of champerty, if the consideration be inadequate (5). So an assignment to navy agents of prize money connected with a depending suit, is champerty (6).

It is not material that the party suing for the champerty should have suffered any damage by the transaction, nor even that the suit has been determined (7). The seller and purchaser made an agreement that the latter should bear the expense of certain suits commmenced by the seller for rent, on condition of his having the rents, and any sum that could be recovered for dilapidations. The purchaser also was to use the seller's name in any action which might be brought. Judgment was given for the defendant in the king's bench, and upon error brought in the exchequer chamber it was affirmed. The court said, there was no champerty in an agreement to enable the bonâ fide purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase, more especially where such purchaser was not an officer of the king (8). Nor is it champerty for a surety to pay a debt (9).

The offence of champerty may be laid in any county at the pleasure of the informer (10).

Maintenance.] Another misdemeanor against the administration of justice, is maintenance, which is the unlawful taking in hand, or upholding of quarrels or sides to the disturbance or hindrance of common right (11). This kind of maintenance differs from champerty, inasmuch as there is no contract to have any part of the

(1) Provided the matter be given to the counsellor for his wages, and not in consideration of any precedent bargain after the suit commenced. Id. s. 19. But a strong presumption of champerty will hang about such an unwise proceeding. Ibid. See 2 Inst. 564, Case of *Penros*, a counsel.

(2) As a conveyance or promise by a father to his son, or by an ancestor to his heir apparent, since it only gives them the greater encouragement to do what by nature they are bound to do. Id. s. 18.

(3) 1 Hawk. c. 84. s. 9.

(4) Id. s. 14.

(5) 1 Eden. 303, *Strahan* v. *Brander*.

(6) 15 Ves. jun. 139. *Stevens* v. *Bagwell*. See 3 Ves. jun. 502; 18 Ves. jun. 128; a bond to an attorney from his client set aside. 2 Sim. & Stu. 244. See also as to champerty. 1 Russ C. M. 179, &c.

(7) 1 Hawk. c. 84, s. 7.

(8) 5 Bing. 309, *Williams* v. *Protheroe*. See likewise 33 Ed. 1, st. 2. & 3; 4 Ed. 3, c. 11; 20 Ed. 3, c. 4 & 5; 7 Ric. 2, c. 15; 32 Hen. 8, c. 9.

(9) Palm. 190.

(10) 31 El. c. 5, s. 4.

(11) 1 Hawk. c. 83, s. 1.

thing in suit (1). Almost any kind of officious (2) assistance may be said to amount to maintenance, whether it be tendered in or out of court (3). A juror is said to be guilty of maintenance who solicits the judge to give judgment according to the verdict (4). But he may exhort his companions to give a just verdict, without incurring this blame (5). Even after judgment, a person may be a maintainer, because the party aggrieved by the maintenance might be dissuaded from bringing his writ of error, or attaint (6). Unlike the case of champerty, the better opinion seems to be, that money or any other reward given before the commencement of the suit, with an evident design of maintaining the litigation at issue, will constitute maintenance, if the action or defence to the action be prosecuted in consequence (7). Although it has been said, that the suit must have previously begun (8). Neighbouring advice given bonâ fide, as to the recovery of a debt, or other matter, will not amount to maintenance, provided it do not appear that there has been an officious intermeddling, which is one chief ingredient in this offence (9). Nor can a bare promise to maintain be construed into maintenance (10), unless the person promising be of great influence, or unless the promise be made in a public manner, so as to produce the excitement to litigation, which the law disapproves (11).

Maintenance is an offence, both at common law and by statute. At common law, independently of an action against the person maintaining, there is the remedy by indictment, and judgment of fine and imprisonment follows upon conviction. And a court of record may commit for an act of this nature done in the face of the court (12). By 1 Edw. 3, c. 14, and 20 E. 3, c. 4, the king's ministers, and the great men of the realm were especially forbidden from interference in quarrels, by sending letters or otherwise, and all other persons "great [and] small" were likewise generally warned against the offence (13). A similar ordinance was made by 1 Ric. 2, c. 4, (14) where the king's councillors, officers, or servants, as well as all others, are mentioned. The punishment in the case of the greater persons was a pain to be ordained by the king himself; and in the case of the less officers and servants, loss of their places, together with imprisonment and ransom at the king's will; and in the case of other persons, imprisonment or ransom as aforesaid (15). And by 32 Hen. 8, c. 9, maintenance in general is again forbidden, under a penalty of 10*l*., one moiety to be paid to

