CHAPTER VIII.

ASSAULTS.

I. ASSAULTS GENERALLY.

1. *Incidents of Offence.*

§ 603. An assault is an apparent attempt, by violence, to do corporal hurt to another.[1] It must be apparent; for if it can be

[1] Com. *v.* White, 110 Mass. 407; Hays *v.* People, 1 Hill N. Y. 351; State *v.* Davis, 1 Ired. 128; Richels *v.* State, 1 Sneed. 606; 1 Hawk. c. 62, ss. 1, 2; 1 East P. C. 406. Judge Gaston, in State *v.* Davis, *ut supra*, introduces "intentional" in the definition; and so Jarnigan *v.* State, 6 Tex. Ap. 298; People *v.* Yslas, 27 Cal. 630. But a *negligent* attack may be an assault. *Infra*, § 608 *a*. See cases cited *supra*, §§ 329 *et seq.* Compare Com. *v.* Adams, 114 Mass. 323; Johnson *v.* State, 43 Tex. 576.

According to Sir J. F. Stephen (Dig. C. L. art. 241), "An assault is (*a*) an attempt unlawfully to apply any the least actual force to the person of another, directly or indirectly; (*b*) the act of using a gesture toward another, giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid; (*c*) the act of depriving another of his liberty; in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud.

"A battery is an assault whereby any the least actual force is actually applied to the person of another, or to the dress worn by him, directly or indirectly.

"Provided, that such acts as are reasonably necessary for the common intercourse of life are not assaults or batteries if they are done for the pur-

collected, notwithstanding indications to the contrary, that there is not an apparently real approaching injury, there is no assault.[1] Thus, where a man laid his hand on his sword, and said, "If it were not assize time, I would not take such language from you," the court agreed that it was not an assault, as intent to injure was disavowed.[2] The same conclusion was reached in a case in which it appeared that the defendant, as he raised his whip, and shook it at the prosecutor, though within striking distance, made use of the words, "Were you not an old man, I would knock you down."[3] So if a man raise his hand against another, within striking distance, and at the same time say, "If it were not for your gray hairs, I would tear your heart out," it is no assault, because the words explain the action, and take away the idea of an intention to strike.[4] And so of the attempt to persuade a woman to sexual intercourse.[5] But when the threat is to strike unless something is done which thing is done, this is an assault.[6]

An assault is an apparent violent attempt to do corporal hurt to another.

An assault, even when the object is a felony, is at common law only a misdemeanor.[7]

§ 604. "It must also," to adopt the language of the late Judge Gaston,[8] "amount to an attempt; for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault. Therefore it is that, notwithstanding many ancient opinions to the contrary, it is now settled that no words can, of themselves, amount to an assault.[9] It

There must be some movement towards physical violence.

pose of such intercourse only, and with no greater force than the occasion requires.

"No mere words can, in any case, amount to an assault."

For definition of battery, see *infra*, § 617.

[1] Com. *v.* Stoddard, 9 Allen, 280; State *v.* Mooney, Phil. (N. C.) L. 434; Tarver *v.* State, 43 Ala. 354; Smith *v.* State, 39 Miss. 521; Rainbolt *v.* State, 34 Tex. 286.

[2] Tuberville *v.* Savage, 1 Mod. 3.

[3] State *v.* Crow, 1 Iredell, 375.

[4] Com. *v.* Eyre, 1 S. & R. 346.

[5] People *v.* Bransby, 32 N. Y. 465, 525. See R. *v.* Wollaston, 12 Cox C. C. 180; Smith *v.* Com., 54 Penn. St. 209. *Supra*, §§ 141, 576, 577; *infra*, § 636.

[6] See U. S. *v.* Richardson, 5 Cranch C. C. 348; State *v.* Morgan, 3 Ired. 186, cited *infra*, § 607.

[7] *Infra*, § 640 *a*.

[8] State *v.* Davis, 1 Ired. 128. See State *v.* Church, 63 N. C. 15.

[9] 1 Hawk. c. 61, s. 1, p. 110; 2 Comyn, Bat. C. And see Warren *v.* State, 33 Tex. 517.

is difficult, in practice, to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted."[1] Thus, riding after a person so as to compel him to run into a garden for shelter, to avoid being beaten, has been adjudged to be an assault.[2] And so of threats of violence by an armed assailant apparently designing an attack.[3] But there must be some hostile demonstration of violence which, if allowed its apparent course, would do hurt.[4]

§ 605. Nor does it matter that the attack was frustrated or intercepted by extrinsic means.[5] Where the defendant was advancing in a threatening attitude, with intent to strike the plaintiff, so that his blow would in a second or two have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, it was held an assault was committed.[6] A voluntary abandonment, however, before any effect is produced, or there is an action taken by the defendant calculated to alarm the prosecutor, is a defence.[7]

Frustration no defence.

§ 606. An offer to strike by one person rushing upon another will be an assault, although the assailant be not near enough to reach his adversary, if the distance be such as to induce the latter, under the accompanying circumstances, to believe that he will instantly receive a blow, unless he strike in self-defence.[8] And one reason for this is, that an attack *apparently* likely to hurt is as provocative of a breach of

Apparent ability to hurt is sufficient.

[1] See, also, *supra*, §§ 181–187; Cutler *v.* State, 59 Ind. 300.

[2] Morton *v.* Sheppee, 3 C. & P. 873; 14 Eng. C. L. 355.

[3] State *v.* Martin, 85 N. C. 508.

[4] Cutler *v.* State, 59 Ind. 300; State *v.* Millsaps, 82 N. C. 549; State *v.* Painter, 67 Mo. 84.

[5] State *v.* Vannoy, 65 N. C. 532; State *v.* Adams, 20 Kans. 311.

[6] Stephens *v.* Myers, 4 C. & P. 349; 19 Eng. C. L. 414. But see People *v.* Lilly, 43 Mich. 521. See, fully, *supra*, § 187; *infra*, §§ 636–8.

[7] *Supra*, § 187; People *v.* Lilly, 43 Mich. 521.

[8] State *v.* Davis, 1 Ired. 128; State *v.* Hampton, 63 N. C. 13; People *v.* Yslas, 27 Cal. 630; State *v.* Rigg, 10 Nev. 284. *Supra*, §§ 182, 488. See Com. *v.* Shaw, 134 Mass. 221; Lange *v.* State, 95 Ind. 114. *Aliter* if the pistol be not presented or cocked. Lawson *v.* State, 30 Ala. 14.

the peace as one actually capable of hurting.[1] Hence, drawing a gun or other dangerous weapon on another with threat to use it is an assault, although the weapon is not pointed.[2] Whether, when the weapon is not loaded, there is an assault, has been doubted.[3] But, as will be soon more fully seen, when the attitude is threatening, and the effect is to terrify, the offence is complete, the party assaulted believing in the reality of the attack.[4] Where, however, there is wanting apparent or real ability to hurt in any way, there is, generally, no assault.[5] Thus the mere pointing of an unloaded gun is said not to be an assault, without action indicating intention to attack.[6] And it has been ruled not to constitute an assault if a gun or pistol be aimed at the party assaulted at a distance at which it cannot do execution.[7] The true rule is, that there must be some adaptation of the means to the end, and it is enough if this adaptation be apparent, so as to impress or alarm a person of ordinary reason.[8] Thus where the prosecutor was at a place where he had a right to be, and four other persons, having in their possession a manure fork, a hoe, and a gun, by following him, and by threatening and insulting language, put him in fear, and induced him to go home sooner than, or by a different way, from what he would otherwise have gone; it was held that these persons were guilty of an

[1] See West *v.* State, 59 Ind. 113; Cutler *v.* State, Ibid. 300; State *v.* Hampton, 63 N. C. 13. *Contra*, under Indiana statute, McCulley *v.* State, 62 Ind. 428.

[2] People *v.* McMakin, 8 Cal. 547; State *v.* Epperson, 6 Jones (Mo.), 255; State *v.* Church, 63 N. C. 15; State *v.* Marsteller, 84 Ibid. 726; State *v.* Taylor, 20 Kans. 643; Kief *v.* State, 10 Tex. Ap. 286.

[3] See Blake *v.* Barnard, 9 C. & P. 526; People *v.* Anderson, 44 Cal. 65.

[4] *Supra*, §§ 183–4, 488. *Infra*, § 642; R. *v.* St. George, 9 C. & P. 483; Com. *v.* White, 110 Mass. 407; State *v.* Smith, 2 Humph. 457; State *v.* Shepherd, 10 Iowa, 130; State *v.* Myerfield, Phill. (N. C.) L. 108; Crumbley *v.* State, 61 Ga. 582; State *v.* Mullen, 45 Ala. 43; Beach *v.* Hancock, 7 Fost. 223; Smith *v.* State, 32 Tex. 593. See Agitone *v.* State, 41 Ibid. 501; Kief *v.* State, 10 Tex. Ap. 286.

[5] See *supra*, § 183. See 3 Crim. L. Mag. 557.

[6] Blake *v.* Barnard, 9 C. & P. 626; R. *v.* James, 1 C. & K. 530; Robinson *v.* State, 31 Tex. 170; McKay *v.* State, 44 Ibid. 43; though see *contra*, R. *v.* St. George, 9 C. & P. 483; R. *v.* Baker, 47 Eng. C. L. 253.

[7] Tarver *v.* State, 43 Ala. 354; Smith *v.* State, 32 Tex. 593.

[8] Kunkle *v.* State, 32 Ind. 220; State *v.* Pinkman, 81 N. C. 613; Mullen *v.* State, 45 Ala. 43; Tarver *v.* State, 43 Ibid. 354; Crow *v.* State, 41 Tex. 468. And see Com. *v.* McDonald, 5 Cush. 365; Johnson *v.* State, 26 Ga. 611; Allen *v.* State, 28 Ibid. 395. See *supra*, § 182.

assault upon him, though they did not get nearer to him than seventy-five yards, and did not level the gun at him.[1]

A conditional threat of force is an assault.

§ 607. A conditional threat of force may be an assault. Thus where the appellant drew his pistol, cocked it, pointed it towards the breast of F., and said, "If you do not pay me my money I will have your life," the parties being close together, it was held that this was an assault.[2] So when A., being within striking distance, raises a weapon for the purpose of striking B., and at the same time declares that if B. will perform a certain act he will not strike him, and B. does perform the required act, in consequence of which no blow is given, this is an assault in A;[3] and while mere words do not constitute such an assault, it is otherwise with words which are explanatory of an impending attack.[4]

Assault on a mass of people is an assault on the individuals.

§ 608. Recklessly shooting into a crowd is an assault,[5] and an assault on several indiscriminately is an assault on each individual.[6] So it is no defence to an indictment for shooting into a house that the object was to hurt some one who it turned out was not actually in the house.[7]

Intent not necessary.

§ 608 *a*. From what has been said in prior sections, it follows that intention to hurt is not necessary to constitute an assault. Hence a blow inflicted as a joke, there being no assent, is an assault and battery.[8] A negligent attack, also, in which there is no intent, may be an assault;[9] and so of an assault made negligently in drunkenness.[10] A negligent

[1] State *v.* Rawles, 65 N. C. 334. *Supra*, §§ 183, 488.

[2] Keefe *v.* State, 19 Ark. 190.

[3] U. S. *v.* Richardson, 5 Cranch C. C. R. 348; State *v.* Morgan, 3 Ired. 186; Crow *v.* State, 41 Tex. 468; Cato *v.* State, 4 Tex. Ap. 87. *Infra*, § 612.

[4] *Supra*, § 604; see Com. *v.* Eyre, 1 S. & R. 347; State *v.* Baker, 65 N. C. 332. *Infra*, §§ 609, 611.

[5] *Supra*, § 112; Smith *v.* Com., 100 Penn. St. 324; State *v.* Myers, 19 Iowa, 517.

[6] *Supra*, § 112; State *v.* Merritt, Phill. (N. C.) L. 134; State *v.* Nash, 86 N. C. 650. That in such case malice is to be inferred, see *supra*, § 319.

[7] *Supra*, §§ 108 *et seq.* Cowley *v.* State, 10 Lea, 282.

[8] Hill *v.* State, 63 Ga. 578. *Supra*, § 373 *a*.

[9] *Supra*, §§ 329 *et seq.* Smith *v.* Com., 100 Penn. St. 324. See, however, *contra*, State *v.* Rutherford, 13 Tex. Ap. 92, and cases in note to § 603.

[10] Com. *v.* Malone, 114 Mass. 295. *Supra*, § 50.

exposure of a child or of an infirm person may also be indicted as an assault.[1]

Assault to be inferred from facts.

§ 609. Striking at another with a cane, stick, or fist, although the party striking misses his aim;[2] drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a gun at a man, and beginning to move towards him;[3] presenting a gun within shooting distance;[4] assuming a threatening attitude, and hurrying towards him; or any other act indicating an intention to use violence against the person of another, completes the offence.[5] And, as we have seen, words may be received to indicate intent.[6]

Evidence of false imprisonment and of riotous acts will sustain an indictment for assault and battery,[7] and so will detention in a particular place by threats;[8] though it is said not to be so when the resistance is merely passive, there being no application of force made or threatened.[9]

Whether it is an assault and battery on B. to strike a horse driven by B. was at one time doubted;[10] but the better opinion is that a blow is a battery irrespective of the number of mechanical agencies through which it is transmitted.[11] It is clear that an assault on a horse on which B. is riding is an assault on B.;[12] and there is no good reason why sending dynamite through an express agency which may occupy a month in the transmission should not be as much of an assault as putting the dynamite in person in the hands of the person assailed.[13] Hence it is an assault for A. to

[1] R. *v.* Mulroy, 3 Cr. & Dix, 318; R. *v.* Ridley, 2 Camp. 650; and cases cited *supra*, §§ 318, 335, 359. As to *casus* and accident, see *infra*, § 620.

[2] Ro. Abr. 545, i. 45.

[3] Richels *v.* State, 1 Sneed, 606.

[4] Blake *v.* Barnard, 9 C. & P. 626.

[5] 1 Hawk. c. 62, s. 1; Stephens *v.* Myers, 4 C. & P. 349; State *v.* Martin, 85 N. C. 508.

[6] State *v.* Rawles, 65 N. C. 334. See Com. *v.* Eyre, 1 S. & R. 346. *Infra*, § 611. *Supra*, § 607.

[7] Long *v.* Rogers, 17 Ala. 540; State *v.* Dineen, 10 Minn. 409. See *supra*, § 591.

[8] Ibid.; Smith *v.* State, 7 Humph. 43; Bloomer *v.* State, 3 Sneed, 66; *supra*, § 591.

[9] Innis *v.* Wylie, C. & K. 257; People *v.* Lee, 1 Wheeler C. C. 364.

[10] Kirkland *v.* State, 43 Ind. 146.

[11] *Infra*, § 617; *supra*, §§ 161; De Marentille *v.* Oliver, 1 Pen. (N. J.) 380.

[12] Clark *v.* Downing, 55 Vt. 259; citing Hopper *v.* Reede, 7 Taunt. 698: Martin *v.* Shoppe, 3 C. & P. 373; State *v.* Martin, 85 N. C. 508. And see People *v.* Lee, 1 Wheel. C. C. 363.

[13] *Supra*, §§ 161-7; Crim. Law Mag., March, 1885, 155 *et seq.*

push B. against C.;[1] and it makes no difference whether B. is one person or a series of persons.[2]

Administering poison may be an assault.

§ 610. It is permissible to charge the administering of poison as an assault; and the same reasoning applies to the malicious application of injurious drugs.[3] In England, it is true, the weight of authority now is that administering poison does not necessarily involve an assault;[4] but this is open to doubt.[5] There are cases of poisoning which clearly involve assaults—*e. g.*, throwing vitriol at another, injecting poison by force. Here there can be no question. The difficulty arises when we take into view those cases of poisoning in which the person poisoned voluntarily accepts the poison, supposing it to be something else. Can there be in such case an assault upon a consenting party, if such person be capable of consent? Does fraud, or mistake as to the nature of the act consented to, nullify such assent? If so, assent to administering poison, under the impression that it was something else, does not bar the prosecution.[6] It is otherwise if the assent was to the particular act, and the particular act did not go to deprive the party assenting of inalienable rights.[7]

Attempt to poison is discussed in a prior section.[8]

Violence provocative of a breach of the peace may be an assault.

§ 611. Threats of great bodily harm, accompanied by acts showing a formed intention of putting them into execution, if intended to put the person threatened in fear of their execution, and if they have that effect and are calculated to produce that effect upon a person of ordinary firmness, constitute a breach of the peace punish-

[1] See Kirland *v.* State, *supra*.

[2] *Supra*, §§ 161-7; 1 Russ. on Cr. 1021; Com. *v.* Hawley, 99 Mass. 433.

[3] See People *v.* Blake, 1 Wheeler C. C. 490; Com. *v.* Stratton, 114 Mass. 303; Whart. Prec. *in loco*.

[4] R. *v.* Walkden, 1 Cox C. C. 282; R. *v.* Dilworth, 2 Mood. C. C. 531; R. *v.* Hanson, 2 C. & K. 912; 4 Cox C. C. 138; overruling R. *v.* Button, 8 C. & P. 660. *Contra*, Woolrych on Misdemeanors, 176, 177. See Bechtelheimer *v.* State, 54 Ind. 128. In Canada the same view is taken. R. *v.* Smith, 34 U. C. R. 552.

[5] See Com. *v.* Stratton, 114 Mass. 303. In England the above ruling was corrected by statute. R. *v.* Wilkins, 9 Cox C. C. 20; Leigh & C. 89; *supra*, § 576 *a*; R. *v.* Bennett, 4 F. & F. 1105; *infra*, § 612. Under Michigan statute see People *v.* Carmichael, 5 Mich. 10; People *v.* Adwards, 5 Mich. 22. In Texas it is said that to administer poison is not to assault. Garnet *v.* State, 1 Tex. App. 605.

[6] *Supra*, §§ 141-150. See London Law Times, Nov. 5, 1881, p. 11.

[7] *Supra*, §§ 146, 559.

[8] *Supra*, § 179.

able by indictment.[1] And provoking language, accompanied by acts whose tendency is to produce public disturbance, may be indictable as a breach of the peace.[2]

§ 612. It is no defence that the attack was made upon an unconscious person, or upon one ignorant of the nature of the act. Thus to expose an unconscious child may be an assault.[3] The same rule applies where the party assaulted does not know what the act is. Thus one decoying a female under ten years of age, and detected standing before her in a state of indecent exposure, is properly convicted of an assault with an attempt to commit a rape, though there is no evidence of his actually touching her.[4] And even non-resistance is no defence to an indictment for an assault with intent to take indecent liberties, when the defendant is a schoolmaster and the person assailed a female pupil, and there is no actual assent.[5] But where there is actual intelligent assent, even by a child of seven years, an indictment for assault cannot be maintained at common law.[6]

And so of injurious physical attempts on persons ignorant of act.

Where a medical practitioner had sexual connection with a female patient of the age of fourteen years, who had for some time been receiving medical treatment from him, it was held that he was guilty of an assault, the jury having found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bonâ fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure; and the intimation of the judges was, that he might have been indicted for rape.[7]

In England, under the statute, it has been held an assault for a man to communicate a syphilitic disease to a woman who consented

[1] State *v.* Benedict, 11 Vt. 236; State *v.* Baker, 65 N. C. 332; State *v.* Marsteller, 84 N. C. 726; Marion *v.* State, 68 Ga. 290. *Supra*, § 197; *infra*, § 1553.

[2] R. *v.* King, 14 Cox C. C. 434.

[3] R. *v.* March, 1 C. & K. 496. See *supra*, § 359.

[4] Hayes *v.* People, 1 Hill, N. Y. 351. See R. *v.* Lock, L. R. 2 C. C. R. 10, and cases cited *supra*, §§ 558–9, 576.

[5] R. *v.* Nichol, R. & R. 130; R. *v.* McGavaran, 6 Cox C. C. 64; Ridout *v.* State, 6 Tex. Ap. 249. See *supra*, § 576; *infra*, § 636. As to general defence of assent see *supra*, § 141. As to special relations, *infra*, § 636.

[6] R. *v.* Roadley, 14 Cox C. C. 463; 42 L. T. (N. S.) 515, relying on R. *v.* Reed, 3 Cox C. C. 266; 1 Den. C. C. 377. But see *supra*, § 578.

[7] R. *v.* Case, 1 Eng. L. & Eq. R. 544; 1 Den. C. C. 580; 4 Cox C. C. 220; R. *v.* Flattery, 13 Ibid. 388. *Supra*, §§ 141, 559, 597; *infra*, § 636. See, also, People *v.* Bransby, 32 N. Y. 525.

to sexual intercourse with him, the consent not going to the communication of disease.[1]

§ 613. An assault has been held to be proved where a medical man unnecessarily stripped, with his own hands, a female naked, under the pretence of examining her;[2] where a parish officer, against the will of a pauper, cut off her hair;[3] where an almshouse keeper applied unnecessarily severe chastisement;[4] and where the captain of a vessel compelled a seaman, in an exhausted state, to go aloft, to which the latter, in terror, assented.[5] And, as we have seen, false imprisonment itself involves an assault.[6] But where there is intelligent *consent*, by a person capable of consenting, there is no assault.[7] And it has been held not an assault to arrest a person apparently drunk.[8]

Wrongful abuses of authority may be assaults.

Assaults by officers will be hereafter considered.[9]

§ 614. Where a parent inadvertently exposes a young child to the inclemency of the weather, and no injury results, this is not an assault;[10] and to constitute a neglect by the parent to supply shelter a misdemeanor at common law, there must be an injury to the health.[11] But this is not requisite when the assault is by strangers. Thus where C. was delivered of a child, at the house at which A. and B. resided, and they, telling her that the child was to be taken to an institution to be nursed, put it into a bag, and hung it on some palings at the side of a foot-path, and there left it; it was held that this was an assault on the child.[12]

Apparent effect must be injurious.

§ 615. No matter how private or secret the assault may be, it does not thereby cease to be an indictable offence if there be injury done, or even if the party assailed be reasonably, according to his lights, put in fear.[13]

No defence that act was secret.

[1] R. *v.* Bennett, 4 F. & F. 1105. See R. *v.* Sinclair, 13 Cox C. C. 28; and *contra*, Hegerty *v.* Shinn, cited *infra*, § 636.

[2] R. *v.* Rosinski, 1 Mood. C. C. 12. See *supra*, § 576.