(1) Id. s. 3.
(2) Godb. 81.
(3) 1 Hawk. c. 83, s. 4, 5, 6, 7.
(4) Id. s. 9.
(5) S. 10.
(6) S. 13.
(7) S. 12.
(8) Ibid.
(9) Id. s. 11.
(10) Cart. Rep. 230, Vaughan, C.J.
(11) 1 Hawk. c. 83, s. 8.
(12) Id. s. 48.
(13) A court baron is within the statutes. 1 Hawk. c. 83, s. 51. But not a suit in a spiritual court. s. 58. Cro. El. 594.
(14) See also 3 Ed. 1, c. 28, 33; 33 Ed. 1 st. 3; 4 Ed. 3, c. 11; 20 Ed. 3, c. 5; 7 Ric. 2, c. 15.
(15) Imprisonment for three years, and fine at the king's pleasure. 33 Ed. 1, st. 3. (Statute of champerty)

the king, and the other to him who will sue for the same by action of debt (1).

It seems, that the apprehension of maintenance will be sufficient to warrant the suing out of a writ upon the statute 1 Ric. 2 (2). But in an information upon 32 Hen. 8, it must be said, that a plea was depending (3). And under 1 Ric. 2, he who barely assists another in taking out an original, which is never returned, is not liable to any action (4). It is immaterial whether the plaintiff be nonsuited, or whether he recovered in the action alleged to have been the subject of maintenance (5).

Justifications.] Several justifications, however, are admitted by the law in answer to a charge of maintenance. As kindred or affinity (6). But although this exception goes so far as to allow even a godfather to counsel and assist his godson; no relation can lay out his money in a cause unless he be the father, the son, or the heir apparent to the party, or the husband of an heiress (7). Again, a landlord may maintain his tenant by laying out his money to defend the title or otherwise. But he cannot do this with respect to lands not holden of him (8). And it is said, that the lord of a town may maintain the right of inhabitants to a common burying place in an action brought against them, by shewing to the jury authentic evidence of their right (9). So a tenant may maintain his lord (10). And the tenants of a manor may join together (11). A master may maintain his servant (12), yet not beyond the amount of his wages in hand (13). But the master may not speak to the court in favour of the servant's cause (14). So if the servant be arrested in an action of debt, the master may assist him with money to effect his enlargement, in order that he may have the benefit of his service (15). But the rule is limited to personal actions, so that the master cannot help his servant in matters relating to land, unless he have wages in hand belonging to the servant, in which case, he may lay them out with the consent of the latter on his behalf (16). A servant, moreover, may maintain his master, provided he be a general servant; but he may not lay out any of his own money to assist his master in a suit, although he may get counsel for his master,

(1) See also 1 Hawk. c. 83, s. 55, citing the various statutes concerning liveries or badges of maintenance.
(2) 1 Hawk. c. 83, s. 54.
(3) Id. s. 59.
(4) Id. s. 52. And nul tiel record is a good plea. Ibid. The word "unlawfully," is necessary in an indictment, upon 32 Hen. 8, Id. s. 57. If a record be made of an information laid upon one of these statutes, as 32 Hen. 8, and the indictment conclude *contrà formam statuti*, so generally the court cannot properly entertain the charge, because maintenance is made penal by other statutes, as 1 Ric. 2, &c.; 1 Ld. Raym. 537, *R.* v. *Higginson;* S. C. 12 Mod. 322.
(5) 1 Hawk. c. 83, s. 53.
(6) 1 And. 301.
(7) 1 Hawk. c. 83, s. 26.
(8) Id. s. 29. See sect. 27.
(9) Id. s. 28.
(10) Id. s. 30.
(11) Hob. 92.
(12) Mo. 814.
(13) Mo. 6.
(14) 1 Hawk. c. 83, s. 31.
(15) Id. s. 32.
(16) Id. s. 33.

and render him any services of that nature (1). A trustee may maintain to the amount of his trust (2). Even a neighbour may help another neighbour with counsel, but he must not advance money to further his suit (3). And any one may go to a counsel on behalf of a foreigner who cannot speak English, to inform the counsel concerning his case (4). And, again, as a matter of mere charity, money may be given to a poor person, in order to enable him to procure justice for himself (5).

The acts of a counsel or attorney can hardly be called exceptions to the rule concerning maintenance. For they must not work with their own money (6), and their interference is particularly sanctioned by the courts where they are concerned. If an attorney, however, should carry on a cause at his own charge with a promise never to expect repayment, he is guilty of this offence (7); or if any one should bring an action without the privity of the plaintiff (8). So if a counsellor should contract to receive a sum in gross for his services (9). And if any deceitful conduct be practised by counsel or attorney, the party so acting will be guilty of maintenance. Indeed by the statute of Westminster 1, c. 29, if any serjeant (10), pleader, or other, do any manner of deceit or collusion (11) in the king's court or consent unto it, he shall, being attainted, be imprisoned for a year and a day, and shall not be thenceforth heard to plead in that court for any man. If he be no pleader he shall be imprisoned for a year and a day at the least, and if the trespass require greater punishment, it shall be at the king's pleasure.

Lastly, there are some circumstances or ties of interest which will form a ground of defence to the charge under our consideration. As where the person in remainder or reversion defends the suit of tenant in tail with his own money (12). Or the lessor the title of his lessee (13), or the alienee of land in respect of an action brought by the person who sold the inheritance to him (14). So the holder of a contingent interest in land may maintain the title although he may never be the better for the contingency (15); or the holder of an equitable interest (16). Commoners, likewise, may maintain those who have common with them. And inhabitants may join to support the right to a way or churchyard (17). Also, it is said, that he who is bail for another may take care to have his appearance recorded, but that he ought not to intermeddle further (18).

(1) Id. s. 34.
(2) Mo. 620.
(3) 1 Hawk. c. 83, s. 35; and see also sect. 11, ante, p. 417; Dy. 256.
(4) 1 Hawk. c. 83, s. 37.
(5) Id. s. 36; Freem. 71, 81; Godb. 159.
(6) 1 Hawk. c. 83, ss. 38, 39, Hob. 67, 117.
(7) 1 Hawk. c. 83. s. 40.
(8) Mar. 47, pl. 76.
(9) Rep. T. Finch. 75.
(10) Counsel not sworn are within this act as well as serjeants who are sworn, 1 Hawk. c. 83, s. 42.
(11) All fraud and falsehood tending to impose upon or abuse the justice of the king's courts are within the purview of the statute, s. 43. As a false plea, s. 47, and see ss. 44, 45, 46.
(12) 1 Hawk. c. 83, s. 14.
(13) Sect. 15.
(14) Sect. 16.
(15) Sect. 17, 18, see also s. 19, 20.
(16) Sect. 21; see s. 22.
(17) Sect. 24.
(18) Sect. 25.

However, as we have seen in champerty, the charge of maintenance must rest upon a suit to which the party is a stranger. So assignee of a bond or other chose in action, made over to him for good consideration in satisfaction of a precedent debt due bonâ fide to him, and not merely in consideration of the intended maintenance, may either maintain the obligee in an action brought by him for the debt, or commence an original action in his name, for he has an equitable interest in the debt (1).

Barratry.] A barrator is a common mover, exciter, or maintainer of vexatious suits or quarrels either in courts or in the county (2). A barrator is, therefore, an offender against the due administration of justice, as well as against the public peace. As where a counsellor maliciously abetted the institution of several false actions for debt in a case where the *plaintiff* was the real debtor (3). The barrator is as much mixed up with controversies concerning lands as with calumnies and other such disquieting proceedings (4). And the opinion of Hawkins is, that he is a barrator who brings a number of false actions in his own name without any manner of colour (5), although the contrary is said to have been holden (6). The words "many suits" are important, because no man can be a barrator in respect of one (7). So an attorney who is not privy to a groundless suit is not a barrator (8), although he may be engaged in others. It is the opinion of Hawkins also, that a feme covert may be charged with this offence, although he cites a decision to the contrary (9).

The defendant in an indictment for barratry must have a copy of the articles intended to be insisted on against him (10), and the prosecutor must assign particular instances in the indictment (11): and if he prove them, he shall be admitted to prove as many more as he pleases, to aggravate the fine (12).