[3] Ford *v.* Skinner, 4 C. & P. 239. See R. *v.* Miles, 6 Jur. 243. *Infra*, § 1633.

[4] *Infra*, § 635.

[5] U. S. *v.* Freeman, 4 Mason C. C. 505. *Supra*, § 360; *infra*, § 1585.

[6] *Supra*, §§ 591, 609.

[7] See *infra*, § 636; and particularly *supra*, §§ 141 *et seq.*

[8] Com. *v.* Presby, 14 Gray, 63; Com. *v.* Coughlin, 123 Mass. 436.

[9] *Infra*, § 630 *a*.

[10] R. *v.* Renshaw, 20 Eng. Law & Eq. 593; 2 Cox C. C. 285. See Whart. Prec. 916. *Infra*, §§ 631, 1564 *et seq.*

[11] R. *v.* Philpott, Dears C. C. 179; 6 Cox C. C. 140; 20 Eng. Law & Eq. 591. *Infra*, §§ 1563–70.

[12] R. *v.* March, 1 C. & K. 496—Tindal. *Infra*, §§ 1563–70.

[13] Com. *v.* Simmons, 6 J. J. Marshall, 615.

§ 616 All concerned in any assault are principals.[1] Hence, one who incites others to commit an assault is guilty, and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it; as whatsoever will make a man an accessary before the fact in felony will make him a principal in misdemeanor.[2]

All concerned are principals.

If two parties go out to strike one another and do so, it is an assault in both, and it is quite immaterial which strikes the first blow.[3] And consequently, when a number of persons met together, and there is evidence tending to show a common design to commit an assault upon another, they may all be properly found guilty, though only one of them used threatening and insulting language to him.[4]

§ 617. A battery is an assault in which force is applied, by material agencies, to the person of another, either mediately or immediately.[5] Thus it is a battery to spit at another;[6] to push a third person against him;[7] to set a dog at him which bites him;[8] to cut his dress while he is wearing it, though without touching or intending to touch his person;[9] to shoot him;[10] and to cause him to take poison.[11] So it is a battery for a man to fondle against her will a woman not his wife.[12] The force may be applied through conductors more or less close. Thus to strike the dress of the person assailed, or the horse on which he is riding, or the house in which he resides, may be as much a battery as to strike his face;[13] and sending an explosive machine by express from New York to San Francisco may be as much a battery as taking it to San Francisco in person.[1] It is not, however, a battery to lay hands on another to attract his attention, or in a party falling to seize another for support.[2] Sending a missile into a crowd, also, is a battery on any one whom the missile hits;[3] and so is the use, on the part of one who is excused in using force, of more force than is required.[4]

Any tactual application of force is a battery.

[1] *Supra*, § 223. *Infra*, § 618; Dunman *v.* State, 1 Tex. Ap. 593. See Hilmes *v.* Stroebel (Wis. 1884), 18 Rep. 126.

[2] Com. *v.* Hurley, 99 Mass. 433; State *v.* M'Clintock, 8 Iowa, 203; State *v.* Lymburn, 1 Brevard, 397. All thus concerned may be charged jointly with the assault. Ibid. See Whart. Cr. Pl. & Pr. § 301. *Supra*, § 223.

[3] R. *v.* Lewis, 1 C. & K. 419.

[4] State *v.* Rawles, 65 N. C. 334. See *supra*, §§ 223 *et seq.*

[5] State *v.* Philley, 67 Ind. 304; Steph. Dig. C. L. art. 241. See *supra*, § 609.

[6] 6 Mod. 142.

[7] Bul. N. P. 16. Whether striking horse is striking driver see Kirland *v.* State, 43 Ind. 146. *Supra*, § 609.

[8] 1 Russ. Cr. 958.

[9] R. *v.* Day, 1 Cox C. C. 207.

[10] State *v.* Prather, 54 Ind. 63.

[11] *Supra*, § 610.

[12] R. *v.* Dungey, 4 F. & F. 99; Goodrum *v.* State, 60 Ga. 509. *Supra*, § 576.

[13] *Supra*, §§ 167, 324, 609; State *v.* Davis, 1 Hill, S. C. 46.

2. *Defence.*

§ 618. A prosecutor in an indictment for an assault and battery, who has commenced a civil suit for the injury, will not be compelled to abandon either the civil suit or the prosecution. Both may be sustained; the first for damages to the injured individual, the second to avenge the public wrong.[5] The court, however, will not give a severe judgment upon the criminal conviction, unless the prosecutor will agree to relinquish his civil remedy.[6]

Pendency of civil prosecution no defence.

§ 619. No words, no matter how irritating or opprobrious, will justify an assault.[7]

Nor are words of provocation.

§ 620. Whatever would be a defence on ground of misadventure to an indictment for homicide is equally a defence to a charge of battery.[8] Thus if a horse run away with his rider and run against a man, it is no battery,[9] nor is it a battery if a soldier, in his ranks, discharge his gun, and a man unexpectedly pass before him at the time, and be hurt by it.[10] It is also a good defence that the alleged battery was merely an amicable contest; as that the defendant wrestled with the prosecutor for a wager;[11] or that it happened by accident whilst the defendant was engaged in some sport or game,

Misadventure or *casus* is a good defence.

[1] *Supra*, §§ 161, 609. See Crim. Law Mag., March, 1885, 155.

[2] Steph. Dig. C. L. art. 241.

[3] *Supra*, § 608.

[4] *Infra*, §§ 624 *et seq.* *Supra*, § 612.

[5] *Supra*, § 31 *b*; Whart. Cr. Pl. & Pr. § 453; State *v.* Blennerhasset, 1 Walk. 7; State *v.* Gibson, 10 Ired. 214.

[6] Buckner *v.* Beek, Dudley (S. C.), 168; Richardson *v.* Zuntz, 26 La. An. 313. As to continuance, see Whart. Cr. Pl. & Pr. § 599 *a*. *Supra*, § 31 *b*.

[7] See Stephens *v.* Myers, 4 C. & P. 249; Com. *v.* Eyre, 1 S. & R. 347; Mitchell *v.* State, 41 Ga. 527; *supra*, § 455 *a*.

[8] *Supra*, §§ 306, 340 *et seq.*

[9] Gibbons *v.* Pepper, 2 Salk. 637; 4 Mod. 405. *Supra*, § 306.

[10] Weaver *v.* Ward, Moor, 864; Hob. 134; and see R. *v.* Gill, 1 Stra. 190.

[11] Com. Dig. Pleader, 3 M. 18. *Supra*, §§ 141 *et seq.*, 371.

which was neither unlawful nor dangerous.[1] That misadventure when negligent is no defence has been already seen.[2]

Attacks on property may be forcibly repelled.

§ 621. The owner of property, as we have seen, may by force resist an attempt to take it from him, and may rescue it from another's grasp.[3] And it has been held that a mere snatching by the hand on claim of right is not an assault.[4] But a party thus vindicating his rights is guilty of an assault if he use an excess of force.[5] Nor can he punish an assailant after the latter has retreated. He can *defend*, but not *punish*.[6]

Intruders may be expelled by force from depot or other grounds.

§ 622. A superintendent of a railroad depot has authority to exclude therefrom persons who violate the reasonable regulations prescribed for their conduct, and annoy passengers or interrupt the officers and servants of the corporation in the discharge of their duties.[7] Hence an innkeeper may be ejected from a depot when his conduct, in soliciting passengers to go to his inn, is an annoyance to passengers, or a hindrance and interruption to the railroad officers in the performance of their duties, he having due notice that he is a trespasser, and there being no more force applied than is necessary to eject him.[8] The same distinctions apply to intruders on other grounds, if the intrusion is without color of right.[9]

Passenger disobeying rules may be expelled from car.

§ 623. A passenger on a railway car, when guilty of improper conduct, or refusing to comply with the reasonable rules of the company, may be ejected without subjecting the officer who attempts it to an indictment, provided undue

[1] See *supra*, §§ 141 *et seq.*, 371–73.

[2] *Supra*, § 608 *a*.

[3] *Supra*, §§ 100, 501; *infra*, § 1083; State *v.* Elliott, 11 N. H. 540; State *v.* Miller, 12 Vt. 437. See Com. *v.* Lakeman, 4 Cush. 597; Filkins *v.* People, 69 N. Y. 101; Overdeer *v.* Lewis, 1 Watts & S. 90; Harrington *v.* People, 6 Barb. 607; Anderson *v.* State, 6 Baxt. 608.

"It is not disputed that a man may justify an assault and battery in defence of his lands or goods, or of the goods of another delivered to him to be kept, and whether he resist with greater force than is necessary, or than is proportioned to the violence of the trespasser, will be for the jury under the instructions of the court." Allen, J., Filkins *v.* People, 69 N. Y. 106.

[4] Com. *v.* Ordway, 14 Gray, 65.

[5] *Supra*, § 102. Golden *v.* State, 1 So. C. 292; Whart. *v.* People, 8 Ill. Ap. 232.

[6] *Supra*, § 98 *et seq.*

[7] See Harris *v.* Stevens, 31 Vt. 79.

[8] *Supra*, § 197; Com. *v.* Power, 7 Met. 596.

[9] See Com. *v.* Ruggles, 6 Allen, 588.

force be not used;[1] and so where he refuses to pay his fare.[2] And so where he refuses to surrender his ticket,[3] though he is not required to so surrender before the journey's end, unless a check or other substitute is handed him.[4]

Person refusing to leave may be expelled from house.

§ 624. Force is generally excusable where a person, after request, refuses to leave another's premises.[5] Where there has been, however, a trespass in law merely, without actual force, the owner of the close must first request the trespasser to depart before he can justify laying his hand on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to remove him.[6] But if the trespasser use force, then the owner may oppose force to force;[7] and in such a case if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer, however, to a justification of defence of his possession, the other party may prove that the battery was excessive;[8] or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like. Peculiar sanctity being attached to a dwelling-house or mansion, the owner of such a house is entitled to use all necessary force to compel an intruder to leave.[9] But though a man may in such a case put out of his house another who persists in

[1] *Supra*, § 437. See Whart. on Neg. § 646; R. *v.* Mann, 6 Cox C. C. 461; People *v.* Caryl, 3 Parker C. R. 326; State *v.* Ross, 2 Dutcher, 226; Ill. Cent. R. R. *v.* Sutton, 53 Ill. 397; State *v.* Chovin, 7 Iowa, 204; Robinson *v.* State, 54 Ala. 86.

[2] People *v.* Jilson, 3 Parker C. R. 234. See State *v.* Goold, 53 Me. 279; State *v.* Overton, 4 Zab. 435; State *v.* Campbell, 32 N. J. 309; State *v.* Chovin, 7 Iowa, 207.

[3] People *v.* Caryl, 3 Park. C. R. 326.

[4] State *v.* Thompson, 26 N. H. 250. But spitting on the floor is not ground for expulsion. People *v.* McKay, 46 Mich. 439.

[5] *Supra*, § 506; Com. *v.* Clarke, 2 Met. 23; Harrington *v.* People, 6 Barb. 608; Corey *v.* People, 45 Barb. 262. See 2 Ro. Abr. 549, l. 7; Com. *v.* Kennard, 8 Pick. 133; State *v.* Taylor, 82 N. C. 554. *Supra*, §§ 97, 502 *et seq.*

[6] *Supra*, §§ 102, 506; Weaver *v.* Bush, 8 T. R. 78. See 2 Rolle Abr. 548, l. 35, 45; 2 Salk. 641; Territory *v.* Drennan, 1 Mont. 41; Jones *v.* Jones, 71 Ill. 562; Abt *v.* Burgheim, 80 Ill. 92; State *v.* Burke, 82 N. C. 551. See Low *v.* Elwell, 121 Mass. 309.

[7] Salk. 641; 8 T. R. 78; 1 C. & P. 6. *Supra*, §§ 502, 506.

[8] Skin. 387; Lutw. 1436.

[9] *Supra*, §§ 503, 506.

remaining after notice express or implied to leave, yet he is not entitled to inflict a wanton and unduly violent battery.[1]

Innkeeper has this right as to visitors.

§ 625. The proprietor of a public inn has a right to request a person who visits it, not as a guest, or on business with a guest, to depart; and, if he refuse, the innkeeper has a right to lay his hands gently upon him, and lead him out, and if resistance be made, to employ sufficient force to put him out.[2] And for so doing he can justify his conduct on a prosecution for assault and battery.[3] But if from excess of violence the party expelled be killed, the offence is manslaughter.[4]

And so has person controlling cemetery.

§ 626. The sexton of a church cemetery, charged by its owners with its exclusive control, has a right to eject by force any trespasser who insists in interring a body contrary to the rules governing the cemetery.[5]

Agent may eject trespassers.

§ 627. A person lawfully in possession of a building, as agent, may eject trespassers.[6]

Prior assault a defence.

§ 628. It is a good defence in justification even of a wounding to prove that the prosecutor attacked and beat the defendant first, and that the defendant committed the alleged battery merely in his own defence;[7] though proof that the prosecutor struck the first blow will not justify an excessive battery or an attack with a dangerous weapon.[8]

A provoked assault is no defence.[9]

[1] *Supra*, §§ 102, 506; State *v.* Lazarus, 1 Mill's Const. R. (S. C.) 34. See Gregory *v.* Hill, 8 T. R. 299.

[2] See Howell *v.* Jackson, 6 C. & P. 723.

[3] Com. *v.* Mitchell, 2 Pars. (Phil.) 431. As to duties of innkeepers, see *infra*, § 1587.

[4] State *v.* Murphey, 61 Me. 56. *Supra*, §§ 500, 506.

[5] Com. *v.* Dougherty, 107 Mass. 243.

[6] Com *v.* Clark, 2 Met. 23; Com. *v.* Powers, 7 Met. 596.

[7] 1 Sid. 246; 1 Co. Rep, 19; 2 Salk. 642; 3 Ibid. 46; Com. *v.* Mann, 116 Mass. 58; State *v.* Franmberg, 40 Iowa, 555; State *v.* Fowler, 52 Iowa, 103; Pease *v.* State, 13 Tex. Ap. 18. That an assault embodying an apparent danger will excuse a battery, see Allen *v.* State, 28 Ga. 395. *Supra*, §§ 488, 619. *Infra*, § 645.

[8] *Supra*, §§ 470 *et seq.*; Cushman *v.* Ryan, 1 Story, 91; Com. *v.* Ford, 5 Gray, 475; State *v.* Gibson, 10 Ired. 214; State *v.* Wood, 1 Bay, 351; State *v.* Quinn, 2 Brev. 515; Floyd *v.* State, 36 Ga. 91; Riddle *v.* State, 49 Ala. 389; Allen *v.* State, 52 Ibid. 391; Presser *v.* State, 77 Ind. 274; State *v.* Hays, 67 Mo. 264; State *v.* Newland, 27 Kan. 764; State *v.* Lawry, 4 Nev. 161; Cotton *v.* State, 4 Tex. 260. See *supra*, §§ 456, 470. *Cf.* Allen *v.* State, 28 Ga. 395.

[9] *Supra*, § 485; Page *v.* State, 69 Ala. 229; Johnson *v.* State, Ibid. 253; People *v.* Miller, 49 Mich. 23.

It is not the defendant's mere notion that he is about to be attacked that justifies; but there must be circumstances leading the defendant, according to his lights, to expect an attack.[1]

If the defendant prove an assault merely, as, for instance, that the prosecutor lifted up a cane or staff, and offered to strike him, this is sufficient to justify the defendant's striking the prosecutor; for a party seriously threatened need not, in such a case, stay till the other has actually struck him.[2]

Nor is a party in such case precluded from self-defence by the mere fact that he could have previously invoked the interposition of the public authorities for his protection.[3]

Defence of relative in like manner justified.

§ 629. A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child,[4] a child in defence of his parent,[5] a master in defence of his servant, and a servant in defence of his master, whenever this is necessary to protect from apparently superior force.[6]

It is otherwise, however, when the object of interference is merely to take part in a fight.[7] And an assault by a husband in cool blood cannot be excused by an alleged prior assault on a wife.[8]

Exercise of legal right no provocation.

§ 630. Generally, the exercise of a legal right is not a provocation that excuses an assault.[9] But it is no excuse for an assault that the party assailed was a vagrant and indebted to the assailant.[10]

§ 630 *a*. As is elsewhere seen, an officer whose duty it is to arrest, or to execute a writ committed to him, is entitled to use such force

[1] *Supra*, § 491. See Whart. on Crim. Ev. §§ 69 *et seq.*; State *v.* Lull, 48 Vt. 581; State *v.* Bryson, 1 Winston (N. C.), No. 2, 86; May *v.* State, 6 Tex. Ap. 191. See State *v.* Nash, 88 N. C. 618.

[2] Bull. N. P. 18; 2 Ro. Abr. 547, l. 37. See *supra*, §§ 455 *et seq.*

[3] Evers *v.* People, 6 Thomp. & C. 156; 3 Hun, 716. *Supra*, § 97 *a*.

[4] A parent, however, seeking to recover control of a child under a divorce decree, may be convicted of an assault for forcing his way in face of resistance into the house of a third person for the purpose of seizing the child. Com. *v.* Beals, 133 Mass. 396.

[5] State *v.* Brittain, 89 N. C. 481. But see State *v.* Sharp, 19 Ohio St. 379, cited *supra*, § 494.

[6] 2 Ro. Abr. 546 (D.); 1 Hawk. c. 60, ss. 23, 24. *Supra*, §§ 97 *et seq.*, 494.

[7] State *v.* Johnson, 75 N. C. 174; Waddell *v.* State, 1 Tex. Ap. 720.

[8] *Supra*, § 429; Stewart *v.* State, 66 Ga. 90.

[9] State *v.* Lawry, 4 Nev. 161. See *supra*, §§ 95 *et seq.*

[10] Ward *v.* State, 28 Ala. 52.

Peace or other officer may use force.

as is requisite to perform the duties with which he is charged.[1] A commanding officer in the military and navy service, also may use such force as the maintenance of discipline may require.[2]

§ 631. It is admissible for the defendant to show that the battery was merely the correcting of a child by its parent;[3] but if the parent chastizing the child exceed the bounds of moderation and inflict cruel, merciless, or unnecessary punishment, he is subject to indictment.[4] The same doctrine applies to persons standing *in loco parentis*.[5] But a "child" in this sense is not merely a minor but must be a minor under tutelage.[6] A minor who is emancipated cannot be thus brought into subjugation.[7]

Parents have right of proper correction.

A forcible exposure of a child may be an assault.[8]

How far a parent is responsible for neglecting his child will be hereafter discussed.[9]

§ 632. The law confides to schoolmasters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible, unless the punishment be such as naturally to occasion permanent injury to the child, or be inflicted merely to gratify their own evil passions.[10] The teacher must be governed, when chastisement is proper, as to the mode and severity of the punishment, by the nature of the offence, the age, size, and apparent powers of endurance of the pupil. It is for the jury to decide whether the punishment is excessive.[1] But the better opinion is that chastisement is to be limited to cases of misconduct, and cannot be inflicted, unless where education is by law compulsory, to compel pursuance of any particular line of study.[2] And in any case the pupil must be duly informed of the offence, and the discipline must be humane.[3]

And so of schoolmasters and teachers.

[1] *Supra*, §§ 401 *et seq.*; *infra*, § 647; Whart. Cr. Pl. & Pr. §§ 7 *et seq.*; State *v.* McNinch, 89 N. C. 695.

[2] U. S. *v.* Ruggles, 5 Mason, 192; U. S. *v.* Taylor, 2 Sumn. 584 (limiting this right to captain); U. S. *v.* Wickham, 1 Wash. C. C. 316.

As to maltreatment of seamen, see *infra*, §§ 1865, 1871, 1885, and as to responsibility of officers, see further, § 431.

On the other hand, force in resisting an illegal or unduly violent assault is excusable. See *infra*, § 649.

[3] Com. Dig. Pleader, 3 M. 19; 1 Hawk, c. 60, s. 23; c. 62, s. 2; and see 2 B. & P. 224; Reeve's Dom. Rel. 288; 1 Kent Com. 204; State *v.* Alford, 68 N. C. 322; Neal *v.* State, 54 Ga. 281. See *supra*, § 359; *infra*, § 1563. As to guardian and ward, see Stanfield *v.* State, 43 Tex. 167.

[4] Com. *v.* Coffey, 121 Mass. 66; Com. *v.* Blaker, 1 Brewst. 311; Neal *v.* State, 54 Ga. 281; Johnson *v.* State, 2 Humph. 283; Anderson *v.* State, 3 Head, 455; Fletcher *v.* People, 52 Ill. 395; Smith *v.* Slocum, 62 Ibid. 354; State *v.* Bitman, 13 Iowa, 485. *Supra*, §§ 331, 359, 374; *infra*, § 1563.

[5] R. *v.* Cheeseman, 7 C. & P. 455; State *v.* Harris, 63 N. C. 1; Ware *v.* State, 67 Ga. 349; Stanfield *v.* State, 43 Tex. 167. *Supra*, § 374.

[6] McGregor *v.* State, 4 Tex. Ap. 599.

[7] Ibid.

[8] R. *v.* Mulroy, 7 C. & P. 277. *Infra*, § 1564. *Supra*, § 614.

[9] *Infra*, §§ 1563 *et seq.*

[10] Com. *v.* Randall, 4 Gray, 362; State *v.* Mizner, 45 Iowa, 248; State *v.* Pendergrass, 2 Dev. & Bat. 365; Com. *v.* Seed, 5 Penn L. J. R. 78; Com. *v.* Fell, 11 Haz. Pa. Reg. 179; State *v.* Alford, 68 N. C. 322; State *v.* Harris, 63 Ibid. 1; Dowlen *v.* State, 14 Tex. Ap. 61; Reeve's Dom Rel. 288. See R. *v.* Hopley, 2 F. & F. 202. That a teacher has a right judiciously to chastise a pupil, is recognized also in 2 Kent, 265; 1 Black. Com. 453; Starr *v.* Liftchild, 40 Barb. 541; State *v.* Williams, 27 Vt. 755; Danenhoffer *v.* State, 69 Ind. 295; State *v.* Burton, 45 Wis. 150; and *supra*, §§ 332, 374.

That a superintendent of a charitable institution is indictable for cruel treatment of children, see Cowley *v.* People, 83 N. Y. 464. *Infra*, § 1585.

§ 633. By the common law, the husband possessed the power of chastising his wife, though the tendency of criminal courts in the present day is to regard the marital relation as no defence to a battery. "Perhaps, however," it has been argued by the Supreme Court of Mississippi, "the husband should still be permitted to exercise the right of moderate chastisement in cases of great emergency, and to use salutary restraints in every case of misbehavior, without subjecting himself to vexatious prosecutions, resulting in the discredit and shame of all parties concerned."[4] And where a husband is indicted for an assault and battery on his wife, he may show in mitigation that he was provoked thereto by her immediate bad behavior and misconduct.[5] Nor, it has been said, can he at common law be convicted of a battery on her, unless he inflicts permanent injury on her, or is guilty of malignant cruelty. Nor is this view modified

Husband at common law may coerce wife.

[1] Com. *v.* Randall, 4 Gray (Mass.), 36; Danenhoffer *v.* State, 69 Ind. 295; S. C., 79 Ibid. 75; State *v.* Mizner, 45 Iowa, 248; Anderson *v.* State, 3 Head. 455. See Cooper *v.* McJunkin, 4 Ind. 200. *Supra*, §§ 359, 360.

[2] Rulison *v.* Post, 79 Ill. 567; State *v.* Mizner, 50 Iowa, 145; Morrow *v.* Wood, 35 Wis. 59.

[3] State *v.* Mizner, 45 Iowa, 248. See 2 Am. Law Journ. 72.

[4] Bradley *v.* State, 1 Walker, 156.

[5] Robbins *v.* State, 20 Ala. 36. See Fulgham *v.* State, 46 Ala. 143; Greta *v.* State, 10 Tex. Ap. 36.

by the fact that the two have agreed to live apart.[1] But the better opinion is that while a husband has no right to inflict corporal punishment on his wife,[2] he may defend himself against her, and restrain her from acts of violence towards himself or others.[3]

So of master as to servant, and officer of justice.

§ 634. A master, it is said, may chastise his apprentice moderately;[4] and so may a master to whom a minor child is handed over with a cession of the parents' rights;[5] though a master, not standing *in loco parentis*, cannot chastise a servant.[6] The master of a vessel, unless restrained by statute, has the same power under the same checks.[7] Where an officer of justice is charged with assault and battery, it is a good defence that the offence was committed in the discharge of his official duties.[8] No greater force, however, can be used,[9] nor any further duress imposed,[10] than is necessary to effect the immediate object. So a man may justify laying his hands upon another to prevent his fighting, or committing a breach of the peace;[11] or to prevent him from rescuing goods taken in execution;[12] or the like.[13] A coroner,[14] and a magistrate, upon a private personal inquiry,[15] may justify a forcible exclusion of a person from the justice room, even though he be

[1] State *v.* Black, 1 Wins. (N. C.) Law, No. 1, 266. See Whart. Conf. of L. § 166.

[2] Com. *v.* McAfee, 108 Mass. 458; People *v.* Winters, 2 Park. C. R. 10; Edmond's App., 57 Penn. St. 232; State *v.* Rhodes, Phill. (N. C.) 453; Gholston *v.* Gholston, 31 Ga. 625; Pillar *v.* Pillar, 22 Wis. 656; Fulgham *v.* State, 46 Ala. 143; Oliver *v.* State, 70 N. C. 60; Owen *v.* State, 7 Tex. Ap. 329.

[3] Com. *v.* McAfee, 108 Mass. 458; People *v.* Winters, 2 Parker C. R. 10; State *v.* Buckley, 2 Harring. 552; State *v.* Mabrey, 64 N. C. 592; Fulgham *v.* State, 46 Ala. 143. That he may be indicted for assaulting her even though he was prevented by a friend from striking, see State *v.* Mabrey, 64 N. C. 592.

[4] R. *v.* Keller, 2 Show. 289.

[5] 2 Kent Com. 261; Matthews *v.* Terry, 10 Conn. 455, and cases cited in next note. As to master's neglect of servant, see *infra*, §§ 1585 *et seq.*

[6] See People *v.* Phillips, 1 Wheel. C. C. 155; Penns. *v.* Kerr, Add. 324; Com. *v.* Conrow, 2 Barr, 402; Com. *v.* Baird, 1 Ashm. 267; Cooper *v.* State, 8 Baxt. 324; Ambrose, *in re* Phillips, N. C. 91; Davis *v.* State, 6 Tex. Ap. 133; 2 Kent Com. 64, 261.

[7] *Supra*, § 374; *infra*, §§ 1871–85.

[8] 2 Ro. Abr. 546 *a*; Whart. Cr. Pl. & Pr. §§ 1–20. As to homicide in such cases see *supra*, §§ 333, 374.

[9] Harrison *v.* Hodgson, 10 B. & C. 445; Rusberry *v.* State, 1 Tex. Ap. 664; Skidmore *v.* State, 43 Tex. 93.

[10] State *v.* Parker, 75 N. C. 249.

[11] Com. Dig. Pleader, 3 M. 16.

[12] 3 Lev. 113.

[13] See 1 Mod. 168; 2 Ro. Abr. 546.

[14] Garnett *v.* Ferrand, 6 B. & C. 611.

[15] Cox *v.* Coleridge, 1 B. & C. 37.

the attorney of the party accused; but if the inquiry be of a judicial nature all persons concerned have a right to be present.[1]

A convict cannot be whipped as a punishment unless in conformity with law, and any whipping not so prescribed is indictable as a battery.[2]

Alms and poorhouse keepers may restrain inmate.

§ 635. Persons having charge of poor and almshouses have the right to restrain by force, if necessary to the preservation of order, those under their charge. But where the keeper of a town almshouse seized and chained to the floor a pauper, who was at the time quietly reading, it was held to be no defence to an indictment for an assault that the pauper had been turbulent and unruly on prior occasions, and had been guilty of various prior destructive acts in the house, there being no impending necessity for such violent action.[3] And it has been ruled that where a master of a union inflicts personal chastisement on a female pauper in an indecent manner, he is guilty of an assault, even though the extent of the correction is within the limits of moderation.[4] And in Alabama the hirer of a convict has no right to inflict personal chastisement on him.[5]

Assent a defence.

§ 636. As a general rule, if the prosecutor intelligently assented, this is a good defence.[6] Thus, if it be proved that the struggle was an amicable contest, voluntarily entered into on both sides, and not likely to produce serious hurt to either party;[7] or that the blow was given at the prosecutor's request, to save him, as was supposed, from a prosecution of a felony;[8] or that the assault, when the offence is sexual, was agreed to by the woman;[9] the defence is good. It may also be argued that persons engaging in a tumultuous frolic may be indictable for affray, though not for assault.[10] On the other hand, if the fight has

[1] Daubney *v.* Cooper, 10 B. & C. 237.

[2] Cornell *v.* State, 6 Lea, 669.

[3] *Supra*, § 613; State *v.* Hull, 34 Conn. 132. See State *v.* Hawkins, 77 N. C. 494. That in a proper case chastisement may be inflicted, see State *v.* Neff, 58 Ind. 516.

[4] R. *v.* Miles, 6 Jur. 243—Gurney. Ford *v.* Skinner, 4 C. & P. 239. *Supra*, § 613; *infra*, § 1585.

[5] Prewitt *v.* State, 51 Ala. 33.

[6] *Supra*, § 141; R. *v.* Wollaston, 12 Cox C. C. 180; and other cases cited *supra*, §§ 556–577, 612.

[7] Com. Dig. Pleader, 3 M. 18; R. *v.* Guthrie, 11 Cox C. C. 522; L. R. 1 C. C. R. 243. See Fitzgerald *v.* Cavin, 110 Mass. 153.

[8] State *v.* Beck, 1 Hill S. C. 363.

[9] *Supra*, §§ 141, 576.

[10] See *supra*, § 371; Duncan *v.* Com. 6 Dana, 295; though see R. *v.* Hunt, 1 Cox C. C. 177.

anything of the character of illegality, or if the assault be of a nature injurious to the public as well as to the party assaulted, this reasoning does not apply.[1] But in any view, consent obtained through fraud, by stupefaction, or through the ignorance or incapacity of the party assaulted, is no defence.[2] Mere submission, without assent, is no defence.[3] And assent to something different from that actually done is no defence.[4] Thus consent on a woman's part is no defence to an indictment for a sexual assault when the consent was simply given to medical treatment;[5] and consent to take certain food is no defence to an indictment for taking such food when infected by poison.[6] It has been even held that consent on a woman's part to illicit intercourse is no defence to an indictment for assault in communicating to her a venereal disease;[7] or to excessive force in the act.[8] Nor is a husband's assent a defence to an indictment for an indecent assault on a wife.[9] It has also been held that it is no defence that the force applied was part of the form of initiation of a voluntary society which the party assailed had agreed

[1] State *v.* Newland, 27 Kan. 764. That parties fighting with their fists at a prize fight by consent, without ill-will, are guilty of assault has been ruled in R. *v.* Lewis, 1 C. & K. 419; R. *v.* Perkins, 4 C. & P. 537; R. *v.* Coney, L. R. 8 Q. B. D. 534; 15 Cox C. C. 46; 46 L. T. (N. S.) 307; Adams *v.* Waggoner, 33 Ind. 531; Com. *v.* Collberg, 119 Mass. 350; *contra*, Champer *v.* State, 14 Oh. St. 437; State *v.* Beck, 1 Hill S. C. 363; and see *supra*, §§ 142, 372 *et seq.* *Infra*, § 1465 *a*. In R. *v.* Coney, *ut sup.*, Cave, J., went to the length of saying that "an assault being a breach of the peace, and unlawful, the consent of the person struck is immaterial." The rule is thus more guardedly stated in the same case by Stephen, J. "The consent of the person who sustains the injury is no defence, if the injury is of such a nature, or if it is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured." To the same effect, see State *v.* Burnham, 56 Vt. 445.

[2] See particularly *supra*, §§ 141, 144–45, 577, 612, and remarks of Kelly, C. B., in R. *v.* Locke, 12 Cox C. C. 244, cited *supra*, § 146.

[3] R. *v.* Case, 1 Eng. Law & Eq. 544; 4 Cox C. C. 220; 1 Den. C. C. 58; R. *v.* Nichol, R. & R. 130; R. *v.* McGavaran, 6 Cox C. C. 64. *Supra*, §§ 141, 577.

Hence indecent fondling of a child without consent is an assault. Ridout *v.* State, 6 Tex. Ap. 249.

[4] *Supra*, §§ 141, 146, 559, 612.

[5] R. *v.* Case, 4 Cox C. C. 220; R. *v.* Flattery, 13 Ibid. 388; Don Moran *v.* People, 25 Mich. 356. *Supra*, §§ 559, 612.

[6] Com. *v.* Stratton, 114 Mass. 303.

[7] R. *v.* Bennett, 4 F. & F. 1105; R. *v.* Sinclair, 13 Cox C. C. 28; though see Hegerty *v.* Shine, 12 Irish L. T. R. 100, cited in 18 Alb. L. J. 202; 14 Cox C. C. 124, 142. *Supra*, § 612.

[8] Richie *v.* State, 58 Ind. 355.

[9] State *v.* Boyland, 24 Kan. 186.

to join, he not having known beforehand that this was part of the ceremony.[1] Assent, also, will be no defence to an indictment for a deadly assault.[2]

3. *Indictment and Verdict.*

§ 637. It is enough if the indictment charge an assault of the defendant on the prosecutor.[3] It is not necessary that the word "unlawfully" should be used in the indictment if violence be averred;[4] nor is "wilfully" or "maliciously" essential;[5] nor is it necessary to allege that the assault and battery were committed in public, or to the terror of the citizens of the Commonwealth or State.[6] Where, however, as in Indiana, there is a special statute defining assaults, the indictment must follow the statute.[7]

Enough to aver assault on designated party.

§ 638. As has been seen, all concerned, whether as inciters, aiders, or agents, are principals, and may be charged jointly with the assault, no matter what were their respective parts.[8]

All concerned are principals.

[1] Belt *v.* Hansley, 3 Jones N. C. 131; State *v.* Williams, 75 N. C. 134.

[2] *Supra*, § 144.

[3] State *v.* Trulock, 46 Ind. 289; Martin *v.* State, 40 Tex. 19. See State *v.* Beverlin, 30 Kan. 611.

[4] Whart. Cr. Pl. & Pr. § 269; State *v.* Bray, 1 Mo. 126; Bloomer *v.* State, 3 Sneed (Tenn.) 66. See State *v.* Munco, 12 La An. 625; State *v.* Hays, 41 Tex. 526. In Indiana, violence must be alleged or implied; Howard *v.* State, 67 Ind. 401; see Buntin *v.* State, 68 Ind. 38; and so of "unlawfully;" State *v.* Smith, 74 Ind. 557; see Hays *v.* State, 77 Ind. 450.

[5] Ibid.; U. S. *v.* Lunt, Sprague, 311.

[6] Com. *v.* Simmons, 6 J. J. Marshall, 615.

[7] Malone *v.* State, 14 Ind. 219; see Slusser *v.* State, 71 Ind. 280.

[8] *Supra*, § 616. See State *v.* Dalton, 27 Mo. 13; State *v.* Herdina, 25 Minn. 161.

An indictment which avers that the defendant "in and upon the body of I. S., deceased, in the peace of the Commonwealth then and there being, did make an assault, and him the said I. S. did strike divers grievous and dangerous blows, upon the head of him the said I. S., whereby the said I. S. was cruelly and dangerously beaten and wounded and his life greatly endangered," sufficiently shows that the assault was upon a living person. Com. *v.* Ford, 5 Gray, 475. See R. *v.* Mulroy, 3 Craw. & Dix. 318.

An indictment against a medical practitioner charged that he made divers assaults on the deceased, a patient, and applied wet cloths to his body, and caused him to be put in baths. It was held that this was a proper mode of laying the offence, although all that was done was by the consent of the deceased; and that the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty. R. *v.* Ellis, 2 C. & K. 470—Tindal and Rolfe.

The injured party may be charged as unknown.[1]

When double blow is given both parties struck may be joined.

§ 639. *Two or more persons assaulted* may be properly joined in the same count, when the assault was a single act,[2] though if the act was not strictly single, such a joinder is bad for duplicity.[3]

Battery may be discharged as surplusage.

§ 640. The "battery" can be discharged as surplusage, and a conviction sustained for the assault.[4] And so of other averments of aggravation, which can be discharged, and a verdict taken for assault and battery.[5] But there can be no conviction of a battery unless a battery be averred or implied.[6]

II. ASSAULTS WITH FELONIOUS INTENT.

Assaults classified by statute.

§ 640 *a*. At common law assaults with the intent to commit felonies were misdemeanors, and under this head fall all aggravated assaults.[7] The punishment, indeed, varied according to the discretion of the court, but the grade of offence was the same. By statutes, however, in most jurisdictions in this country, assaults have been divided into various grades; requiring distinctiveness of indictment and prescribing distinctiveness of punishment. At common law, also, it is the practice to state on the indictment such aggravations as would explain if not justify the sentence inflicted by the court. Some of the particular grades of assault which have been thus recognized will be now considered.[8]

[1] Whart. Cr. Pl. & Pr. § 111; State *v.* Snow, 41 Tex. 596.

[2] See cases cited in Whart. Cr. Ev. § 590. Whart. Cr. Pl. & Pr. § 469.

[3] Ibid.; State *v.* McClintock, 8 Iowa, 203.

[4] See Greer *v.* State, 50 Ind. 267; Ryan *v.* State, 52 Ibid. 167; Fulford *v.* State, 50 Ga. 591; Hansford *v.* State, 54 Ibid. 55; Bard *v.* State, 55 Ibid. 319; Wood *v.* State, 50 Ala. 144; Bedell *v.* State, 50 Miss. 492; State *v.* Cass, 41 Tex. 552; Young *v.* State, 44 Ibid. 98; People *v.* O'Neill, 48 Cal. 257. For indictments for assaults, see Whart. Prec. 213 *et seq.*

[5] Ibid.; Com. *v.* Blaney, 133 Mass. 571; Ferrell *v.* State, 2 Lea, 25; Flynn *v.* State, 8 Tex. Ap. 368; Cole *v.* State, 10 Ibid. 67.

[6] Young *v.* People, 6 Ill. App. 434.

[7] Com. *v.* Roby, 12 Pick. 496; Com. *v.* McLaughlin, 12 Cush. 612; Com. *v.* Barlow, 4 Mass. 39; Murphy *v.* Com., 23 Grat. 960; State *v.* Swann, 65 N. C. 339 (a case of assault with deadly weapon). *Infra*, § 645 *b*.

[8] The classification of assaults in the N. Y. Penal Code of 1882, is thus summarized in the Report of the N. Y. City Bar Association of Feb. 13, 1833:—

"Instead of the simple assault at common law and the statutory assault with intent to steal (Laws 1862, Ch. 374, § 3), ranking as misdemeanors; and the various statutory provi-

Intent to kill essential to indictment for assault with intent to murder.

§ 641. On an indictment for an assault with intent to murder, the intent is the essence of the offence.[1] Unless the offence would have been murder, either in the first or second degree, had death ensued from the stroke, the defendant must be acquitted of this particular charge.[2] And, as a general rule, in all cases of assaults with in-

sions defining assaults with intent to commit a felony (3 R. S. 98, § 439) with and without deadly weapons (Ibid. § 46); assaults with deadly weapons to resist the execution of process (Ibid.); assaults with intent to do bodily harm, and with sharp, dangerous weapons (Laws 1854, Ch. 74), and administering poison with intent to kill (3 R. S. 938, § 47), which ranked as felonies, the Code gathers them all under the head of assault, and divides the crime into three degrees; the first two of which rank as felonies, the third as a misdemeanor. The first degree is confined to cases where there is an intent to kill, or to commit a felony upon the person or property of the one assaulted, and the assault is committed either with a deadly weapon or by means likely to produce death, or by the administration of poison or destructive thing endangering life (§ 217). When the crime is not committed under the circumstances mentioned, it is assault in the second degree, when the intent is to injure and the assault is the unlawful administration of poison or drug dangerous to life or health, or when the intent is to enable one to commit a crime, and the assault is by the administration of an intoxicating or anæsthetic agent, or where one unlawfully wounds or inflicts grievous bodily harm with or without a weapon, or so assaults another by the use of a weapon likely to produce grievous bodily harm, or assaults another with intent to commit a felony, or to prevent or resist the execution of process or the lawful apprehension or detention of a person (§ 218). All other assaults or assault and battery, except such as are declared not unlawful, are assaults in the third degree."

[1] See U. S. *v.* Small, 2 Curtis C. C. 241; U. S. *v.* Gallagher, 2 Paine, C. C. 447; Com. *v.* Barlow, 4 Mass. 439; Com. *v.* Newell, 7 Mass. 244; Com. *v.* Squire, 1 Met. 258; Com. *v.* Chapman, 7 Bost. Law Rep. 155; Com. *v.* Cunningham, 13 Mass. 245; Com. *v.* Goddard, 13 Mass. 455; People *v.* Shaw, 1 Parker C. R. 61; People *v.* O'Leary, Ibid. 187; Stewart *v.* State, 5 Ohio, 242; Sharp *v.* State, 19 Ibid. 379; Bowles *v.* State, 7 Ibid. 599; Wilson *v.* State, 18 Ibid. 145; Smith *v.* State, 12 Ohio St. 511; Hayes *v.* State, 14 Tex. Ap. 230; Davis *v.* State, 15 Ibid. 473.

As to statutory construction, see further, State *v.* Gilman, 69 Me. 163; Davidson *v.* State, 9 Humph. 455; Hogan *v.* State, 61 Ga. 43; Meredith *v.* State, 60 Ala. 441; Humphries *v.* State, 5 Mo. 203.

As to special requisites under statutes, see Slusser *v.* State, 71 Ind. 280; State *v.* Fee, 19 Wis. 562; Black *v.* State, 8 Tex. Ap. 329.

That a battery is not essential to an assault with intent to murder, see State *v.* McClure, 25 Mo. 338.

[2] State *v.* Neal, 37 Me. 468; People *v.* Vinegar, 3 Parker C. R. 24; Nichols *v.* State, 8 Oh. St. 435; Reed *v.* Com., 22 Grat. 924; Elliott *v.* State, 46 Ga. 159; Jackson *v.* State, 51 Ibid. 164; People *v.* Scott, 6 Mich. 287;

tent, the intent forming the gist of the offence must be specifically averred and satisfactorily proved.[1] The same rule is applicable to indictments for malicious shooting with intent to kill,[2] and to assaults with intent to do great bodily harm.[3] There must in such cases be both attempt[4] and intent.

The prosecution, therefore, as to the intent to murder, fails if it appear that the wound was given under such circumstances as would, had death ensued therefrom, have mitigated the offence from murder to manslaughter or excusable homicide.[5]

An assault with intent to commit manslaughter in hot blood is included in an assault with intent to commit murder.[6]

Whether a person who, intending to murder A., and supposing B. to be A., shoots at and wounds B., may be convicted of wounding B. with intent to murder him, is elsewhere discussed.[7]

Wilson *v.* People, 24 Ibid. 410; People *v.* Comstock, 49 Ibid. 330; Campbell *v.* People, 16 Ill. 17; Hopkinson *v.* People, 18 Ibid. 264; McCutcheon *v.* People, 69 Ibid. 601; State *v.* White, 41 Iowa, 316; Rapp *v.* Com., 14 B. Monr. 615; State *v.* Anderson, 2 Tenn. 6; Meredith *v.* State, 60 Ala. 441; Ewing *v.* State, 4 Tex. Ap. 417. See, however, Bonfanti *v.* State, 12 Minn. 123, to the effect that the intent must be murder in first degree.

[1] State *v.* Neal, 37 Me. 468; State *v.* Negro Bill, 3 Harr. 571; Seborn *v.* State, 51 Ga. 164; Smith *v.* State, 52 Ibid. 88; State *v.* Johnson, 35 Ala. 363; Morgan *v.* State, 34 Miss. 54. See U. S. *v.* Tharp, 5 Cranch C. C. 390; State *v.* Johnson, 9 Nev. 175; Wilson *v.* State, 4 Tex. Ap. 637; Bingham *v.* State, 6 Ibid. 641.

As to Iowa, see State *v.* Schele, 52 Iowa, 608.