The indictment must call the defendant a common barrator (13), and must conclude against the peace, &c. (14). Although a conclusion, against the form of the statute, is sufficient notwithstanding the absence of any such statute except as far as the proceedings and punishment are concerned (15). So an indictment may be good without averring the offence to have happened at any particular place, because as the misdemeanor consists in the repetition of several acts, it must be intended to have happened in several

(1) Sect. 23; see also upon this subject 2 Inst. 215, 1 Russ. C. & M. 176.
(2) 1 Hawk. c. 81, s. 1; Jenk. 247; see 8 Rep. 36, the case of barratry.
(3) 3 Mod. 98, *R.* v. ——.
(4) 1 Hawk. c. 81, s. 2.
(5) Id. s. 3.
(6) Ibid.
(7) Sect. 5.
(8) Sect. 4.
(9) Sect. 6, 1 Ro. Rep. 39.
(10) 12 Mod. 516, *R.* v. *Ward*; S. P. 5 Mod. 18, *R.* v. *Grove*, 6 Mod. 262; 1 T. R. 754; 1 Hawk. c. 81, s. 13.
(11) Mo. 302, *Cornwall's* C.
(12) 1 Lord Raym. 490; 1 T. R. 751, 754; 1 New Rep. 95, Heath, J.; see however 6 Mod. 311, where Holt, C. J. excepts barrator and scold from the rule which requires particular instances to be set forth.
(13) Cro. Jac. 526, *Palfrey's* C.; 1 Sid. 282, *R.* v. *Hardwicke*; 1 Hawk. c. 81, s. 9.
(14) 1 Sid. 282; 1 Hawk. c. 81, s. 12.
(15) 1 Hawk. c. 81, s. 10.

places; wherefore it is said that a trial ought to be by a jury from the body of the county (1).

With respect to the proceedings against barrators and their punishment, it is enacted by 34 Edw. 3, c. 1, that three or four persons shall be assigned in every county for the purpose of restraining offenders, rioters, and all other barrators, and of pursuing and punishing them. And by Hawkins, "It seemeth from these words, that justices of peace, as such, have cognizance of barratry without any other commission; sed quære, for the contrary opinion seems to have been holden in Rolle's Reports" (2). But it has been held that justices of the peace may try this offence without any special commission of oyer and terminer (3).

Judgment.] The judgment for barratry is fine and imprisonment, and to be bound to the good behaviour, and, moreover, if any such offenders be of the profession of the law, they ought to be disabled from practising for the future (4).

Buying or Selling Titles.] To buy or sell a doubtful title is a species of maintenance. It is forbidden by the common law and by statute. As by 13 Edw. 1, c. 49, where persons of the king's house are prohibited from buying any title whilst the thing is in dispute, upon pain of the punishment both of buyer and seller at the king's pleasure. So by 1 Ric. 2, c. 9, it was forbidden to make gifts of lands in debate, and such gifts were declared to be of no value. And by 32 Hen. 8, c. 9, the act of bargaining for, buying or selling pretended rights or titles is made punishable by a forfeiture of the whole value of the lands both by the buyer and seller, one half to go to the king and the other half to him who will sue for the same. But there is a proviso enabling a party in lawful possession to buy the pretended right of another person to the same lands (5). And this proviso was necessary, for the rule is, that the offence may be committed whether the title be a good or bad one, or whether the seller be in possession or not, unless his possession be lawful and uncontested (6). The offence of buying titles may be laid in any county at the pleasure of the informer (7). But it is dangerous to misrecite the statute of Hen. 8 (8).

(1) Id. s. 11; 1 Ro. Rep. 295. *R.* v. *Wells.* See, however, Godb. 383, *Man's* C.

(2) 1 Hawk. c. 81, s. 8, 2 Ro. Rep. 151; see Yelv. 46.