[2] Reed *v.* Com., 22 Grat. 924; Elliott *v.* State, 46 Ga. 159; State *v.* Painter, 67 Mo. 84; Ferguson *v.* State, 6 Tex. Ap. 504; *infra*, § 1344. See Whart. Cr. Pl. & Pr. § 464; Johnson *v.* State, 5 Dutch. 483; State *v.* Hattabough, 66 Ind. 223; State *v.* Durham, 72 N. C. 447; Kelsey *v.* State, 62 Ga. 558. As to divisibility of offences, see *supra*, § 27.

As to construction of N. Y. statute, see People *v.* Kerrains, 1 Th. & C. 333; Slattery *v.* People, 58 N. Y. 354.

On an indictment for feloniously assaulting, and beating with intent to disfigure, it has been said that stronger circumstances of malice aforethought must be proved than on an indictment for murder. It seems specific proof of the intent to disfigure must be made. Penn *v.* McBirnie, Add. 30.

[3] State *v.* Gillett, 56 Iowa, 430.

[4] People *v.* Devine, 59 Cal. 630.

[5] Wright *v.* State, 9 Yerg. 342; Collier *v.* State, 39 Ga. 31; Vandermark *v.* People, 47 Ill. 122; Wilson *v.* State, 4 Tex. Ap. 637. *Infra*, § 645.

[6] State *v.* White, 45 Iowa, 325; State *v.* Connor, 59 Ibid. 357; and see State *v.* Waters, 39 Mo. 54; State *v.* Phinney, 42 Ibid. 384; State *v.* Butman, 42 N. H. 490; State *v.* Reed, 40 Vt. 603; State *v.* Nichols, 8 Conn. 496; Beckwith *v.* People, 26 Ill. 500; People *v.* Congleton, 44 Cal. 92; Wall *v.* State, 23 Ind. 150; Meredith *v.* State, 60 Ala. 441.

[7] *Infra*, § 645 *a*. *Supra*, §§ 107, 111,

If a shot be aimed at a crowd of which B. is a member, the offence may be charged as committed with intent to kill B.[1]

It has just been stated that a defendant cannot be convicted of an assault with intent to commit murder, unless an intent to commit murder can be proved. It is not necessary, however, to sustain such an indictment that a specific intent to take life should be shown. If the intent were to commit grievous bodily harm, and death occurred in consequence of the attack, then the case would have been murder in the second degree; and, in case of death not ensuing, then the case would be an assault with intent to commit murder in the second degree.[2] And if the intent were to kill in hot blood, or to kill one erroneously believed to be an aggressor, then the defendant may be convicted of an assault with intent to commit manslaughter.[3]

§ 641 *a*. As has already been observed, the defendant, when the felonious intent is not proved, may be convicted of the assault.[4] Where, however, the greater offence, being a

Conviction of minor offence, but

318. See R. *v.* Smith, 33 Eng. Law & Eq. 567; Dears. C. C. 559. Lacefield *v.* State, 34 Ark. 275.

[1] *Supra*, § 608.

[2] See State *v.* Saylor, 6 Lea, 586.

[3] *Supra*, § 176; State *v.* Connor, 59 Iowa, 357. *Contra*, in Michigan, People *v.* Lilley, 43 Mich. 521. See State *v.* Leary, 88 N. C. 615; White *v.* State, 13 Tex. Ap. 259; Caruthers *v.* State, Ibid. 339; Harrell *v.* State, Ibid. 374; Gillespie *v.* State, Ibid. 415; People *v.* Devine, 59 Cal. 630.

It is said in Minnesota (Bonfanti *v.* State, 2 Minn. 123) that where the intent is to commit an offence which would be murder in the second degree, if consummated, there can be no conviction of an assault with intent to murder. But this is supposing that all intended murder is murder in the first degree. That this is not the case has already been seen. *Supra*, § 377. And the better opinion is, there can be a conviction of assault with intent to commit murder, or of assault with intent to kill, on facts which, if the death had been proved, would only have justified a verdict of murder in the second degree, provided these facts show an intent, no matter how vague or morbid, to take life. See People *v.* Scott, 6 Mich. 289; Wilson *v.* People, 24 Ibid. 410; Hopkinson *v.* People, 18 Ill. 264; Frolich *v.* State, 11 Ind. 213, and other cases cited in first part of this note.

[4] R. *v.* Dawson, 3 Stark, 62; R. *v.* Dungey, 4 F. & F. 99; State *v.* Reed, 40 Vt. 603; Com. *v.* Fischblatt, 4 Met. 354; Francisco *v.* State, 4 Zabr. 30; Stewart *v.* State, 5 Ohio, 242; Clark *v.* State, 12 Ga. 350; State *v.* Stedman, 7 Port. 495; Dickerson *v.* Com., 2 Bush (Ky.), 1; State *v.* Bowling, 10 Humph. 52; McBride *v.* State, 2 Eng. 374; People *v.* McDonald, 9 Mich. 150; State *v.* Graham, 51 Iowa, 72; State *v.* Gillett, 56 Ibid. 430; State *v.* Vadnais, 21 Minn. 382; Gardenhier *v.* State, 6 Tex. 348; Harrison *v.* State, 10 Tex. Ap. 93; People *v.* Fine, 53 Cal. 263.

not when there is merger.

felony, is proved, the minor offence, being an assault or attempt, is held in some jurisdictions to merge.[1]

There may be convictions of assault, where there are the proper averments, on indictments for robbery,[2] for mayhem,[3] for rape,[4] for false imprisonment,[5] for riot.[6]

Must be apparent ability to consummate attempt.

§ 642. Where the ability to commit a felonious attack is both apparently and really wanting, the offence is not complete.[7] This position was pushed to an extreme in an early Indiana case where a man was indicted for shooting at another with intent to murder. On trial it appeared that the gun contained in it nothing but powder and cotton wad (though the man shooting believed it contained a bullet), and the man shot at was forty feet distant; and it was held that he was not guilty as charged.[8] This ruling, however, was afterwards reconsidered by the court that advanced it,[9] and the true view is undoubtedly that, assuming the necessary intent to exist, it is enough if the act be apparently adapted to accomplish the particular thing intended.[10] But if the party threatened knew the instrument is utterly incapable of doing harm, the indictment does not lie.

Touching not necessary to offence.

§ 643. An assault with intent to kill may be committed without actual striking or wounding.[11]

In indictment, particularity of specification is not required.

§ 644. In an indictment for an assault with intent to commit an offence, the same particularity is not necessary as is required in an indictment for the commission of the offence itself.[12] It is true that in indictments for attempts it is requisite to set forth the mode of attempt.[1] But an assault (herein differing from an attempt) is *per se* indictable; and hence it is not necessary to go into details as to the mode.[2] Thus an indictment for an assault with intent to steal or to rob, without stating the goods or money intended to be stolen, is good.[3] In an indictment for an assault with intent to murder, at common law, or under a statute which does not specify the instrument, it has been held unnecessary to state the instrument or means made use of by the assailant to effectuate the murderous intent,[4] though where the pleader has it within his power to aver the weapon, it is better that the averment should be made;[5] and where the statute speaks of "dangerous weapons," or in any way points to a particular instrument, there the weapon should be specified.[6] The details of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered matters of evidence to the jury to establish the intent, and not necessary to be incorporated in the

Supra, § 27. See Com. *v.* Walsh, 132 Mass. 8. And see fully Whart. Cr. Pl. & Pr. § 247.

[1] *Supra*, § 570; see State *v.* Gilman, 69 Me. 163; Com. *v.* McLaughlin, 12 Cush. 615. In New York, under the Penal Code of 1882, there is no such merger.

[2] *Infra*, § 858.

[3] *Supra*, § 584.

[4] *Supra*, § 575.

[5] *Supra*, § 609.

[6] *Infra*, § 1550.

[7] See *supra*, §§ 183–4, 606. Young *v.* State, 7 Tex. Ap. 75; Johnson *v.* State, Ibid. 210.

[8] State *v.* Swails, 8 Ind. 524. See *supra*, §§ 182–3.

[9] Kunkle *v.* State, 32 Ind. 220. But see subsequent statute requiring real danger. McCulley *v.* State, 62 Ind. 428.

[10] Mullen *v.* State, 45 Ala. 43. *Supra*, §§ 606–8; and see *supra*, §§ 183, 184, for authorities at large.

[11] State *v.* McClure, 25 Mo. (4 Jones) 338; Stockton *v.* State, 25 Tex. 772.

[12] Crumbly *v.* State, 61 Ga. 582. *Supra*, § 182; Lacefield *v.* State, 34 Ark. 275.

See under North Carolina statute, State *v.* Taylor, 83 N. C. 601; and see Whart. Cr. Pl. & Pr. § 159.

[1] *Supra*, § 192.

[2] See Whart. Cr. Pl. & Pr. § 159; Morris *v.* State, 13 Tex. Ap. 65.

[3] Com. *v.* McDonald, 5 Cush. 365; Com. *v.* Rogers, 5 S. & R. 463; Dickinson *v.* State, 70 Ind. 247; Dickerson *v.* Com., 2 Bush, 1; Taylor *v.* Com., 3 Ibid. 508; Morris *v.* State, 13 Tex. Ap. 65.

That an indictment for an assault with intent to steal a watch or money may be sustained by proof of intent to steal either, see Phillips *v.* State, 36 Ark. 282.

That "intent to commit murder" is an equivalent for "intent to kill," see Pontius *v.* People, 82 N. Y. 239.

[4] U. S. *v.* Herbert, 5 Cranch C. C. R. 87; State *v.* Daley, 41 Vt. 564; State *v.* Dent, 3 Gill & J. 8; State *v.* Gainus, 86 N. C. 632; Rice *v.* People, 15 Mich. 9; Kilkelly *v.* State, 43 Wis. 604; Wall *v.* State, 23 Ind. 150; State *v.* Hubbs, 58 Ibid. 415; State *v.* Montgomery, 7 Baxt. 160; State *v.* Miller, 25 Kan. 699; State *v.* Chandler, 24 Mo. 371; State *v.* Seward, 42 Ibid. 206; State *v.* Franklin, 36 Tex. 155. But see Trexler *v.* State, 19 Ala. 21; Flynn *v.* State, 8 Tex. Ap. 368; People *v.* Jacobs, 29 Cal. 579; State *v.* Moore, 82 N. C. 659; State *v.* Hooper, Ibid. 663; State *v.* Benthall, Ibid. 664. Compare Whart. Cr. Pl. & Pr. §§ 159 *et seq.*

[5] State *v.* Bernthall, 82 N. C. 663; Trexler *v.* State, 29 Cal. 579; Flynn *v.* State, 8 Tex. Ap. 368; and see Porter *v.* State, 57 Miss. 300; where it was said that when the pistol is averred to be loaded with shot, such loading may be inferred from the circumstances of the case.

[6] *Infra*, § 645 *d*. Slusser *v.* State, 71 Ind. 280; Territory *v.* Sevailles, 1 New Mex. 119. So, under a charge of "aggravated assault," the facts constituting aggravation should be given. State *v.* Beadon, 17 S. C. 55. See, however, State *v.* Lowry, 33 La. An. 1224; State *v.* Cognowitch, 34 Ibid. 529.

indictment.[1] And in any view it is sufficient, unless the statute impose special conditions, if the use of a deadly weapon be averred, and the intent be specifically stated.[2] The indictment is not bad because it introduces several weapons cumulatively.[3]

[1] Whart. Cr. Pl. & Pr. §§ 159 *et seq.* Williams *v.* State, 47 Ind. 568; Harrison *v.* State, 2 Cold. (Tenn.) 232; Martin *v.* State, 40 Tex. 19; Bittick *v.* State, 40 Ibid. 117; Meredith *v.* State, Ibid. 480; State *v.* Rigg, 10 Nev. 284. But see *contra*, Wood *v.* State, 50 Ala. 144; State *v.* Johnson, 11 Tex. 22; State *v.* Jordan, 19 Mo. 213. See Agee *v.* State, 64 Ind. 340; Ash *v.* State, 56 Ga. 583; Mayfield *v.* State, 44 Tex. 59.

[2] State *v.* Davis, 26 Tex. 201; People *v.* English, 30 Cal. 214; People *v.* Congleton, 44 Cal. 92; State *v.* Garvey, 11 Minn. 154. See Whart. Cr. Pl. & Pr. § 159, 163 *a*.

An indictment which charges the accused with "an assault and battery with a deadly weapon, with intent to commit manslaughter," cannot be construed to be an indictment for an assault with intent to kill, which is understood, and has been held to be an intent to commit murder. Bradley *v.* State, 10 S. & M. 618. But see State *v.* Connor, 59 Iowa, 357, where an indictment for an assault to commit manslaughter was sustained, and other cases, *supra*, § 641.

An indictment for an assault with a deadly weapon, *e. g.*, a pistol, need not aver that the pistol was loaded. Allen *v.* People, 82 Ill. 610; Cross *v.* State, 55 Wis. 262.

In an indictment for assault with intent to kill, the person intended to be killed must be named or designated. A charge "with intent, in so striking and beating him, the said J. W., with the club, etc., feloniously, etc., to kill and murder, against," etc., is bad for uncertainty, J. W. being only named as the person assaulted. State *v.* Patrick, 3 Wis. 812.

Where, in a case in Maine, the first two counts charged an assault, in different forms, with intent to murder; and the last two charged an assault with intent to kill; it was held, that they all charged but one substantive offence, and the verdict might be, guilty of an assault simply, or of an assault with intent to kill, or of one with intent to murder. State *v.* Phinney, 42 Me. 384.

In some jurisdictions the indictment must charge that the proposed act was done feloniously, with malice aforethought; it is not sufficient that this allegation is made in the first part of the indictment, where the assault is charged. See Whart. Cr. Pl. & Pr. § 260; State *v.* Howell, Ga. Decis. part i. 158; State *v.* Wilson, 7 Ind. 516; but see U. S. *v.* Gallagher, 2 Paine C. C. 447.

That it is not necessary to charge the assault to be "aggravated," see Meier *v.* State, 10 Tex. Ap. 39; nor, on arrest of judgment, that it was with malice aforethought, see Cross *v.* State, 55 Wis. 262; though see, *aliter*, Lilley *v.* State, 43 Mich. 521.

The object must be stated to be felonious, *e. g.*, feloniously to kill, etc. Whart. Cr. Pl. & Pr. § 260.

"Malice aforethought" is an essential averment in such an indictment. State *v.* Fee, 19 Wis. 562; State *v.* Wilson, 7 Ind. 516; Milan *v.* State, 24 Ark. 346. See *supra*, § 517; Whart. Cr. Pl. & Pr. § 258.

[3] State *v.* McDonald, 67 Mo. 13.

§ 645. Whatever provocation or mitigation would be a defence to an indictment for homicide is a defence to an indictment for an assault with an intent to kill. If there be an aggression—a going *out* of the line of defence for the purpose of attack—self-defence ceases.[1] It is necessary that the danger should have been personal, imminent, and immediate; though, when the assault with intent to kill is necessary, according to the defendant's lights, to prevent the commission of one of the higher felonies, it is excusable.[2] Yet this violent action is not permissible in order to prevent such larcenies or trespasses as are not made with force.[3] And whether the defendant had reasonable cause, according to his lights, to apprehend a felonious attack, is for the jury.[4]

Self-defence same as in cases of homicide.

§ 645 *a*. Shooting with intent to kill is in many jurisdictions a statutory offence, and is regulated by the rules we have already noticed as applying to assaults. An interesting question arises, however, when the person shot is not the person whom the defendant intended to shoot. Under a statute which makes it simply indictable to shoot at a person maliciously, there may be a conviction without regard to whether the

Indictment must conform to statute.

It is, however, otherwise with an assault with intent to kill. State *v.* Newberry, 26 Iowa, 467.

"Feloniously" is essential in an assault to commit a rape. Mears *v.* Com. 2 Grant, 385. Whether it is necessary in other assaults with felonious intent is elsewhere considered. Whart. Cr. Pl. & Pr. § 260.

It is not necessary to aver the intent to commit murder was to commit murder *in the first degree*. The italicized words can be omitted. Logan *v.* State, 2 Lea, 222.

It is not necessary that the term "unlawfully" should be used. State *v.* Williams, 3 Foster (N. H.) 321; Whart. Cr. Pl. & Pr. § 269.

[1] See State *v.* Boyden, 13 Ired. 505; State *v.* McGreer, 13 S. C. 464. *Supra*, §§ 95 *et seq.*

[2] That prosecutor's dangerous character can be put in evidence, see Upthegrove *v.* State, 37 Oh. St. 662. See People *v.* Hall, 57 Cal. 569; Smith *v.* State, 8 Lea, 402. But not to a provoked assault; People *v.* Miller, 49 Mich. 23. Whart. Cr. Ev. § 69.

[3] *Supra*, §§ 484, 628. See State *v.* Morgan, 3 Ired. 186; Field *v.* State, 50 Ind. 15; Harris *v.* State, 53 Ga. 640; Brown *v.* State, 55 Ibid. 169; Curry *v.* State, 4 Neb. 545; Williams *v.* State, 43 Tex. 382; Rodriguez *v.* State, 8 Tex. Ap. 129.

[4] State *v.* Alley, 68 Mo. 124; Spicer *v.* People, 11 Ill. Ap. 294; Aldridge *v.* State, 50 Miss. 250; Garza *v.* State, 11 Tex. Ap. 345; Pease *v.* State, 13 Ibid. 18. See, however, State *v.* Nash, 88 N. C. 618.

In People *v.* De Los Angelos, 61 Cal. 188, it was held that a belief that a rape was intended when set up as a defence to an indictment for an assault with a deadly weapon, must be "reasonable." See as to "reasonable," *supra*, §§ 489 *et seq.*

person shot was the one the offender had in view.[1] But where the statute makes the offence the shooting a person with intent to kill him, then we have an important distinction to observe. If A. shoots B., intending to shoot B., yet mistaking B. for C., then the conviction may be sustained under the statute for reasons already given.[2] But if the shooting of B. were entirely inadvertent and accidental, then an indictment under the statute, averring B. to be the person intended to be shot, cannot be sustained.[3] When, also, the statute makes the use of loaded arms indictable, then the averment of "loaded arms" in the indictment is essential, and must be substantively proved.[4] And all other statutory conditions must be observed in the indictment.[5]

Offence a misdemeanor, and divisible.

§ 645 *b*. An assault with intent to commit a felony is, at common law, only a misdemeanor.[6] Hence, as the grade of the offence is the same as that of a simple assault, the averments of felonious intent can be stricken out, and a conviction had for assault, and for assault and battery.[7] Assaults with intent to commit rape are considered in another chapter.[8]

All parties indictable.

§ 645 *c*. Where confederacy is proved each party is chargeable with the other's acts, subject to the limitations heretofore given.[9]

III. ASSAULTS WITH DANGEROUS WEAPONS.

Made indictable by statute.

§ 645 *d*. By statutes existing in most jurisdictions assaults with dangerous weapons are subjected to punishment greater than that assigned to simple assaults. Under these statutes the following points may be noted:—

[1] R. *v.* Smith, Dears. C. C. 559; 7 Cox C. C. 51; 33 Eng. L. & E. 567; R. *v.* Jarvis, 2 M. & R. 40; R. *v.* Stopford, 11 Cox C. C. 643; Callahan *v.* State, 21 Ohio St. 306; Walker *v.* State, 8 Ind. 290; People *v.* Torres, 38 Cal. 141. See *supra*, §§ 107, 119.

[2] *Supra*, § 387. State *v.* Gilman, 69 Me. 163.

[3] R. *v.* Hewlett, 1 F. & F. 91; Com. *v.* Morgan, 11 Bush, 601; State *v.* Meadows, 18 W. Va. 658; Barcus *v.* State, 49 Miss. 17; Morgan *v.* State, 13 Sm. & M. 242; Lacefield *v.* State, 34 Ark. 275. *Supra*, § 120.

[4] R. *v.* Harris, 5 C. & P. 159. *Supra*, § 183.

[5] Griffin *v.* State, 12 Tex. Ap. 423. See, however, Knight *v.* State, 84 Ind. 73.

[6] State *v.* Scott, 24 Vt. 127; Stout *v.* Com., 11 S. & R. 179; though see Curtis *v.* People, 1 Breese, 199; State *v.* Boyden, 13 Ired. 505; Territory *v.* Conrad, 1 Dak. Terr. 363. *Supra*, § 640 *a*.

[7] *Supra*, §§ 27, 643; Whart. Cr. Pl. & Pr. §§ 247, 249, 251, 261, 742.

[8] *Supra*, § 576.

[9] *Supra*, §§ 213 *et seq*. Hoanna *v.* People, 86 Ill. 246.

(1) The gravamen of the offence is the use of a dangerous weapon with intent to hurt. Mere accidental possession of a dangerous weapon without using it, or intent to use it, would not constitute the offence, nor would the intent without the use.[1]

Danger is to be estimated by the effect likely to be produced by the weapon; and when the statute specifies danger to life, such danger must be proved.[2] A bowie-knife has been held to be in this sense a dangerous weapon;[3] and so has a chisel, when used for stabbing;[4] and a heavy iron weight or other ponderous instrument;[5] and a heavy pistol when used as a bludgeon;[6] and heavy stones thrown at the assailed;[7] and a heavy pestle used as a club.[8]

(2) Whether a weapon was, under the circumstances, dangerous, is a question of fact to be determined by all the circumstances of the case, and especially by the mode of use.[9] A "deadly" weapon is one which, in the manner used, is likely to cause death or serious bodily injury.[10] When the weapon is a gun or pistol, it need not be levelled;[11] but there must be something to indicate that the assault was real.[12] It is not necessary, however, in order to sustain the case of the prosecution, to prove that the blow took effect.[13]

(3) The indictment, under a statute prohibiting assaults with dangerous weapons, should not only aver the weapon to be danger-

[1] Tarpley *v.* People, 42 Ill. 340; Slusser *v.* State, 71 Ind. 280; People *v.* Congleton, 44 Cal. 92; People *v.* Murat, 45 Ibid. 283; State *v.* Napper, 6 Nev. 113. See McKinney *v.* State, 25 Wis. 378; *supra*, § 644.

[2] R. *v.* Moakes, 5 C. & P. 326; U. S. *v.* Small, 2 Curt. 24; Briggs *v.* State, 6 Tex. Ap. 146.

[3] Buchanan *v.* State, 24 Ga. 286; see Briggs *v.* State, 6 Tex. Ap. 144; Johnson *v.* State, 7 Ibid. 210.

[4] Com. *v.* Branham, 8 Bush, 387.

[5] State *v.* West, 6 Jones, N. C. 505; Milner *v.* State, 30 Ga. 138; McReynolds *v.* State, 4 Tex. Ap. 324.

[6] Prior *v.* State, 41 Ga. 155.

[7] Coleman *v.* State, 28 Ga. 78. See Buchanan *v.* State, 24 Ibid. 286; Regan *v.* State, 46 Wis. 256.

[8] Rasberry *v.* State, 1 Tex. Ap. 664.

[9] U. S. *v.* Small, 2 Curt. 241; Doehring *v.* State, 46 Ind. 56; Prior *v.* State, 41 Ga. 155; Berry *v.* Com., 10 Bush, 15; State *v.* Davis, 14 Nev. 407; State *v.* Franklin, 36 Tex. 155; Kowns *v.* State, 3 Tex. Ap. 12; Hunt *v.* State, 6 Ibid. 663.

[10] Reynolds *v.* State, 4 Tex. Ap. 327.

[11] State *v.* Epperson, 27 Mo. 255.

[12] *Supra*, § 604. See Johnson *v.* State, 43 Tex. 596. In Fastbinder *v.* State (Ohio, 1884), 2 Am. Law J. 107, it was held that under the Ohio statute, to sustain a prosecution of this class, the gun must be shown to have been loaded.

[13] People *v.* Keeper, 18 Cal. 636; People *v.* Yslas, 27 Ibid. 630; Mayfield *v.* State, 44 Tex. 50.

ous, but should specify it.[1] The assault must be averred to be with a dangerous or deadly weapon, as the case may be.[2] The averment, "With a certain dangerous weapon, to wit, with a pistol then and there loaded with powder and with a leaden ball," is sustained by proof of an assault by shooting with a pistol.[3]

IV. ASSAULT ON OFFICERS, ETC., WHEN IN THE EXECUTION OF THEIR DUTIES.[4]

§ 646. The right of resistance to illegal official action, it must be remembered, is essential, not merely to all free government, but to any government whatsoever. The Roman law has been charged with being despotic; but by the Roman law this right is repeatedly and unreservedly recognized.[5] If there be no jurisdiction in the officer, then issues the terse command, "Vim vi repellere licet." When an officer transcends his powers, obedience to him may become even an offence. "Extra territoriam ius dicenti impune non paretur. Idem est, si supra iurisdictionem suam velit jus dicere."[6] With sharp emphasis does the same law summon the citizen to resist acts of oppression and extortion attempted by government officials: "Sancimus licere universis, obiicere manus his, qui ad capienda bona alicuius venerint, qui succubuerint legibus; ut etiam si officiales ausi fuerint, a tenore datae legis desistere, ipsis privatis resistentibus a facienda iniuria arceantur."[7] If government agents attempt to extort illegal taxes, the party on whom the attempt is made has what is quaintly called

Illegal official action may be forcibly resisted.

[1] State *v.* Moore, 82 N. C. 659; State *v.* Benthall, Ibid. 664; Slusser *v.* State, 71 Ind. 280; Territory *v.* Sevailles, 1 New Mex. 119.

[2] People *v.* Vierra, 52 Cal. 451. See Ash *v.* State, 56 Ga. 583; Mayfield *v.* State, 44 Tex. 50. *Supra*, § 644.

[3] Com. *v.* Fenno, 125 Mass. 387.

That weapons may be cumulatively averred, see People *v.* Casey, 72 N. Y. 393. As to variance, see People *v.* Cavanagh, 62 How. N. Y. 187; Ferguson *v.* State, 4 Tex. Ap. 156.

[4] By the federal Act of April 9, 1866 (Civil Rights Act), penalties are attached to the violating the provisions of that act, and for obstructing officers, etc., in their duties, etc. St. 1866, 27, 28. There is nothing, however, in this statute to prevent the arrest of a federal officer, though in execution of his duties, on a state warrant for felony (U. S. *v.* Kirby, 7 Wall. 482) or misdemeanor. Penny *v.* Walker, 64 Me. 430.

[5] L. 12. 4. Cod. si a non competente iudice. (7. 48.) L. 170. D. de reg. iur.

[6] L. 20. D.

[7] L. 5. Cod. de iure fisci (10. 1).

the "Jus eum propulsandi."[1] Even to the remotest provinces is this right reserved. "Contra nostra praecepta si quis vetito et temerario ausu exactionem audebit—licebit provinciali, temeritatem legitime repellere."[2] Nor was it from any popular impulse that the Roman law thus spoke. Except for the preservation of the due symmetry of government, and the maintenance of each member of the body politic, subject as well as officer, in his due orbit, the Roman law had no mission. But that each member of the body politic should be so kept in his due orbit, its concern was great. If each subordinate official—each tax collector or each deputy of a deputy prefect—be recognized as *jure divino* impeccable until his proceedings are by law reversed, then all the gradations of government will be destroyed. Not merely will the subject have to submit to spoliation without redress, not only will the coffers of subalterns be gorged with the spoils of the wrecked industry of the laborer, but the pettiest policeman will have the same *jure divino* claims to irresistibility as the prince, and in case of collision the prince can claim no higher infallibility than the policeman. Instead of government this would be chaos.

§ 647. Nor could it be justly replied, so said the old jurists, that the subject, in case of oppression, could have redress by a suit at law. What redress could he have if the injury suffered by him be irreparable? What comfort is it to a man who has been insulted, plundered, or wounded, that the officer who has done him the injury is removed or imprisoned? And how poor a compensation is money to one who has had his family rights invaded, or his person maimed, or his business destroyed? And can even such reparations as these be secured? Is it sure that the law will punish the officer for his illegal acts? Is not the idea of the irresistibility of an official so far blended with that of infallibility, that the same superstitious reverence for authority which saved him from being resisted when

Oppressed party in such cases not confined to a resort to law.

[1] L. 4. Cod. de discussoribus.

[2] L. 5. Cod. de executor. et exact. See, for a summary of these and other statutes, Berner's Lehrbuch, § 211, who shows that even the canon law, which accepted the *jure divino* claims of government in their highest sense, took the same view: "Auch das Kanonische Recht, das gewiss dem Strafbaren Widerstande gegen die Obrigkeit keinen Vorschub leisten will, bestätigt diese Grundsätze." C. 5. x. de regulis juris. C. 6 de sentent. ex comm. in VIto.

he outraged another may save him from being convicted when sued for the outrage? Is it certain that the offending officer will allow an appeal? Is it not likely that the violence that outrages will interpose to prevent the party injured from making complaint? So argued the old jurists in support of the position that when an officer transcends his jurisdiction, or illegally encroaches on a subject's rights, then resistance to him is not only lawful but meritorious. The old English common law writers argued from another standpoint. The theory of due and symmetrical official gradation, which so much fascinated the jurists of Rome, had no charms for those of England at the time the English common law took shape. To them feudalism was the true governmental model, and in feudalism the mesne lord, or the lord of the manor, or the lord of the manor's bailiff, was as absolute as the lord paramount. Undoubtedly the mesne lord was responsible to the lord paramount if the lord paramount was strong enough to exact such responsibility. But the vassal was bound to implicit obedience to the lord whom he immediately served, or to any representative that lord might depute. To this principle of feudalism may we trace that line of early English decisions which hold, that when officers of justice transcend their powers the remedy is not resistance but submission, and subsequent appeal to the law for redress. No doubt this view has been, in recent years, as is elsewhere seen, much modified. But it may still be a question whether a sound and free jurisprudence does not recommend modifications still more liberal, and a still closer approximation to the principles of the jurists of Rome.

§ 648. But even by the English common law it is settled that to constitute the offence of resisting an officer, it must be shown that the process is legal.[1] The officer must at the time be engaged in

[1] *Supra*, § 414; Com. *v.* Newton, 123 Mass. 420; People *v.* Muldoon, 2 Parker C. R. 13; Com. *v.* Bryant, 9 Phila. 595; State *v.* Zeibart, 40 Iowa, 169; Barbour's Cr. Treatise, 82; Roscoe's Cr. Evid. 625, 656. See State *v.* Cassady, 52 N. H. 500; Com. *v.* Tobin, 108 Mass. 426; State *v.* Moore, 39 Conn. 244.

In Com. *v.* Tobin, 108 Mass. 426; the defendant was indicted for assaulting an officer in the discharge of his duty. It appeared that the defendant was arrested for a breach of the peace. It did not appear that any complaint was subsequently made against him. The defendant requested a ruling that the failure to complain against and prosecute him for the offence for which he was arrested made the officer a trespasser, and the defendant had a right to resist him. This was affirmed by

executing his duties, and the defendant must be notified thereof;[1] and unless there be notification or knowledge to this effect, the killing of the officer in resisting the arrest will not be murder. Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning in order to arrest him, but not telling his business or using words of arrest, and the party not knowing that the other was an officer, in the first surprise snatched down a sword which hung in his room and killed the bailiff, this was ruled to be only manslaughter.[2]

To justify arrest process must be legal and must be notified.

An officer making an arrest by virtue of a warrant, however, is not bound to exhibit his warrant and read it to the prisoner before securing him, if he resist.[3] And there is a current of authority to the effect that the legality of an officer's appointment cannot be

the Supreme Court. See, fully, *supra*, §§ 402–444; and Whart. Cr. Pl. & Pr. §§ 1–17.

[1] 1 Hale, 470. *Infra*, § 650; *supra*, §§ 402–444; Whart. Cr. Pl. & Pr. §§ 1–11; R. *v.* Cumpton, L. R. 5 Q. B. D. 341; 42 L. T. N. S. 543; Codd *v.* Cabe, 13 Cox C. C. 202; Johnson *v.* State, 5 Tex. Ap. 43. See, under Alabama statute, Jones *v.* State, 60 Ala. 99.

[2] 1 Hale, 470. *Supra*, §§ 402–444.

[3] Com. *v.* Cooley, 6 Gray, Mass. 354. See Johnson *v.* State, 30 Ga. 426; Whart. Cr. Pl. & Pr. §§ 1–11.

"With regard," says Mr. East, "to such ministers of justice as, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary that the parties concerned should have some notice of the intent with which they interpose; otherwise the persons engaged may, in the heat and bustle of an affray, imagine that they come to take a part in it. But in these cases a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer in any other manner declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged to bear the office he assumes; or if, in order to keep the peace, he produce his staff of office, or any other known ensign of authority, the law will presume that the party killing had due notice of his intent, especially if it be in the daytime. In the night, indeed, when such ensigns of authority cannot be distinguished, some further notification is necessary; and commanding the peace, or using words of the like import notifying his business, will be sufficient. These kinds of notification, by implication of law, hold also in cases where such officers, having warrants directed to them as such to execute, are resisted in the attempt." See *supra*, §§ 402–444; Whart. Cr. Pl. & Pr. §§ 1–11. But even when the officer is properly authorized, this protection does not shelter him in case his conduct in execution of process is unlawful, or in case the proceedings have been pressed by him maliciously and arbitrarily. *Supra*, §§ 408, 418, 419; State *v.* Dunn, 1 Rice's Dig. 49.

tested by a forcible resistance to his acts.[1] This may be sound law when the defendant, by his conduct, or by the issue presented by him, admits that the party resisted holds the office in question. But the rule ought not to be extended to cases where the object is to test the right of the party resisted to hold the office,[2] nor to cases where the pretence is to exercise an office not really existing.[3]

Ignorance a defence to indictment for resistance.

§ 649. If the defendant, indicted for resisting an officer, can prove that he was ignorant that the party resisted was an officer, this is a defence to the indictment for resistance;[4] but not to that for an assault, if undue violence were used.[5] So persons interfering in an arrest by an officer under criminal process, not knowing that he is an officer and acting in the discharge of his duty, but interfering with the intention of quelling a fight, if they use more force than is necessary for that purpose, are liable to an indictment for an assault.[6] On the other hand, a defendant who aggressively assaults an officer in ignorance of the latter's official rank is said to be liable, for the reason that he voluntarily perpetrates an unlawful act, to conviction for the aggravated offence.[1] But this exception is to be jealously limited. It is against the policy of the State to clothe its servants with official immunities, except when engaged in official acts. The immunity belongs not to the individual but to the office; and if the immunity is to be vindicated, the office must be proclaimed. To punish resistance to a secret officer as a crime turns first the officer into a spy, and then the spy into a despot.[2]

[1] See Pearce *v.* Whale, 5 B. & C. 38; R. *v.* Gordon, 1 Leach, 516; R. *v.* Newton, 1 C. & K. 469; Jones *v.* Stevens, 11 Price, 235; U. S. *v.* Wood, 2 Gall. 361; State *v.* Boies, 34 Me. 235; Com. *v.* Dugan, 12 Met. 233; Com. *v.* Cooley, 6 Gray, 354; People *v.* Hopson, 1 Denio, 574; Muir *v.* State, 8 Blackf. 154.

[2] See Smith *v.* Taylor, 1 New Rep. 196; 11 Mod. 308; 4 M. & S. 548; 1 Ad. & El. 695; R. *v.* Curvan, 1 Mood. C. C. 132; Com. *v.* Carey, 12 Cush. 246; People *v.* Gulick, Hill & Denio, 229; McQuoid *v.* People, 3 Gilman, 76; Cantrill *v.* People, Ibid. 356; Aulanier *v.* Governor, 1 Tex. 653.

In Com. *v.* Sheriff, 3 Brewst. 343, it was held that remonstrance was not resistance. And see Whart. Cr. Pl. & Pr. § 5, and *infra*, § 1617.

[3] Snyder, *ex parte*, 64 Mo. 58.

[4] *Supra*, § 87; R. *v.* Ricketts, 3 Camp. 68; Com. *v.* Kirby, 2 Cush. 577; Yates *v.* People, 32 N. Y. 509; People *v.* Muldoon, 2 Parker C. R. 13; Logue *v.* Com., 38 Penn. St. 265; State *v.* Belk, 76 N. C. 10; Johnson *v.* State, 26 Tex. 117. See Com. *v.* Kirby, 2 Cush. 577, and cases *supra*, §§ 419, 491.

That the indictment must aver such knowledge, see State *v.* Maloney, S. C. R. I. 1879, citing Com. *v.* Kirby, 2 Cush. 577; Com. *v.* Cooley, 6 Gray, 354; State *v.* Downer, 8 Vt. 424, 429; Kernan *v.* State, 11 Ind. 471; United States *v.* Tinklepaugh, 3 Blatchf. 425; United States *v.* Keen, 5 Mason, 453; Com. *v.* Israel, 4 Leigh, 675; State *v.* Hilton, 26 Mo. 199. *Supra*, §§ 87–8.

[5] See *supra*, § 630 *a*. That an excessive assault by the officer may be repelled by the party attacked without criminal responsibility, see Com. *v.* Dougherty, 107 Mass. 243. *Supra*, § 102.

[6] Com. *v.* Cooley, 6 Gray, 350.

[1] U. S. *v.* Liddle, 2 Wash. C. C. 531; U. S. *v.* Ortega, 4 Ibid. 531; U. S. *v.* Benner, Baldwin, 234. *Supra*, § 87.

[2] It is no defence to an indictment for forcibly obstructing an officer of the customs in the discharge of his duties, that the object of the defendant was personal chastisement, and not to obstruct or impede the officer in the discharge of his duties, if he knew the officer to be so engaged. U. S. *v.* Keen, 5 Mason, 453.

[3] People *v.* Gulick, Hill & Denio, 229.

[4] Roddy *v.* Finnegan, 43 Md. 490; Woodworth *v.* State, 26 Ohio St. 195. Under Wisconsin statute see State *v.* Welch, 37 Wis. 196. Under Texas statute see Hill *v.* State, 43 Tex. 329.

[5] Com. *v.* Sheriff, 3 Brewst. 343. In U. S. *v.* Lukins, 3 Wash. C. C. 335, it was said *obiter* that refusal to obey an officer is indictable resistance. This is disapproved in State *v.* Welch, 37 Wis. 196, as without authority and reason.

[6] McQuoid *v.* People, 3 Gilm. 76.

[7] U. S. *v.* Stowell, 2 Curtis C. C. 153; State *v.* Scammon, 2 Fost. N. H. 44; State *v.* Beasom, 40 N. H. 367; Cantrill *v.* People, 3 Gilm. 356; Bowers *v.* People, 17 Ill. 373; State *v.* Hailey, 2 Strobh. 73; Slicker *v.* State, 8 Eng. (13 Ark.) 397. See State *v.* Henderson, 15 Mo. 486; State *v.* Burt, 25 Vt. 373. And see *contra*, State *v.* Belk, 76 N. C. 94.

[8] Lamberton *v.* State, 11 Ohio, 282;

Indictment need not set forth process in detail.

§ 650. An indictment for resisting an officer while attempting to serve a lawful process need not describe particularly the nature of the process, or the mode of the resistance.[6] But the indictment must set forth that such process was legal, or so describe it as to show it to be so; and if issued from a court of limited jurisdiction, it must appear that the court, in issuing it, acted within the sphere of their authority.[7] It is not enough to say that the defendant "resisted" the officer; for this is a mere conclusion of law.[8]

§ 651. Municipal and police are, equally with State officers, under the protection and subject to the limitations of this branch of the law.[1]

Municipal and police officers under same sanction.

§ 652. Officers charged with process are eminently under the protection of the law, and to forcibly resist them is therefore not only an indictable offence,[2] but, if amounting to an obstruction of process, is a contempt of court, summarily punishable as such.[3] If a party assist in resisting a criminal arrest, he may become thereby an accessary after the act, by endeavoring, if the case be one of felony, to shelter the accused,[4] while if the offence be misdemeanor (or, according to the old authorities, treason) then by the old common law a party aiding in resisting the arrest is indictable as a principal in such offence.[5] Now, however, that the common law offence of accessaryship has become generally obsolete, the offence is tried in most jurisdictions as a substantive felony or misdemeanor, as the case may be.[6] It is within the election of the prosecution, however, to treat the offence as a substantive misdemeanor, waiving its accessorial character; and in most jurisdictions this is required by statute.[7]

And so of officers charged with process.

It is not necessary that there should be a blow struck or force actually applied,[8] though it is essential that the resistance should

though see U. S. *v.* Batchelder, 2 Gallis. 15; State *v.* Hooker, 17 Vt. 658.

An indictment for assaulting and obstructing an officer in the discharge of his duties as such averred that the defendant made an assault upon the officer, and, while the latter was in the due and lawful execution of his office, did "unlawfully, knowingly, and designedly hinder and oppose him," etc.; this was held to be a sufficient allegation that the defendant knew that the person assaulted was an officer. Com. *v.* Kirby, 2 Cushing, 577–8.

[1] Johnson *v.* State, 30 Ga. 426.

[2] See *supra*, § 414; Whart. Cr. Pl. & Pr. §§ 1–5; Phillips *v.* State, 66 Ga. 755. Under federal statute see U. S. *v.* Martin, 17 Fed. Rep. 150; U. S. *v.* Kindred, 4 Hughes, 493. *Infra*, § 1380. As to who is an officer in this sense see Maverty *v.* State, 10 Lea, 729.

[3] Whart. Cr. Pl. & Pr. §§ 949 *et seq.*

[4] *Supra*, § 241; 4 Bl. Com. (Wend. ed.) 129–30; Dalt. 530, 1; 1 Hale, 619; 2 Hawk. c. 29, s. 26; R. *v.* Marsden, L. R. 1 C. C. 131; 11 Cox C. C. 90; U. S. *v.* Tinklepaugh, 3 Blatch. 425; McQuoid *v.* People, 3 Gilm. 76; Slicker *v.* State, 13 Ark. 397.

[5] See R. *v.* Marsden, L. R. 1 C. C. 131; 11 Cox C. C. 90; State *v.* Downer, 8 Vt. 424; State *v.* Buchanan, 17 Ibid. 573; Com. *v.* Miller, 2 Ashm. 61. As to rescue see *infra*, § 1680.

[6] *Infra*, §§ 1677, 1680.

[7] R. *v.* Cumpton, L. R. 3 Q. B. D. 341; R. *v.* Bailey, L. R. 1 C. C. 347; Woodworth *v.* State, 26 Ohio St. 196.

[8] U. S. *v.* Lukins, 3 Wash. C. C. 335; U. S. *v.* Bootie, 2 Burr. 864; Woodworth *v.* State, 26 Ohio St. 196; Heath *v.* State, 36 Ala. 273.

imply the application of force, actual or threatened;[1] mere vituperation not constituting the offence, unless there be an apparent intention to resist by force.[2] But whether the process be criminal or civil, resistance to its execution, whereby such execution is hindered, is an indictable offence.[3] The officer's title is not at issue in such a prosecution,[4] when it appears that he is an officer *de facto*,[5] *i. e.*, the recognized official representative of a government in actual power.[6] The process, however, must be legal *prima facie*,[7] since if this test were not applied everybody could arrest everybody else,[8] When "legally appointed and duly qualified" is averred, these averments must be proved.[9] Merely technical defects on the writ, however, cannot be set up as a defence.[10] Knowledge that the person resisted is an officer, however, must be shown, though this knowledge may be inferred from all the circumstances of the case.[11]

§ 652 *a*. The converse of what has just been stated is true in regard to the duty imposed upon citizens to aid officers when in the lawful discharge of their duties. As is noticed more fully in another work,[12] "This duty of the citizen is absolute. . . . . His obligation to come to the aid of the sheriff (or other officer) is just as imperative as that imposed on the latter to see that the community suffer no harm from licentiousness."[13]

Officers entitled to call in aid.

[1] See *supra*, §§ 604, 646; State *v.* Moore, 39 Conn. 344.

[2] Com. *v.* Sheriff, 3 Brewst. 343; State *v.* Welch, 37 Wis. 196.

[3] See Whart. Cr. Pl. & Pr. §§ 4 *et seq.*

[4] U. S. *v.* Wood, 2 Gall. 361; Whart. Crim. Ev. § 833. *Supra*, §§ 646 *et seq.*; *infra*, § 1617.

[5] R. *v.* Newton, 1 C. & K. 469; Morse *v.* Calley, 5 N. H. 220; Com. *v.* Dugan, 12 Met. 238; State *v.* Carroll, 38 Conn. 448; People *v.* Hopson, 1 Denio, 574; Roddy *v.* Finnegan, 43 Md. 490; Bogle, *in re*, 7 Wis. 264; State *v.* Johnson, 12 Ala. 840. *Supra*, § 648.