(3) 1 Hawk. c. 81, s. 14. A juror cannot be withdrawn in barratry, Str. 984, *R.* v. *Jeffs.* See further upon barratry, 1 Russ. C. M. 185; 2 Saund. 328, *R.* v. *Urlyn*, and note (1) of Wms. Saund. there. Error: reversal of judgment in barratry. And held that no restitution lay to a stranger on the record, 1 Show. 261, *R.* v. *Lever.*

(4) Yelv. 46, recognised, in 2 Sir Wm. Bl. 1250, 2 Saund. 328; note (1), and the barrator may be tried on the day when the indictment is found, Jenk. 317; S. P. Cro, Jac. 404, *Rice* v. *Regem.*

(5) See 1 Hawk. c. 86, s. 7, &c. for the construction of this statute.

(6) 1 Hawk. c. 86, s. 1.

(7) 31 El. c. 5, s. 4; and see more upon this subject, 1 Hawk. c. 86; Godb. 450. *R.* v. *Hill*, 1 And. 76; 2 And. 57; Dy. 52, 74, 374; Mo.. 266, 665, 751. Plowd. 77.

(8) Cro. Car. 232, *R.* v. *Hill* and another.

Embracery.] Embracery, denoted as another species of maintenance, is any attempt whatever to corrupt, influence, or instruct a jury, or in any way to incline them to one side by money, promises, letters, threats, or persuasions whether any verdict be given or not, or the verdict given be true or false (9). And if money be given after verdict, it is an act of embracery, for jurors might entertain an idea that they would be rewarded for their services, if such were the received practice (1). So if A. give B. a sum of money to be distributed amongst jurors, it is embracery, whether the distribution take place or not. So an attempt to gain over a person to offer himself as a juror, or not to appear in that character, is a misdemeanor (2), although it is said that there are circumstances where a person may be requested to appear and give a verdict according to his conscience (3). And the juror himself will be as criminal if he endeavour to seduce his brethren into a verdict by any practice, except argument, with reference to the case laid before them (4). So, where persons by indirect means procured themselves to be sworn on a tales, they were found guilty of embracery, and Hale, C. J., refused to hear any motion to arrest the judgment (5). But, of course, the arguments of counsel and the strength of evidence are not embraceries (6). They are the only legitimate means of influencing the jury, and when practised in open court are entirely lawful (7). Nor are allowances for travelling, acts of embracery (8).

The proceedings at common law for this misdemeanor may be by indictment, information, or action. The judgment is fine and imprisonment.

But embracery is likewise pointed at by the legislature. By 5 Edw. 3, c. 10, if any juror shall take of one party or the other, he shall, upon conviction, be imprisoned and ransomed at the king's will, and shall be incapacitated from serving on any assizes, juries, or inquests. By 34 Edw. 3, c. 8, the complaint against a juror shall be heard by bill forthwith, and if the juror be attainted at the suit of other than the party, and be fined, the party suing shall have half the fine, and the parties to the plea shall recover their damages by the assessment of the inquest. Moreover, the attainted juror shall be imprisoned for one year. By 38 Edw. 3, c. 12, which contains further provisions, the forfeiture is declared to be ten times as much as the juror has taken, half for the party suing and half for the king, and if the juror have not sufficient to pay the forfeiture he shall be imprisoned for one year (9).

Again, the statute 32 Hen. 8, c. 9, inflicts a forfeiture of

(1) 1 Hawk. c. 85, s. 1, 5.
(2) Id. s. 3.
(3) Id. s. 2, 6.
(4) Id. s. 6.
(5) Id. s. 4.
(6) 1 Saund. 301, *R.* v. *Opie* and others. But Mr. Serjeant Williams, in note (1) to p. 302, cites a passage in Hawkins, p. 442, note (d), fo. ed. where the serjeant observes, "In my own experience I never knew such a motion refused to be heard." And the present present practice, says Serjeant Williams, is to hear such a motion.
(7) 1 Hawk. c. 85, s. 1.
(8) Ibid.
(9) Id. s. 3.
(10) See various points decided in ancient times upon these actions of *decies tantum*, as they were called, 1 Hawk. c. 85, s. 11—22.

10*l.* upon such as "embrace any jurors," one moiety to belong to the king, and the other to him who will sue for the same. By 6 Geo. 4, c. 50, s. 61, if any one be guilty of embracery, or if any juror do wilfully and corruptly consent thereto, he shall be fined and imprisoned. If an act of embracery be not known before the trial of a cause, so that the party whose interests were intended to be prejudiced, has had no opportunity of preventing the evil effects of it by challenging the juror, it will be a good ground to move the court to set aside the verdict (1).