[6] See on this subject Whart. Cr. Pl. & Pr. § 966. *Infra*, § 1572 *d*.

[7] *Supra*, § 646; Whart. Cr. Pl. & Pr. § 7 *et seq.*; Com. *v.* Cooley, 6 Gray, 354; Cantrill *v.* People, 8 (Gilm.) Ill. 356; State *v.* Shelton, 79 N. C. 605. As to tests see Whart. Cr. Pl. & Pr. § 6.

[8] See *supra*, §§ 402, 444, 648.

[9] State *v.* Sherburne, 59 N. H. 99.

[10] *Supra*, §§ 402–444; Com. *v.* Martin, 98 Mass. 4; People *v.* Mead, 92 N. Y. 415; McQuoid *v.* People, 3 Gilm. 76; Nolty *v.* State, 17 Wis. 668.

[11] *Supra*, § 649. Whart. Cr. Pl. & Pr. § 7.

[12] Whart. Cr. Pl. & Pr. § 17, note.

[13] King, J., cited Ibid.; and see *infra*, § 1584; R. *v.* Brown, C. & M. 314; Res *v.* Montgomery, 1 Yeates, 419; Comfort *v.* Com., 5 Whart. 437; Anon., 1 Haz. U. S. Reg. 263; State *v.* Littlejohn, 1 Bay, 316.

PART II.

OFFENCES AGAINST PROPERTY.

CHAPTER IX.

FORGERY.

I. DEFINITION.

§ 653. FORGERY at common law is defined by Sir Wm. Blackstone as the fraudulent making or altering of a writing to the prejudice of another's rights,[1] and by Mr. East as the false making or altering, *malo animo*, of any written instrument for the purposes of fraud and deceit.[2]

[1] 4 Blac. Com. 247. As to intent to defraud, see *infra*, § 717.

[2] See 2 Russ. on Cr., 317, *et seq.*, for a full examination of the English cases; and see, also, 2 East P. C. 852; State *v.* Kimball, 50 Me. 411; Com. *v.* Chandler, Thacher's C. C. 187; Penn. *v.* McKee, Add. 33; Van Horne *v.* State, 5 Pike, 349.

According to Sir J. F. Stephen,[1] "every one commits a misdemeanor who forges any document by which any other person may be injured, or utters any such document knowing it to be forged, with intent to defraud, whether he effects his purpose or not."[2]

In 1865, in a remarkable case, which will be hereafter criticized,[3] Cockburn, C. J., declared that forgery, "by universal acceptation, is understood to mean" "the making or altering a writing so as to make the alteration purport to be the *act of some other person*, which it is not." But this definition was soon found too scant, and afterwards, in 1869, we hear it announced on a crown case reserved, by Kelly, C. B., with the concurrence of all his associates, that the offence consists in the fraudulent making of an instrument, in words purporting to be what they are not, to the prejudice of another's rights.[4]

By Blackburn, J., in the same case, the following definition from Comyn is adopted: "Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of another." This definition comes nearer than the two previous towards satisfying the cases which will appear hereafter. As, however, it is too limited in its description of the instrument of forgery ("deed" or "writing"), the following definition is now proposed:—

[1] Dig. C. L. art. 366.

[2] Of this he gives the following illustrations:—

An order from a magistrate to a jailer to discharge a prisoner as upon bail being given. R. *v.* Harris, R. & M. (1 Moody) 393. *Infra*, §§ 682, 683.

A certificate of character to induce the Trinity House to enable a seaman to act as master. R. *v.* Toshack, 1 Den. C. C. 592. *Infra*, § 687.

Testimonials whereby the offender obtained an appointment as a police constable. R. *v.* Moah, D. & B. 550. *Infra*, § 687.

The like with intent to obtain the office of a parish schoolmaster. R. *v.* Sharman, Dear. C. C. 285. *Infra*, §§ 653, 685, 705.

A certificate that a liberated convict was gaining his living honestly, to obtain an allowance. R. *v.* Mitchell, 2 F. & F. 44. *Infra*, § 687.

[3] Windsor, *in re*, 6 B. & S. 522; 10 Cox C. C. 118; the latter report being the fullest; and see criticism, *infra*, § 667.

[4] R. *v.* Ritson, L. R. 1 C. C. 200. *Infra*, § 663.

Forgery in making a false suable[1] *document with intent to defraud.*[2]

Forgery is the making a false suable document with intent to defraud.

The offence is consummated by the making of a false document, on which suit might be brought, with intent to defraud, without any uttering.[3]

Is a misdemeanor at common law.

§ 654. By the common law, forgery is a misdemeanor.[4] By statutes passed in England and the United States, various kinds of forgery are made felonies. Whether in particular cases the statute has absorbed the offence is a matter of special statutory construction. It may be generally stated that unless the statute, in its terms, undertakes to be absorptive, establishing a statutory offence coextensive with the offence at common law, forgery may still be pursued as a common law misdemeanor, in cases to which the statute does not reach, in those States where a common law criminal jurisdiction exists. On the other hand, when the statute in its terms is coextensive with the common law, then the statutory remedy must be exclusively followed; and eminently important is it for the pleader to recollect this in cases where by statute the offence is made a felony.[5] Yet as a rule, in those States in which there is a common law criminal jurisdiction, the legislature has not attempted to absorb the common law in one sweeping statutory enactment, but has simply (as in England) declared that certain kinds of forgery shall be felonies, or shall be subject to special penaltics. Where this is the case, other kinds of forgery, not enumerated in the statutes, may be prosecuted at common law.

That forgery of federal securities is cognizable in State courts we have already seen.[6]

[1] I insert this limitation in accordance with the law hereafter given (*infra*, §§ 680-66) and to exclude the falsification of historical and news documents. The publication of false news is an independent offence. *Infra*, § 1448.

[2] 3 Steph. Hist. C. L. 186. See discussion of Eno's Case, 30 Alb. L. J. 144 *et seq.*; Spear on Extrad., 2d ed. 276. The definition and classification of forgery in New York has been remodelled in the Penal Code of 1882, §§ 509 *et seq.*

[3] R. *v.* Crocker. 2 Leach, 987; R. & R. 97; Com. *v.* Ladd, 15 Mass. 526; Com. *v.* Chandler, Thacher C. C. 187.

[4] *Supra*, § 22.

[5] See *supra*, §§ 25-8.

[6] *Supra*, § 266.

II. MODES OF PERPETRATION.

Parties concerned in are principals.

§ 655. Where forgery is a misdemeanor, all concerned, by force of the general rule as to misdemeanors, are principals. Where, however, the offence—*e. g.*, in counterfeiting—is a statutory felony, those counselling and advising are accessaries before the fact, in those States in which the distinction between principal and accessary is maintained, while in other States such persons are principals. But all actually contributing to the work are principals.[1] Nor is it necessary that they should be cognizant of each other's action. Thus in trials for forging bank paper, the maker of the paper, the engraver of the plate, the filler up of the instrument, have been held principals, though no one of them knew that the others were concerned.[2]

A fortiori is this the case with principal and agent, the principal present and commanding, and the agent executing.[3] And a party acting through an innocent agent is principal in the first degree.[4]

Partner may be guilty of as against partner.

§ 656. Forgery may be committed by a partner, in falsely altering the books of the firm, when the intent is to defraud his partners.[5]

Party signing his name when such name is another's may be guilty of forgery.

§ 657. *When a person signs paper in his own name*, though it be on a false affirmation of procuration from another, this is not forgery,[6] unless, as we will see, the name written is used in such a way as to throw the onus of the obligation on another person bearing the same name. But if the name signed is common to two persons, one of whom signs it, or causes it to be signed[7] in such a way (*e. g.*, by adding or even implying a wrong address)

[1] See Gregory *v.* State, 26 Ohio St. 510. *Infra*, § 710.

[2] R. *v.* Dade, 1 Mood. C. C. 307; R. *v.* Kirkwood, Ibid. 304. *Supra*, § 216.

[3] R. *v.* Bingley, R. & R. 446; Com. *v.* Stevens, 10 Mass. 181.

[4] Com. *v.* Hill, 11 Mass. 136; Gregory *v.* State, 26 Ohio St. 510; Gooden *v.* State, 55 Ala. 178.

[5] R. *v.* Smith, 9 Cox C. C. 162; Leigh & C. 168; R. *v.* Moody, 9 Cox C. C. 166; Leigh & C. 173; R. *v.* Dodd, 18 L. T. (N. S.) 89. These are cases of forgery by the treasurers of voluntary societies to defraud their associates; but the reasoning applies to all partnerships.

[6] R. *v.* White, 2 C. & K. 413; 1 Den. C. C. 208; 2 Cox C. C. 210. For other cases see *infra*, §§ 669, 674.

[7] So in a case where an innocent person was induced to sign his name as accepting a bill, and the defendant introduced a false address, it was held forgery. R. *v.* Blenkinshop, 2 C. & K.

as to make the writing purport to be by that other, this is forgery ;[1] and so when one of these two, having obtained possession of a bill,

531 ; S. C., 1 Den. C. C. 276 ; R. *v.* Mitchell, Ibid. 282. *Infra*, §§ 670, 713.

Sir J. F. Stephen (Dig. C. L. art. 356) gives the following :—

"To make a false document is—

"(*a*) To make a document purporting to be what in fact it is not ; R. *v.* Ritson, R. & M. 486 ; *infra*, §§ 663, 682 ;

"(*b*) To alter a document, without authority, in such a manner that if the alteration had been authorized it would have altered the effect of the document ; R. *v.* Hart, R. & M. 486 ; *infra*, § 671 ;

"(*c*) To introduce into a document, without authority, whilst it is being drawn up, matter which, if it had been authorized, would have altered the effect of the document ; R. *v.* Griffiths, D. & B. 584 ;

"(*d*) To sign a document—

"(i) In the name of any person without his authority, whether such name is or is not the same as that of the person signing ;

"(ii) In the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing ; *infra*, § 670. Sheppard's Case, 1 Leach, 226 ; R. *v.* Parkes, 2 Leach, 775 ; *infra*, §§ 660, 726 ;

"(iii) In a name represented as being the name of a different person from that of the person signing it, and intended to be mistaken for the name of that person ; R. *v.* Mahoney, 6 Cox C. C. 437 ; *infra*, § 670 ;

"(iv) In a name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be ; R. *v.* Hadfield, 2 Russ. Cr. 763.

"But it is not making a false document—

"To procure the execution of a document by fraud ; R. *v.* Chadwick, 2 M. & R. 545 ; *infra*, §§ 674, 702 ;

"To omit from a document being drawn up matter which would have altered its effect if introduced, and which might have been introduced, unless the matter omitted qualifies the matter inserted ; 1 Hawk P. C., 265 ;

"To sign a document in the name of a person personated by the person who signs it, provided that the effect of the instrument does not depend upon his identity with that person.

"It is not essential to the making of a false document that the false document should be so framed that, if genuine, it would have been valid or binding, provided that, in cases in which the forgery of any particular instrument is made a specific offence by any statute, the false document must, in order that the offence may be completed, fall within the description given in the act. But see *infra*, § 692.

"The fact that a document is made to resemble that which it purports to be, and is not, is evidence, for the consideration of the jury, of an intent to defraud, but is not essential to the making of a false document.

"Provided that, in cases in which the forgery of any particular instrument is made a specific offence by any statute, the false document must have such a resemblance to the document which it is intended to resemble as to be likely to deceive a common person."

[1] R. *v.* Webb, Bayl. Bills, 432 ; Barfield *v.* State, 29 Ga. 127. See Com. *v.* Foster, 114 Mass. 311. In State *v.* Robinson, 1 Harr. (N. J.) 507, it was held forgery to change on a bank bill the name of the city where the bank

cheque, or order payable to another, indorses it, knowing he is not the person to whom the bill or check was payable.[1] This is falsely personating another, and signing that other's name, which is indictable as forgery ;[2] and it is no defence that the two parties have the same name.

Otherwise when names are slightly variant.

§ 658. But it is said to be otherwise when names are not identical (*e. g.*, Storer and Story), and when the defendant, by signing his true name (Story), obtains from the post-office a money order addressed to Storer. This may be indictable as a false pretence, but not as a forgery at common law.[3]

Forgery to sign under an assumed name.

§ 659. It is forgery to sign a money order in an assumed name, if the name were assumed to defraud the person to whom such order was given, though the prisoner was known to the prosecutor only by the assumed name.[4] But obtaining money on the pretence that a signature by a non-existent person is good, is not forgery but false pretences.[5]

It may be forgery to sign name of non-existent person.

§ 660. It may, however, be forgery to sign the names of non-existent persons[6] or of a non-existent firm,[7] who apparently (though not really) represent responsible parties. If, however, the fictitious name be one which the defendant had been accustomed to employ, and under

was situate so as to charge another bank of the same name but of a different city.

[1] R. *v.* Aickles, 2 East P. C. 988 ; 1 Leach C. C. 438 ; R. *v.* Bontien, R. & R. 260 ; People *v.* Peacock, 6 Cowen, 73. *Infra*, § 670.

[2] R. *v.* Epps, 4 F. & F. 81 ; Mead *v.* Young, 4 T. R. 28. *Infra*, § 680.

[3] R. *v.* Story, R. & R. C. C. 81.

[4] R. *v.* Francis, R. & R. C. C. 209. See fully *infra*, 660.

[5] Dunn's Case, 1 Leach C. C. 57 ; R. *v.* Martin, 14 Cox C. C. 375 ; 41 L. T. N. S. 531 ; see *infra*, §§ 1144, 1162.

[6] R. *v.* Lewis, Foster, 116 ; R. *v.* Wilks, 2 East P. C. 957 ; R. *v.* Bolland, Ibid. ; R. *v.* Lockett, 1 Leach, 94 ; R. *v.* Parks *et al.*, 2 Ibid. 775 ; 2 East, P. C. 963 ; R. *v.* Froud, 1 B. & B. 300 ; R. & R. 389 ; R. *v.* Sheppard, 1 Leach, 226 ; R. *v.* Whiley, 2 Ibid. 983 ; R. & R. 90 ; R. *v.* Francis, Ibid. 209 ; and see R. *v.* Webb, 3 B. & B. 228 ; R. *v.* Watts, R. & R. 436 ; U. S. *v.* Turner, 7 Pet. 132 ; State *v.* Hayden, 15 N. H. 355 ; Com. *v.* Costello, 119 Mass. 214 ; Com. *v.* Smith, 6 S. & R. 569 ; Sasser *v.* State, 13 Ohio, 453 ; State *v.* Givens, 5 Ala. 747 ; Henderson *v.* State, 14 Texas, 503. As to intent, see R. *v.* Bontien, R. & R. 260 ; R. *v.* Peacock, Ibid. 273. See *infra*, § 698.

[7] R. *v.* Rogers, 8 C. & P. 629 ; R. *v.* Ashby, 2 F. & F. 560. In other words, to declare a bad note to be good is a false pretence ; to sign a bad note by an apparently (though not really) good name may be forgery.

which he had done business, a conviction cannot be sustained ;[1] nor is it forgery when the offence is not the assumption of the name of a supposed third person, but the adoption of *an alias* or alternative name by the party charged.[2]

It is forgery at common law to forge the name of an imaginary child as representative of a childless person.[3] So, also, is it indictable, on the same reasoning, to forge the name of a non-existing, though apparently responsible, corporation, when the object is to defraud.[4] This principle is of much use in cases where a corporation alleged to be defrauded is incorrectly described, or is prohibited from issuing the notes in question.[5] In such case it is sufficient to aver as the party defrauded the person on whom it is attempted to pass the forged note.[6]

Forgery to alter writer's name when effect is to defraud.

§ 661. Where the drawer of a paid check on a bank, after it was returned to him, altered his signature so as to give it the appearance of forgery, in order to defraud the bank and criminate the payee, this has been held in England not to be forgery.[7] But as an action, supposing the altered signature to be what it purported to be after alteration, would lie against the bank in favor of the alterer, this decision cannot be sustained.[8]

The test is, could such an action *primâ facie* lie on such fraudulently altered paper, by means of such alterations, against a person intended, directly or indirectly, to be defrauded? If it could not, the offence, no doubt, is not forgery.[9] But if it would sustain such an action, forgery is made out.

And so to falsely alter one's own executed deed.

§ 662. Is it forgery to alter one's own deed, so as to make it purport to be what it is not, and thus, if it be sustained as altered, to prejudice the rights of another? Now if A., engaging with B. to convey to the latter certain land, and undertaking, after the terms are settled, to draw the

[1] R. v. Bontien, R. & R. 260; R. v. Aickles, 1 Leach C. C. 438; 2 East P. C. 968.

[2] R. v. Martin, 14 Cox C. C. 375; affirming Dunn's Case, 1 Leach C. C. 57; Com. v. Baldwin, 11 Gray, 197.

[3] R. v. Lewis, 2 East P. C. 957.

[4] *Infra*, §§ 698, 716; U. S. v. Mitchell, Baldwin C. C. 367; White v. Com., 4 Binn. 418; Buckland v. Com., 8 Leigh, 732.

[5] *Infra*, § 698.

[6] *Infra*, § 744. As to false pretence in such cases see *infra*, §§ 1123, 1162.

[7] Brittain v. Bank of London, 3 F. & F. 465; 11 W. R. 569.

[8] See 2 Russ. Cr. 719. *Infra*, § 695.

[9] People v. Fitch, 1 Wend. 198; People v. Cady, 6 Hill, 490. *Infra*, §§ 680 *et seq.*

deed, omit or introduce a material item in defiance of his agreement, this may be forgery, in accordance with principles hereafter laid down in another relation.[1]

And it is clear that if, after a vendor, by an instrument duly executed, has conveyed land to another, he should falsely alter the date of the deed, so as to cut out intermediate incumbrances, this would be forgery. The deed has become a muniment of title; a false alteration is made in it in such a way as to prejudice prior vendees or mortgagees, if the alteration be sustained; and hence it is forgery to make the alteration.[2]

Fraudulently executing a deed with a false date may be forgery.

§ 663. Still further has this principle been pushed in England, in a decision sustained by the judges in 1869, in a crown case reserved. A., the vendor of lands, after duly conveying them to B., who entered into possession, leased them to C. (A.'s son), by a deed antedating that to B., and C. produced this lease in an action against B. Was the introduction of this false date forgery in A. and C.? So was it held by the judges, relying on the definition already given, that making an instrument fraudulently purporting to be that which it is not is forgery.[3] This has been doubted in Massachusetts ;[4] and, indeed, under our registry laws, it is difficult for a fraud of this kind to be made effectual in reference to real estate. It could arise, however, in all cases where a fraudulent subsequent assignment of chattels is set up with a false date to defeat an intervening *bonâ fide* attachment or sale. It was said by Kelly, C. B., in sustaining the conviction in the case above cited, that it was impossible to distinguish the case from those in which deeds made in false names were held to be forgeries. To fabricate a deed with a false date issuing from a prior deceased grantor, with intent to cut out a subsequent grantee, would be clearly forgery; why not a falsely antedated deed emanating from the forger himself? Now the position that executing a deed in a fictitious name is forgery is too well and too justly settled to be shaken; and as in the case before us the material point in the deed is *date* and not *name*, we may accept as authorita-

[1] *Infra*, § 671.

[2] People v. Fitch, 1 Wend. 198, may seem to conflict with this principle; but the paper altered by the maker in People v. Fitch was not a muniment of title, but an exhausted draft.

[3] R. v. Ritson, 39 L. J. M. C. 10; L. R. 1 C. C. 200, relying on Coke, 3 Inst. 169.

[4] Com. v. Baldwin, 11 Gray, 197.

tive the decision on which we here comment. The deed is a forgery, because it is a fictitious deed, emanating from a person who in the eye of the law is dead as to the particular property, but who falsely claims to be alive as to such property, and capable of disposing of it.[1] And it was declared, in the language of Blackburn, J., "that every instrument which fraudulently purports to be that which it is not, is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed."

Forgery to make false entry in pass-book.

§ 664. Is the entry of a false item in a pass-book forgery? As illustrating this, we may take pass-books with grocers or other tradesmen, the book being kept by the customer, and the vendor entering, from time to time, sales; or, as another instance, a banker's pass-book, in which the banker enters from time to time cash received or paid out by him. Is it forgery for either party falsely and fraudulently to make or alter entries in such books, to the prejudice of the other party? Now such books are the joint property of the two parties; and each acts as the agent of the other in making entries. Hence, if one make an entry, contrary to the instructions either express or implied of the other, this is equivalent to an agent fraudulently filling up a blank intrusted to him with a wrong sum, which, as will presently be more fully seen, is forgery.[2] *A fortiori* is this the case when either party fraudulently alters a prior entry.[3]

So of entries in book settlements.

§ 665. It may be also forgery, as we will see more fully, to fraudulently affect settlements of book accounts by the subsequent introduction of false items.[4]

[1] As analogous cases, see R. *v.* Blenkinsop, 2 C. & K. 531; 1 Den. C. C. 276; R. *v.* Mitchell, Ibid. 282; and R. *v.* Epps, 4 F. & F. 81, in which the *name* was genuine, but the forgery was in making the address.

[2] See *infra*, § 671. As to bankers' pass-books, this has been frequently held: R. *v.* Smith, 9 Cox C. C. 162; Leigh & C. 168, where the entry of a false deposit was made in the pass-book with intent to defraud a society of which the defendant was treasurer, and by showing them the false entries, to be continued in office as treasurer; S. P. R. *v.* Moody, 9 Cox C. C. 166; L. & C. 173; Harrison's Case, 1 Leach, 180. The same reasoning applies to other pass-books.

[3] See Biles *v.* Com., 32 Penn. St. 529; Barnum *v.* State, 15 Ohio, 717; R. *v.* Smith, 9 Cox C. C. 162; Leigh & C. 168; R. *v.* Moody, Ibid. 166.

[4] Barnum *v.* State, 15 Ohio, 717.

So as to books of original entry.