Tampering with Witnesses.] It is a great misdemeanor to dissuade a witness from giving his evidence, although the persuasion should not succeed. Upon such an occasion it was excepted that the indictment did not positively aver that there had been an indictment against any one, but the court overruled the objection, thinking it quite sufficient to say that the defendant knowing that such a person had been indicted, did such and such acts, and judgment of fine and imprisonment was given (2). And again, where parties had been convicted upon an information for bribing a witness to swear that a certain deed was false, it was unnecessary to aver that the deed in question was true (3).

Threatening a Prosecutor.] It is likewise a serious misdemeanor and punishable by information, to threaten a prosecutor, as by telling him that he will be hanged; or the court will grant an attachment (4).

Lastly, there are some circumstances which may be said to have a tendency to bring the due administration of the law into hazard. We will only cite one or two instances. By 7 & 8 Geo. 4, c. 29, s. 21, if any person shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, or any bill, 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, every such offender shall be guilty of a misdemeanor, and shall be liable to be transported for seven years, or to suffer such other punishment by fine and imprisonment, or both, as the court shall award. And it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence was committed, is the property of any person, or that the same is of any value.

Non-repair of a Gaol.] If no one were under a legal obligation

(1) 1 Hawk. c. 85, s. 7.
(2) 2 Str. 904, *R.* v. *Lady Lawley*; see 1 Russ. C. M. 184. As to subornation of perjury, see ante, pp. 59, 66.
(3) Pollexf. 592, *R.* v *Ireton* and another.
(4) 1 Wils. 75, *R.* v. *Carroll.*

to repair a gaol, the administration of justice would be defective. The county is usually charged with this liability, but it may also rest upon individuals in respect of their estates. As, for instance, the county gaol of Devonshire was for some time repaired by virtue of a charge upon an estate there. And the Earl of Exeter was indicted for the non-repair of a gaol at Peterborough. In this last case there were six counts, the first stating that the defendant and his predecessors, *lords of the liberty*, had immemorially been used and accustomed, &c., to repair, whilst the five other counts alleged simply that the defendant and his predecessors had immemorially been used, &c. without mentioning the franchise. The defendant pleaded not guilty to the first count, and demurred to the five last, and the court were quite clear in favour of the demurrer, observing that the lord of a franchise, as such, was not bound to repair the gaol within it without an immemorial usage to charge him as lord of the franchise (1).

Obstructing Justices in holding their Court.] A rule was granted to show cause why an information should not issue for refusing to let the justices of peace for Worcester hold their sessions in the town hall of that city (2).

(1) 6 T. R. 373, *R.* v. *Earl of Exeter.*

(2) 2 Barnard. 60. Anon.

ADDENDA.

Page 13 in the text, after note (8).—A fortiori, where the indictment only stated that the defendants were "then and there in the said land by night, as aforesaid," without averring that they were committing any offence, or that they were found by night armed as aforesaid, for the purpose aforesaid. Judgment was arrested on the count, and the defendants were convicted of a common assault (*a*).

Page 56 in the text, after note (4).—An indictment charged the uttering of a half-crown by the name of "one piece of false and counterfeit coin," and then went on to state a second uttering thus; "and that the said Ann Jones and Charles Page afterwards, to wit, on the day of such uttering and putting off *the said piece of false and counterfeit* as aforesaid, resembling and apparently intended to resemble and pass for a piece of the queen's current silver coin called a half crown." The word "coin" was omitted. The indictment then alleged that the defendants uttered this coin to S. A., the wife of W. G., "knowing the same to be false and counterfeit." Three objections were made:—1st, the words "then and there" were omitted before the scienter; 2ndly, the word "coin" was omitted; and, thirdly, the word "knowing" might apply to S. A. and not to the prisoner. But by Coleridge, J., "reading the word 'knowing' as a participle in the present tense, I must take it to import the present time." Next, the words "of false and counterfeit," being rejected as surplusage, the count would read, "on the day of such uttering and putting off the *said* piece as aforesaid," which will be good. Lastly, the word "knowing" must be taken to refer to the *defendants* in the absence of any thing else. The prisoners were convicted (*b*).