§ 666. We must extend this reasoning to such books of original entry as by the *lex loci contractus* are evidence against a vendee. A. goes to B.'s store to purchase goods under such a law. He buys his goods, and the price is fixed; and B. becomes A.'s agent for the purpose of entering the sale in B.'s books of original entry. Now if B. enters fraudulently wrong articles or sums, this is equivalent to filling up a blank in A.'s cheque for a larger amount than A. directs. A. authorizes B. to charge him with a particular amount in a writing that binds A. B. enters fraudulently a larger amount. This, on the principle just stated, is forgery in B.[1] It is true that this was apparently denied in New Hampshire, in 1865, in a case where it was held not forgery for a man to make a false entry in his own account book,[2] a proposition which is correct in those cases where the accountant, in accounting, acts exclusively on his own behalf, and where his entries do not bind another. But the rule is not law in respect to an accountant who acts as agent for another whom he thus binds, nor is it law in those States in which a forged book account may be legal evidence in support of a plaintiff's claim. Perhaps, however, we may trace the decision of the court in this case to the peculiar structure of the New Hampshire statute. "In examining our statute," said Sargent, J., who gives the opinion of the court, "it will be seen that almost every form of writing or instrument known to the law is specifically enumerated as the subject of forgery, but no mention is made of accounts or books of account. Is it not probable that if the law was intended to apply to so common a thing as accounts, they would have been mentioned with the other things specified?"

Forgery for clerk to make false entries in book he is employed to keep.

§ 667. Is a clerk guilty of forgery in making a false entry in a book he is employed to keep? If he be directed by his principal to enter one sum, and with intent to defraud the principal he enter another sum, then this is forgery. The case is in fact the same as those elsewhere cited,[3] where it is properly ruled to be forgery for a person employed to fill up a blank to fill it up with a sum larger than his principal authorizes.[4]

[1] And see *infra*, § 671.

[2] State *v.* Young, 46 N. H. 266. See Biles *v.* Com., cited *infra*, § 667.

[3] See *infra*, § 671.

[4] See Biles *v.* Com., 32 Penn. St. 529.

But suppose the clerk is not directed by his employer to enter simply a particular statement in his books, but has a general discretion allowed him as to the mode of keeping the same, and suppose there are no specific commands from his employer as to the particular item alleged to be charged? Here we come to an apparent conflict of authorities, the first of which in point of time is a case in Pennsylvania, decided in 1859, where it was held that it was forgery for a confidential clerk to "make a false addition of one figure in the amount of cash received from bills receivable, in the month of August, 1856, and in the alteration of another true figure in said addition. The true addition was $6,455.63, while the false addition was $5,955.63, the first figure, 5, being an alteration of the original figure in the addition, which was a 6. The result of this forgery was to represent the cash received five hundred dollars less than the actual amount; and of course, to enable their clerk to abstract that sum from the funds of the firm." This was held forgery, first in the Philadelphia Quarter Sessions, and secondly, in the Supreme Court of the State. "The act in question," said Judge Ludlow, in the course of a lucid and well-argued opinion delivered by him in the court below, "was not only prejudicial to the rights of the prosecutors, but the writing, if genuine, might have been 'the evidence of their rights.' True, the 'journal' would not be received as evidence for the prosecutors in a suit of law, but in equity, for collateral purposes, it might have been evidence of their rights; and then, by the adjudged cases, the offence committed would have been forgery." "Again, the entry in question is, in substance, an acquittance, or in the nature of a receipt from the firm to the defendant; as confidential book-keeper, he receives the amount of the bills receivable; to discharge himself from liability, he enters the several items in the journal as the *agent of the firm;* and then, not as the agent of the firm, but as an individual and for his own wicked gain, so erases or alters, or makes a figure or figures in the sum total representing the addition of the entire entry, as to deceive and thereby defraud his employers." This opinion was accepted and affirmed by the Supreme Court, and in both points the ruling can be sustained on the reasoning above given. The books, as altered, could, in several aspects, be made the basis of civil action against the defendant's employer. And

they were sufficiently the books of such employer as to make any false entry in them by the defendant forgery.[1]

But in 1865, on a *habeas corpus* in an extradition case before the English Queen's Bench, that court, under the leadership of Cockburn, C. J., uttered a different view of the law from that which has just been expressed.[2] The cases, indeed, were by no means identical. Charles Windsor, the party petitioning the English court in the case now before us, had been a clerk in the Mercantile Bank of New York, and as such had charged himself on the books, on October 28, 1864, with nearly $250,000 more assets than were deposited in the vaults to his credit; this sum having been embezzled by him. Was this forgery? No doubt the entries could, if genuine, have been used as evidence in a suit against the bank, and no doubt they were false, and made with intent to lull the suspicions of the bank until the work of embezzlement was complete, and the offender had safely absconded. But were they false in the sense of being a false receipt from the bank to the forger, as was the case in the Pennsylvania prosecution just cited? In one sense they were, because, if they were true, the bank could have no claim against the clerk making them. And if so the latter was indictable for forging what was a receipt from his employers.[3] These points, however, were not argued before Chief Justice Cockburn, nor, indeed, permitted to be argued. At the very outset he peremptorily announced a definition of forgery which expressly excluded the case before the court. "Forgery," he declared, "was in 'universal acceptation,' the making or altering a writing so as to make the alteration purport to be the act *of*

[1] Biles *v.* Com., 32 Penn. St. 529, 534, 537. To the same effect is an unreported decision of Judge King, a master of this department of law, in Com. *v.* Nicholson, Phil. 1842. Biles *v.* Com. is discussed and disapproved in Hall, *in re*, 8 Ontario App. 31.

[2] Windsor, *ex parte*, 10 Cox C. C. 118; 6 B. & S. 522.

[3] See R. *v.* Moody, L. & C. 177, in which on an indictment for forging an entry on a banker's pass-book, Martin, B., said: "The forged document, if genuine, would have been evidence that the bank had received the money, and was accountable for it. Then why is it not an accountable receipt?" See Eno's Case, 30 Alb. L. J. 144. In Tully, *in re*, 20 Fed. Rep. 812, it was held (in an extradition case), that false entries in book accounts by a bank officer, for the purpose of covering defalcations is not forgery by the English law. The case was declared by the court to be identical with that of Windsor above cited.

some other person, which it is not."[1] Of course, after this summary disposal of the case, the counsel for the United States could say but little. They suggested, however, that the case before the court might be put on the same footing as that of R. *v.* Hart, where it was held forgery for an agent fraudulently to fill up a blank acceptance with a larger sum than was directed. To this, however, Chief Justice Cockburn replied: "There a man passed off as the acceptance of the acceptor a different sum from that the acceptor meant. This is a statement *to* the bank, not a statement put forward *by* the bank." Upon the reasoning above given three criticisms may be ventured. *First*, the definition proclaimed by Chief Justice Cockburn as ruling the case was afterwards rejected by the judges sitting in 1869 on a crown case reserved,[2] and a definition adopted which would have included the case now before us. *Secondly*, the position that a false statement made *to* the party defrauded is not forgery, when it might be if it purported to be made *by* the party defrauded, is in conflict with several well-considered English rulings.[3] *Thirdly*, a statement to a principal by an agent may be also a statement by the principal who accepts the statement. The actual point, however, ruled by Cockburn, C. J., is still accepted in England as law.[4]

§ 668. To sign the name of another, without authority, it need scarcely be repeated, is forgery at common law,[5] providing something like deceptive similitude is attempted.[1] Even where a person, relying on the kindness of another (*e. g.*, a near relative), puts the latter's name to an obligation, this is forgery.[2] Nor is it any defence that the party forging intended to pay the obligation before maturity.[3] It is also forgery in A. to induce C. (an innocent agent) to forge B.'s name, on the pretence that B. had authorized C. to do so.[4]

Signing another's name without authority is forgery.

§ 669. When the signature is made by an alleged agent in the principal's name, it should appear, to sustain a prosecution for forgery, that the act was without authority; and where, from the course of dealings between the parties, the agent has reached the *bonâ fide* belief that he is entitled to act for the principal, a case of forgery cannot be made out.[5] So where a person for a series of years forged the name of his friend as the indorser of his notes and bills, with the knowledge of his friend, who, although judgments were obtained and executions issued against him in suits on such forged indorsements, never disavowed such acts until the person committing the forgeries had absconded and fled from justice, it was held, in a case where the indorser was sued and suffered a default, and attempted no defence until after the escape of the maker of the notes, that proof of these facts was admissible in evidence, and that from them the jury might imply an authority from the indorser to the maker thus to use his name.[6]

Agent having *bonâ fide* belief he was authorized not so indictable.

To show authority from the prosecutor, a letter left unanswered from the defendant to the prosecutor, claiming authority, has been held to be evidence sufficient for the jury.[7] And where the person whose name was used was informed of it at the time, and did not at once repudiate it, although upon the trial he was a witness, and denied all authority, this is a defence.[8]

But a person who signs his name as attorney for another without authority may, if he claim to be authorized so to sign, be indictable

[1] In this, as in other rulings by Cockburn, C. J., in cases in which the United States were concerned, as a political power, during the late civil war, there is a hardness of tone towards the United States, which may be explained by the critical relations in which the two governments then stood. How far the decision here criticized was thus unconsciously affected need not now be discussed.

As giving the New York rule, see People *v.* Phelps, 49 How. Pr. 462.

[2] See *supra*, § 653; R. *v.* Ritson, L. R. 1 C. C. 200.

[3] R. *v.* Smith, 9 Cox. C. C. 162; L. & C. 168; R. *v.* Moody, 9 Cox C. C. 166; L. & C. 173; R. *v.* Dodd, 18 L. T. (N. S.) 89. See Jarrard, *in re*, 4 Ontario, R. 278, where it was held (on extradition process) that the altering in his own favor by a public officer, "made to falsify the whole of an audited account," is forgery.

[4] See Saunders's Case, 59 L. T. N. S. 133; Lamirande's Case, 10 Low. Can. R. 780; Tully, *in re*, *ut sup.*; Spear on Extrad., 2d. ed. 271.

[5] R. *v.* Forbes, 7 C. & P. 224; R. *v.* Hill, 8 C. & P. 274; Dixon's Case, 2 Lewin, 178; Com. *v.* Henry, 118 Mass. 460. *Infra*, § 680.

[1] Abbott *v.* State, 59 Ind. 70.

[2] R. *v.* Beard, 8 C. & P. 143.

[3] *Infra*, § 718.

[4] Gregory *v.* State, 26 Ohio St. 510.

[5] R. *v.* Forbes, 7 C. & P. 224; R. *v.* Parish, 8 Ibid. 94; R. *v.* Watts, 3 B. & B. 197; S. C., R. & R. 436: R. *v.* Clifford, 2 C. & K. 202; Parmelee *v.* People, 8 Hun, 623; Shanks *v.* State, 25 Tex. Sup. 326. *Supra*, § 148.

[6] Weed *v.* Carpenter, 4 Wend. 219. See R. *v.* Beard, 8 C. & P. 143.

[7] R. *v.* Beardsall, 1 F. & F. 529.

[8] R. *v.* Smith, 3 F. & F. 504.

for a false pretence, but not for forgery.[1] To hold it forgery would make it forgery when A., falsely giving B. as authority, writes any statement with intent to defraud. But where there is no claim to authority, signing another's name to negotiable paper is forgery.[2]

Fraudulently using a man of straw as acceptor to charge a responsible person of the same name is forgery.

§ 670. It has been already stated that when there are two persons of the same name, it is forgery in one of them to use his name in such a way as to fraudulently charge another.[3] This rule properly applies to cases where the forging is done by the defendant as agent for a man of straw, or where the latter signs his name at the former's direction, and the former (the defendant) uses the signature so obtained to prejudice a responsible person bearing the same name.[4] Even when the names are not precisely identical, a conviction may be sustained. Thus, in an English case, P. M., the defendant, undertook to get his mother-in-law "C. W.'s" name to two notes. Taking the notes to his wife, he induced her to sign them in her maiden name, "A. W.," and handed them over, saying, "Here are the notes." The jury convicted him on the ground that when he got his wife's name to the notes his intention was to use them as his mother-in-law's; and it was held by the judges, on a case reserved, that the conviction was right.[5]

It is admissible for the prosecution to introduce such relevant facts as may prove that a nominal acceptor was a fiction, or mere man of straw.[6]

Forgery to fill with terms other than authorized.

§ 671. We are now led to an important position which tends to rule many analogous questions in forgery. It is this: *When an agent has authority to fill with a particular sum a blank in a paper signed by his principal, it is forgery to fill the blank with a larger sum.* This has been held to be the law even in cases where the writer believed

[1] R. v. White, 2 C. & K. 404; 2 Cox C. C. 210; R. v. Arscott, 6 C. & P. 408; State v. Young, 46 N. H. 266; Com. v. Baldwin, 11 Gray, 197; Com. v. Foster, 114 Mass. 311; Heilborn's Case, 1 Park. C. C. 429; Mann v. People, 15 Hun, 155; State v. Willson, 28 Minn. 52, where the question is ably discussed. *Supra*, § 657.

[2] *Supra*, § 655. See Phipps's Case, 4 Crim. L. Mag. 865; 8 Ont. App. 77.

[3] *Supra*, § 657.

[4] R. v. Epps, 4 F. & F. 81; Mead v. Young, 4 T. R. 28; R. v. Webb, 6 Moore, 447, n.; R. & R. 405; R. v. Mitchell, 1 Den. C. C. 282. See Com. v. Foster, 114 Mass. 311.

[5] R. v. Mahony, 6 Cox C. C. 487.

[6] R. v. White, 2 F. & F. 554; R. v. King, 5 C. & P. 123.

that the larger sum was due him.[1] And an unauthorized filling of blanks falls generally under the same rule.[2] But it is not forgery for a party, after an agreement is executed, to enter *bonâ fide* the terms agreed to by the other party.[3]

So to fill cheque without authority.

So for an agent fraudulently to alter terms he was employed to write.

§ 672. *A fortiori* is it forgery to fill up without authority a cheque already signed,[4] and to alter, without authority, in such cheque, the words "order of," to "bearer."[5]

§ 673. It has also been held that a person employed to draw a legal instrument is guilty of forgery if he fraudulently alter a provision in it; and clearly would this be the rule in cases of wills or deeds signed in blank;[6] and on this principle may be justified the rulings already given, that a clerk is guilty of forgery in making particular entries in his master's book, contrary to his master's specific instructions.[7]

But it is not forgery to fraudulently induce another to sign a document.

§ 674. It is not forgery fraudulently to induce a person to execute a document on a misrepresentation of its contents;[8] nor to obtain such signature to a document, the contents of which have been altered without the signer's knowledge.[9] The defendant in such case has written nothing, and ordered nothing to be written. If it were otherwise, then the case might be forgery. But in Maine, though on reasoning it is difficult to accept, it has been held forgery for a party, after obtaining from a grantor assent to a correct deed, afterwards (but before signature) to substitute for it a deed that is incorrect.[10]

[1] R. v. Hart, 1 Mood. C. C. 486; 7 C. & P. 632; R. v. Wilson, 2 C. & K. 527; 2 Cox C. C. 426; 1 Den. C. C. 284; State v. Flanders, 38 N. H. 324; State v. Kroeger, 47 Mo. 552.

That a paper so altered does not bind the party, see Thoroughgood's Case, 2 Co. Rep. 9 b; Swan v. Land Co., 2 H. & C. 175; Frazer v. Mackennon, L. R. 4 C. P. 704; Hollenbeck v. Dewitt, 2 Johns. 404.

[2] Wilson v. Commis., 70 Ill. 46; State v. Maxwell, 47 Iowa, 454.

[3] Pauli v. Com., 89 Penn. St. 432.

[4] Flower v. Shaw, 2 C. & K. 703; Wright's Case, 1 Lewin C. C. 135. See apparently, *contra*, *dictum* of Parsons, C. J., in Putnam v. Sullivan, 4 Mass. 45.

[5] State v. Kroeger, 47 Mo. 552.

[6] See Combe's Case, Noy, 101; Moore, 760; Wilson v. Commis., 70 Ill. 46; State v. Maxwell, 47 Iowa, 454.

[7] See *supra*, § 667.

[8] R. v. Collins, 2 M. & Rob. 461; Putnam v. Sullivan, 4 Mass. 45; Com. v. Sankey, 22 Penn. St. 390; Hill v. State, 1 Yerger, 76; see State v. Flanders, 38 N. H. 324, cited *supra*, § 671.

[9] R. v. Chadwick, 2 M. & Rob. 545.

[10] State v. Shurtliff, 18 Me. 368.

§ 675. Aside from writing by pen and ink, forgery may be committed by printing;[1] by pencil writing;[2] by the use of another's seal; by pasting one name in a note over another name;[3] by photographic process;[4] and by engraving, or preparing materials for engraving;[5] but not, it is said, by painting, though with intent to defraud, the name of a famous painter upon a picture, so as to secure its sale; the reason given being that forgery is limited to the false making of a document or paper.[6]

Forgery may be by writing, printing, or engraving.

§ 676. It has just been said that materially to alter a deed or will, or to erroneously fill up a blank in a note, is, when fraudulently done, forgery. There can be no doubt that the *erasure* by a clerk or agent, of a figure, in an account kept by him as such, is as much forgery as is *adding* a figure. In either case the offence is fraudulent alteration of a writing, which is forgery. The same principle may be extended to every fraudulent abrasion, mutilation, or severance, which materially changes the terms of an instrument. Thus it has been held forgery to fraudulently sever from an instrument a memorandum attached to it, forming with it an entire contract, and investing it with an important qualification;[7] and so of an erasure of a limitation of negotiability.[8] But it has been said not to be forgery of the main paper to obliterate a receipt from a bond;[9] or an indorsement from a note,[10] these being independent obligations or assurances, in

An erasure or a mutilation may be a forgery.

[1] Com. *v.* Ray, 3 Gray, 441; and see R. *v.* Smith, D. & B. 567; 8 Cox C. C. 32, and cases cited *infra*.

[2] Whart. on Ev. § 616.

[3] State *v.* Robinson, 1 Harr. (N. J.), 507.

[4] R. *v.* Rinaldi, Leigh & C. 330; 9 Cox C. C. 391.

[5] R. *v.* Dade, 1 Mood. C. C. 307; R. *v.* Kirkwood, Ibid. 304; People *v.* Rhoner, 4 Parker, C. R. 166; R. *v.* Closs, Dears. & B. 460; 7 Cox C. C. 494. See R. *v.* Smith, D. & B. 566; 8 Cox C. C. 32.

[6] R. *v.* Closs, Dears. & B. 460; 7 Cox C. C. 494. See *infra*, § 681.

[7] State *v.* Stratton, 27 Iowa, 420. So, in a case tried in Massachusetts, in 1813, where the defendant was charged, not with forgery, but with a misdemeanor, in cutting and piecing bank notes, so as out of *seven* notes to manufacture eight; the court said, in arresting judgment: "This is a nondescript offence. If the defendant had completed what may be presumed to have been his intent, and had made an eighth bill, perhaps this would have been forgery." Com. *v.* Hayward, 10 Mass. 34. And no doubt it would now so be held.

[8] Garner *v.* State, 5 Lea, 213. See State *v.* Kroeger, 47 Mo. 552.

[9] Thornburg *v.* State, 6 Ired. 79.

[10] State *v.* McLeran, 1 Aiken, 311. See State *v.* Davis, 53 Iowa, 252.

no way affecting the original qualities of the instrument alleged to be forged. In the cases last mentioned the indictment must be for the forgery of the independent obligation or assurance.

§ 677. It is forgery to fraudulently alter any part of an instrument when the alteration is capable of working injury to another. Thus, it is forgery to alter the dates, names, or any other material parts of an instrument, when the alteration gives it a new operation. Consequently, it is forgery fraudulently to alter the sum in a note;[1] to erase one signature or indorsement and insert another;[2] to insert after a party's name a false address;[3] to alter the date of a promissory note or order;[4] to antedate a deed, though by the grantor himself, to cut out a prior sale;[5] to insert a solvent banker's name in place of one who had failed;[6] to change the vignettes or marginal emblems of a bank note when the effect is to defraud;[7] to add to a copy of a receipt, offered to supply a lost original, the words, "in full for all demands;"[8] to alter book accounts and pass-books;[9] to fill up fraudulently blank cheques or acceptances;[10] and to alter a receipt on a note, though such receipt was without signature.[11] It is even forgery for a person fraudulently to alter an instrument previously forged by himself;[12] or after his cheque has been paid to alter his own signature so

And so of alterations.

[1] R. *v.* Elsworth, Bayley on Bills, 430; 2 East P. C. 986; R. *v.* Teague, Ibid. 979; S. C., R. & R. 33; R. *v.* Post, R. & R. 101; R. *v.* Atkinson, 7 C. & P. 669; Goodman *v.* Eastman, 4 N. H. 455; Haynes *v.* State, 15 Ohio St. 455; State *v.* Wooderd, 20 Iowa, 541.

[2] R. *v.* Birkett, Bayley on Bills, 63, 430; R. & R. 251; Com. *v.* Ladd, 15 Mass. 526; State *v.* Robinson, 1 Harr. (N. J.) 507; State *v.* Hitchens, 2 Harring. (Del.) 527; State *v.* Waters, 3 Brevard, 507; 2 Tr. Con. R. 569.

[3] R. *v.* Blenkinsop, 1 Den. C. C. 296. *Supra*, § 657.

[4] Master *v.* Miller, 4 T. R. 320; S. C., 2 H. Bl. 140; Henfree *v.* Bromley, 6 East, 309; Powell *v.* Devett, 15 Ibid. 29; R. *v.* Atkinson, 7 C. & P. 669; U. S. Bk. *v.* Russell, 3 Yeates, 391; Miller *v.* Gilleland, 19 Penn. St. 119; People *v.* Graham, 6 Parker C. R. 135; State *v.* Kattleman, 35 Mo. 105.

[5] See *supra*, § 663.

[6] R. *v.* Treble, 2 Taunt. 328; R. & R. 164; State *v.* Robinson, 1 Harr. (N. J.) 507.

[7] See R. *v.* Keith, Dears. C. C. 454; 6 Cox C. C. 533; 29 Eng. L. & E. 558; *infra*, § 681; though see State *v.* Waters, 3 Brevard, 507.

[8] State *v.* Floyd, 5 Strobh. 58; Upfold *v.* Leit, 5 Esp. 100.

[9] *Supra*, §§ 664–6.

[10] *Supra*, § 671.

[11] Kegg *v.* State, 10 Ohio, 75.

[12] R. *v.* Kinder, 2 East P. C. 856. *Supra*, § 661.

as to charge his banker with forgery.[1] But the mere addition of surplusage to a document (*e. g.*, a witness to a paper not requiring a witness, or a mere insensible description) has been held not to be forgery;[2] though this cannot hold in case where the forged addition might become an increment of the proof of the validity of the document.