In this case a question arose as to the joint uttering. The prisoners went about the town of Ross in company, and were at the George Inn at about half-past two p.m. Page went in, leaving Jones in the street, about twelve yards from the door. Page passed a bad half crown to Ann Green in a room in the George, which was out of the sight of Jones. Page then came out and joined Jones, and they soon afterwards went together to the Saddlers' Arms, into which Jones went and passed another bad half-crown to Sarah Ann George, Page being on the outside of the house, about twelve yards from the door, and out of sight of the place where Jones passed the half-crown. Coleridge, J., felt considerable difficulty in concluding that there was, in this case, a joint uttering, but the jury found the defendants guilty (*c*).

Page 88, after Election Petitions.—By 4 Vict. c. 12, s. 71, it is made a misdemeanor, and punishable as a perjury, to give false evidence contrary to the provisions of that act. The like enactment will be found in 4 Vict. c. 35, s. 94. And to give false evidence before a committee of the house of commons is also a misdemeanor under 4 Vict. c. 58, s. 76.

(*a*) 9 C. & P. 730, *R.* v. *Curnock* & another.

(*b*) 9 C. & P. 761, *R.* v. *Jones* & another.

(*c*) S. C. And Greaves arguendo, relied on *R.* v. *Manners* and *R.* v. *Skerrit*. "It seems," said the learned counsel, "that these cases

Page 105 in the text, after note (2).—But it is not a clerical error to state a commission under the charge of four commissioners when, in fact there are but three. An indictment for perjury alleged the issuing of a certain commission to four persons, naming them, and then went to say that the four commissioners were commanded to examine witnesses, but when the commission was put in, it appeared, that although directed to four, the command was, that they "or any three or two of them" should examine witnesses. It was objected that here was a fatal variance. And Coleridge, J., acceding to the objection, would not even permit an amendment under 9 Geo. 4, c. 15 (*d*).

Page 111, after note (1).—See 9 C. & P. 786, *R.* v. *Hewins*.

Page 147 in the text, after note (8).—And where the jury negatived that A. B. was entitled to receive certain monies, a verdict of guilty upon an indictment charging the commission of certain overt acts as having been done to defraud A. B., being entitled to these monies, could not be supported (*e*).

Page 187 in the text, after note (4).—The question of consent, however, is a matter for the consideration of the jury. The mere act of *submission* when the child is in the power of a strong man can by no means be taken to be such a consent as will justify a common assault in point of law. The jury will say whether the submission of the prosecutrix was voluntary, or the result of fear under the circumstances in which she was placed (*f*).

Page 196, Assault on Gamekeepers.—See 9 C. & P. 730, *R.* v. *Curnock* and another.

Page 395, after note (10).—An indictment was preferred against overseers for not paying costs incurred in resisting an application for a bastardy order. The order of sessions was that all intended applications for bastardy orders should be entered in the book of the clerk of the peace. The defendant made the entry, but did not appear to support it. It was held, that there had, notwithstanding, been a sufficient application "*and hearing*" within 4 & 5 Will. 4, c. 76, s. 73, so as to give the sessions jurisdiction to make the order (*g*).

have been considered as though they were felonies, whereas they were misdemeanors, and in misdemeanor every one is a principal, whether present at the fact or not." In *R.* v. *Manners* 7 C. & P. 801, A. and B. agreed together for a fraudulent purpose. Each went different ways, but uttered the false money quite apart from each other, and the offences were considered several and not joint. *R.* v. *Skerrit* was a case where two went together to a shop, and one remained outside whilst the other uttered, the former having bad pieces of money in her possession, and it was held that the joint offence was made out. And upon an indictment, stating that the two prisoners had uttered a counterfeit shilling, having another in their possession, it was held immaterial to show which was the piece uttered, no *good* money having been found upon them, 2 C. & P. 427. If one good piece had been found the objection in their favour would have been unreasonable. Id. 429, by Garrow, B.

(*d*) 9 C. & P. 786, *R.* v. *Hewins*.

(*e*) 4 Jur. 864, *R.* v. *Dees*.

(*f*) 9 C. & P. 722, *R.* v. *Day*. Verdict, guilty on the second count, charging a common assault. The first count charging an attempt upon a child under ten years was not sustained, the evidence as to the age of the child not being satisfactory.

(*g*) 1 Arn. & Hodges, 319, *R.* v. *Stamper*.

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