An addition must be specifically pleaded.

§ 678. It should be remembered, however, that the forgery of an *addition* to an instrument cannot, as in the case of the alteration of a substantial integral part, be laid as a forgery of the *whole*. It must be specially alleged, and proved as laid.[3]

The forgery of the obligor's name or of any material integral items, it need scarcely be repeated, may be laid as the forgery of the whole obligation.[4] And if one signature be shown to be forged, it is not necessary to prove the forgery of the rest.[5]

False personation is not forgery.

§ 679. False personation of another, unless accompanied by false writing, is not forgery.[6]

III. WHAT INSTRUMENTS ARE OBJECTS OF FORGERY.

Necessary that the instrument forged

§ 680. To sustain an indictment for forgery it is generally necessary that the instrument alleged to be forged should be one which would expose a particular person to legal process.[7]

[1] 2 Rus. Cr. 719; though see *contra*, Brittain *v.* Bank of London, 3 F. & F. 465. *Supra*, § 661.

[2] R. *v.* Treble, 2 Leach, 1040; 2 Taunt. 328; State *v.* Gherkin, 7 Ired. 206; State *v.* Cilley, 1 N. H. 97.

[3] R. *v.* Birkett, R. & R. 251. See fully, *infra*, § 735.

[4] Jervis's Archbold C. P. 9th ed. 365; R. *v.* Dunn, 1 Leach, 57; R. *v.* Bigg, 1 Stra. 18.

[5] People *v.* Rathbun, 21 Wend. 509.

[6] See R. *v.* Hevey, R. & R. 407, n.; 2 East P. C. 858; 1 Leach C. C. 229; R. *v.* Story, R. & R. 81.

[7] *Infra*, §§ 692-95; State *v.* Corley, 4 Baxt. 410; Clarke *v.* State, 8 Ohio St. 630; Reed *v.* State, 28 Ind. 396.

In R. *v.* Harper, 44 L. T. (N. S.) 615; L. R. 7 Q. B. D. 78, the first count was for forging and uttering an indorsement on a bill of exchange, the second count for forging a paper writing in the form of and purporting to be a bill of exchange, and in the third count for forging a certain paper writing. It appeared that the prosecutor wrote the body of a bill of exchange, but without signing the drawer's name, and sent it to the prisoner, who was to accept it and procure an indorsement by a solvent person, and return it to the prosecutor. The prisoner accepted it, and forged the indorsement of another person's name, and returned it. It was held that the prisoner could not be convicted upon this indictment, as the document was only an inchoate instrument of no value when the prisoner forged the indorsement, and was not a bill of exchange. See Whart. Cr. Pl. & Pr. § 185. By Stephen, J., it was held the case was one of forgery at common law.

In Com. *v.* Dallinger, 118 Mass. 439, the court held that an instrument purporting to be signed by I. S., which is made payable to the order of I. S., is not a promissory note until indorsed; and an indictment for forgery which charges, in separate counts, the making and uttering of such a promissory note, without setting out the indorsement by I. S., cannot be sustained, it appearing in evidence at the trial that there was but one I. S. See Com. *v.* Henry, 118 Mass. 460; Com. *v.* Costello, 120 Mass. 358; Thompson *v.* State, 49 Ala. 16.

should be one on which suit could be brought.

Apparent legal efficiency, however, is enough. It is not necessary that such suit should have in it the elements of ultimate legal success. It is enough if the forged instrument be apparently sufficient to support a legal claim.[1] It is sufficient, also, if the claim be indirect. Thus, forging of legal records or writs is indictable, though the only suit that could be brought on the forged document, supposing it to be genuine, would be one against the officer issuing it, for negligence.

But instrument need not be in writing or in words.

§ 681. In a prosecution already cited, for falsely painting an artist's name on the corner of a picture, so as to make the picture pass for an original by such artist, it was held that the offence was not forgery at common law, as forgery must be of a document or writing.[2] The decision can be rested on the ground that the false name thus painted could not under any circumstances be the ground of a suit against the artist who bore the name. If, however, the reasoning of the court rests on the position that there can be no forgery except of a document, limiting a document to a mere form of words, this reasoning cannot be sustained. A baker's tally, in some parts of the United States, consists simply of a stick of wood, deposited with the customer, on which the baker on the delivery of a loaf makes a notch as a voucher of such delivery. There can be no question that, in accordance with the cases heretofore cited,[3] a false notch by the baker, fraudulently made, is forgery.[4] So, taking a "positive" impression of a note, as a preliminary photographic process, is forgery, though the impression is but a picture on glass.[5] And the

[1] *Infra*, §§ 691 *et seq.*

[2] R. *v.* Closs, Dears. & B. 460; 7 Cox C. C. 494.

[3] See *supra*, § 675.

[4] See Rowland *v.* Burton, 2 Harr. (Del.) 288; Kendall *v.* Field, 14 Me. 30.

[5] R. *v.* Rinaldi, L. & C. 330; 9 Cox C. C. 391.

false making of the ornamental border of a bank note has been held to be virtually forging a note, though no words were filled in.[1]

Bonds, deeds, commercial paper, receipts, orders, "other writing," etc.

§ 682. Whatever falls under the head of bonds, deeds, commercial paper, or receipts, and kindred writings, may be the object of forgery at common law. For the purpose of detailed enumeration, however, it may be mentioned that the principle has been specifically applied to bonds,[2] to deeds,[3] to commercial paper of all kinds,[4] to cheques on banks,[5] to wills;[6] to receipts;[7] to orders for delivery of money or things;[8] to entries on book accounts;[9] to telegraphic messages;[10] and in fine to all written or other instruments which may be the foundation of a suit against another.

[1] R. v. Keith, Dears. C. C. 454; 6 Cox C. C. 533; 29 Eng. L. & Eq. 558. See *supra*, § 677. *Inf.* § 731.

[2] Com. v. Linton, 2 Va. Cas. 205; Penns. v. Misner, Add. 44. That a "certificate of indebtedness" issued by a city is a "bond," see Bishop v. State, 55 Md. 138. And so of a bailbond. Costley v. State, 14 Tex. Ap. 156.

[3] See R. v. Ritson, L. R. 1 C. C. 200.

[4] See R. v. Kinnear, 2 M. & Rob. 117; R. v. Morton, 2 East P. C. 955; Com. v. Butler, 12 S. & R. 237; Com. v. Ward, 2 Mass. 397; Com. v. Henry, 118 Mass. 460; Com. v. Dallinger, 118 Mass. 439; Ames's Case, 2 Greenl. 365.

That such paper must make out a *primâ facie* case, see *infra*, §§ 691 *et seq.*

[5] State v. Coyle, 41 Wis. 267.

[6] R. v. Sterling, 1 Leach, 99; R. v. Coogen, 1 Leach, 449; 2 East P. C. 948; R. v. Tylney, 1 Den. C. C. 319.

[7] R. v. Gade, 2 Leach, 732; 2 East P. C. 874; Barnum v. State, 15 Ohio, 717; State v. Riebe, 27 Minn. 315.

That a receipt is an acquittance, see State v. Shelters, 51 Vt. 102.

Receipts.—As to limitations of this term, see R. v. French, L. R. 1 C.C. 217; Com. v. Lawless, 101 Mass. 32. And other cases cited Whart. Cr. Pl. & Pr. § 185. An ordinary receipt is an acquittance. R. v. Martin, 7 C. & P. 549; R. v. Houseman, 8 C. & P. 180; Com. v. Ladd, 15 Mass. 526.

[8] R. v. Ward, 2 East P. C. 861; U. S. v. Green, 2 Cranch C. C. 520; Harris v. People, 9 Barb. 664; Com. v. Ayer, 3 Cush. 150; State v. Leak, 80 N. C. 403; State v. Lane, Ibid. 407; State v. Kesler, Ibid. 472; Thomas v. State, 59 Ga. 784; Burke v. State, 66 Ibid. 157; Anderson v. State, 65 Ala. 553.

As to treasury notes, see U. S. v. Fisler, 4 Biss. 59. As to meaning of "order" and "request" for payment of money, see, fully, Whart. Cr. Pl. & Pr. §§ 193, 194; R. v. Illidge, 1 Den. C. C. 404; T. & M. 127; 3 Cox C. C. 552; R. v. Harris, 6 C. & P. 129; 1 Moody, 393; R. v. McConnell, 1 C. & K. 371; 2 Moody, 298; R. v. Lonsdale, 2 Cox C. C. 222; Noakes v. People, 25 N. Y. 380; Evans v. State, 8 Ohio St. 196; Carberry v. State, 11 Ibid. 410; State v. Lamb, 65 N. C. 419. As to "affidavits" under federal statute, see U. S. v. Wentworth, 11 Fed. Rep. 32. As to "money order," see U. S. v. Morris, 7 Report. 581; 19 Alb. L. J. 403. As to pension papers, see U. S. v. Wilcox, 4 Blatch. 385.

[9] *Supra*, §§ 666–7.

[10] R. v. Stewart, 25 Up. Can. Q. B. 440.

Statutes, we should at the same time remember, have been passed in England and in most jurisdictions in the United States, making it felony to forge writings of the general class just mentioned; and under these statutes forgeries of "bills of exchange,"[1] of "promissory notes," of "deeds," of "bonds," of "orders," of "receipts," of "warrants," and of "requests," have been made specifically indictable.[2] "Other writing" is, when adopted in a statute, to be used as comprehending all documents objects of common law forgery.[3]

Judicial or political records may be the subject of forgery.

§ 683. It is forgery at common law to forge any judicial writ.[4] Hence it is a forgery to forge an order from a magistrate for the discharge of a prisoner;[5] or a deposition to be used in the trial of a cause,[6] or the seal of a court.[7] From this we may rise to the general position, accepted from the earliest days of the English common law, that the forgery of any matter of judicial or executive record is indictable at common law.[8] Hence to fraudulently alter a marriage register is forgery;[9] and so of the making a false certificate of the recording of a deed;[10] and so of naturalization papers;[11] and so of an entry in a tax duplicate.[12] But it has been ruled otherwise as to political documents of no possible legal effect.[13]

It has been said, indeed, that offences of this kind, to be technically forgeries, must have the tendency to be prejudicial to the

[1] That a draft without a drawer's name is not a bill of exchange under the statute, see R. v. Harper, L. R. 4 Q. B. D. 78; 44 L. T. N. S. 615; cited *supra*, § 680. But a bank cheque is a bill of exchange. Hawthorn v. State, 56 Md. 530.

[2] For the meaning of these terms, see Whart. Cr. Pl. & Pr. §§ 185-199. As to "certificate," see State v. Grant, 74 Mo. 33.

[3] Under the term "other writing," in the United States Revised Statutes, § 5418, a custom-house oath is included. U. S. v. Lawrence, 13 Blatch. 211.

[4] R. v. Harris, 1 M. C. C. 393; 6 C. & P. 129; R. v. Collier, 5 Ibid. 160; Com. v. Mycall, 2 Mass. 136. See People v. Cady, 6 Hill N. Y. 490, a case where the intent to defraud was held not to be proved.

[5] Ibid.; R. v. Fawcett, 2 East P. C. 862.

[6] State v. Kimball, 50 Me. 409.

[7] Fadner v. People, 40 Hun, 240; 10 Abb. New Ca. 462.

[8] 1 Hawk. P. C. by Curwen, 262, 5. See, however, under federal statute, U. S. v. Irwin, 5 McLean, 178.

[9] R. v. Dudley, 2 Sid. 71.

[10] State v. Tompkins, 71 Mo. 613.

[11] U. S. v. Randolph, 1 Pittsb. 24.

[12] Com. v. Beamish, 81 Penn. St. 339, aff. in Luberg v. Com., 94 Penn. St. 85.

[13] State v. Anderson, 30 La. An. 557; 1 South. L. J. 183.

rights of others.[1] But it should be observed (1) that in most cases of forged writs the officer issuing the writ, if it were genuine, would be liable for misconduct in an action on the case; (2) that in cases of forgery of records, there is usually a party to be injured by falsification of the record; and (3) that in any view the prejudice to others is enough even if it be contingent and remote.[2] But if the alleged record is on its face inoperative, it does not fall under this head. Hence it is not forging an exemplification to make falsely a document purporting to be a decree of divorce, which does not on its face purport to be a copy from the record.[3]

And so of book entries.

§ 684. The law as to book entries has been already discussed in another connection.[4] It is enough now generally to state that it is forgery for the treasurer of a society to make entries in his banker's pass-book of false deposits purporting to have been made by him as treasurer of such society;[5] for a vendor to make false entries in his book of original entries when such books are legal evidence against a vendee;[6] for a clerk to make a false statement in his journal of the sum of money received by him for his employers;[7] and for a person keeping his own books, falsely to alter a joint settlement of accounts between him and a customer.[8]

And so of railway or other tickets.

§ 685. A ticket, when noticed in the present relation, is an order from the treasurer or ticket agent of an institution, addressed to a doorkeeper, conductor, or other working agent, requiring him to admit the holder to certain rights. Hence the ticket, resolved into its elements, is an obligation which, if genuine, subjects the obligor to legal process; and hence the forgery of a ticket which possesses this characteristic is forgery at common law. This applies to all tickets on which the obligor may be held responsible; *e. g.*, railway tickets,

[1] People *v.* Cady, 6 Hill N. Y. 490. See State *v.* Tompkins, 71 Mo. 613.

[2] R. *v.* Nash, 2 Den. C. C. 493; R. *v.* Dodd 18 L. T. N. S. 89. See *infra*, §§ 693 *et seq.*, 701, 743.

[3] Brown *v.* People, 86 Ill. 239.

[4] See *supra*, §§ 666, 667.

[5] R. *v.* Smith, 9 Cox C. C. 162; Leigh & C. 168; R. *v.* Moody, 9 Cox C. C. 166; L. & C. 173; R. *v* Dodd, 18 L. T. (N. S.) 89.

[6] *Supra*, §§ 666, 667.

[7] Ibid.; People *v.* Phelps, 49 How. (N. Y.) Pr. 462; Biles *v.* Com., 32 Penn. St. 529.

[8] Barnum *v.* State, 15 Ohio, 717.

tickets to exhibitions, concerts, theatres, and lottery tickets, when the latter are not forbidden by law.[1]

But suppose the ticket be free, or consist simply of a free pass? This question has arisen in England and in the United States; and it has been properly held that, as there is always some consideration, greater or less, received for such tickets, and as, at all events, the issuers of such tickets are liable for gross negligence to the holders in case of accident, the forgery of such tickets or passes is indictable at common law.[2]

Yet, at the same time, it must be remembered that, to make any ticket appear to be an obligation which it is forgery to falsify, something more than the mere words of the ticket must usually be set out in the indictment. The ticket on its face, rarely, if ever, contains a legal obligation. It is very briefly expressed, and sometimes the salient words are given only in signs and initials. These gaps and breaks the indictment must supply, so that the obligation may appear to be one on which the obligor is responsible. And if such description be erroneous, it is fatal, for the description, being material, cannot be rejected as surplusage.[3]

It was once thought in England that, while the *forging* of a railway pass was indictable at common law, such was not the case as to *uttering*.[4] This distinction, however, cannot be maintained, and it may now be said to be acknowledged that in all cases where it is forgery to *make* an instrument, it is indictable at common law to *utter* such forged instrument.[5]

False making of another's signature to any statement exposing the latter to suit is forgery.

§ 686. The false making of the signature of another as authority for any statement which, if the writing were true, would expose that other to an action of assumpsit, or a suit for damages for deceit, will subject the person falsely writing or printing such signature to an indictment for forgery.[6] But the statement must be one in some way calculated to expose to suit the party whose name is forged.[7]

[1] See R. *v.* Fitch, 9 Cox C. C. 160.

[2] Com. *v.* Ray, 3 Gray, 441. See R. *v.* Boult, 2 C. & K. 604; *infra*, § 705.

[3] Com. *v.* Ray, 3 Gray, 441.

[4] R. *v.* Boult, 2 C. & K. 604.

[5] R. *v.* Sharman, Dears. C. C. 285; 6 Cox C. C. 312; 24 Eng. L. & Eq. 553.

[6] Ames's Case, 2 Greenl. 365; though see State *v.* Givens, 5 Ala. 747.

[7] Jackson *v.* Weisiger, 2 B. Monroe, 214. *Infra*, § 691.

§ 687. Forging and uttering a certificate of good character, with intent to defraud and with a capacity for defrauding, is indictable at common law,[1] if there be anything in the recommendation on which a suit could be brought if it were valid.[2] And under this head fall testimonials of character for the purpose of obtaining office;[3] and letters of recommendation for the purpose of receiving specific bounties or favors, when the alleged writer of such letters would be liable to suit if the letter were genuine and damage ensued. But a mere complimentary letter of introduction does not fall within the rule.[4]

So of certificate of character.

§ 688. But there must be an intent to defraud a particular person, or class of persons.[5] Hence, the false making of a diploma, and hanging it up in the defendant's house, without the intent to commit a fraud, has been held not to be forgery,[6] though it would be otherwise if the diploma were used as a certificate of character.[7] And, as we have seen, painting a picture, intending to represent that it was painted by an eminent artist, and writing that artist's name in the corner, is not forgery.[8]

But not, *it seems*, of pictures.

§ 689. Of course, when a certificate as to negotiable paper takes the technical form of an indorsement,[9] its false making is forgery, if the instrument is one which would sustain *primâ facie* a suit.[10] And so must it be as to the marking good of cheques; though this, in respect to the guaranty of a note, has been doubted in Alabama, under the peculiar statute of that State.[11]

Certificate as to negotiable paper is the subject of forgery.

§ 690. When a trade-mark or label can be made the basis of a suit against the alleged issuer in an action for deceit or warranty, then to falsely appropriate such trade-mark or label

[1] R. *v.* Toshack, T. & M. 207; 1 Den. C. C. 592; 4 Cox C. C. 38; R. *v.* Sharman, Dears. C. C. 285; 6 Cox C. C. 312; R. *v.* Mitchell, 2 F. & F. 44; R. *v.* Moah, 7 Cox C. C. 503; Dears. & B. 550.

[2] Waterman *v.* People, 67 Ill. 91.

[3] R. *v.* Sharman, R. *v.* Moah, *ut sup.*

[4] Ibid.; U. S. *v.* Green, 2 Cranch. C. C. 521; Mitchell *v.* State, 56 Ga. 171.

[5] *Infra*, § 717.

[6] R. *v.* Hodgson, Dears. & B. 3; 7 Cox C. C. 122, noticed *infra*, § 718. *Infra*, §§ 709, 718, 1139 *et seq.*

[7] McClure *v.* Com., 86 Penn. St. 353.

[8] R. *v.* Closs, D. & B. 460. *Supra*, § 681.

[9] R. *v.* Lewis, Foster, 116; Poage *v.* State, 3 Ohio St. 229; Penns. *v.* Misner, Addison, 44.

[10] Com. *v.* Dallinger, 118 Mass. 439.

[11] State *v.* Givens, 5 Ala. 747.

is forgery; otherwise not. Thus, if a false certificate from A. be made by B. as to the value of certain papers or goods, this is forgery in B., because A. would have been liable on this certificate, if genuine, in an action for deceit. But if there be no guaranty implied or expressed, then forgery does not lie. Thus, in a trial in England, it appeared that the prosecutor sold powders called "Borwick's Baking Powders," and "Borwick's Egg Powders," wrapped in printed papers; and that the defendant procured 10,000 wrappers to be printed similar to Borwick's, except that the name of Borwick was omitted. The defendant then sold in these wrappers, in other respects similar to those of the prosecutor, powders of his own. The jury found that the wrappers so far resembled Borwick's as to deceive a person of ordinary observation, and that they were prepared by the defendant for the purposes of fraud. The court, however, held that there was no forgery, for no suit of any kind could have been maintained against Borwick on the wrappers as reproduced by the defendant.[1]

So of trade-mark or label when party issuing is liable to action of deceit.

§ 691. It has been already stated that an instrument, to be the subject of forgery, must be such that it can be used as proof, either perfect or imperfect, in a suit with another. Upon this qualification several observations may now be made.[2]

The instrument must be capable, if genuine, of being proof in legal process.

§ 692. It is not necessary that such process should be against the party in whose name the forged instrument is made. It is enough if, in a suit brought by such party, such forged paper may be used as *primâ facie* proof.[3] Thus, it is forgery at common law to falsely make or alter a receipt, though such receipt, ordinarily speaking, could only be used in proof as evidence for the defence in a suit brought by the person whose name was forged. And hence, in

But such process need not be against the person whose name is forged.

[1] R. *v.* Smith, 8 Cox C. C. 32; Dears & B. C. C. 566. Sir J. F. Stephen (Dig. C. L. 357), speaking of this case, says: "It would seem as if in this case the element wanting to complete the offence was the intent to defraud by means of the document, rather than the absence of a document capable of being forged; the offence lay in selling spurious as real powders. The wrappers without the powders could have no effect whatever. The essence of forgery is that the document itself should be made the instrument of fraud."

[2] See *infra*, § 696.

[3] *Supra*, § 680. See Jacobs *v.* State, 61 Ala. 448.

cases heretofore noticed, it is ruled to be forgery for a clerk to make an entry on his books charging himself with a less amount of cash than he has actually received, though such entry, supposing it to bind the employer, would be viewed mainly as evidence against the employer on a suit brought by him against the clerk for a sum greater than that entered on the books.

Nor need the party injured have a local legal existence.

§ 693. Nor need the party injured be one who by the *lex delicti commissi* has a local legal existence. It does not follow that because a party is incapable of local legal existence he is incapable of being sued, either civilly or criminally, for deceit. Hence it is that prosecutions for forgery have under these circumstances been sustained.[1] Thus where, in cases already cited, the treasurers of certain English societies, which the law held incapable of legal existence, forged entries in bankers' pass-books in order to defraud such societies, it was held that this was forgery.[2] So, no doubt, an indictment for forgery would lie for forging the note of a married woman, though by the *lex delicti commissi* she is incapable of being civilly sued.[3] And the reasons for this are threefold. First, she might be liable to a prosecution for false pretences, supposing the note to be good, for obtaining money or goods on the false pretence of being *capax negotii*. Second, she might be sued extra-territorially in jurisdictions where coverture is no defence. Third, she may have a settled estate which may be bound by the note. And hence it is forgery to counterfeit the name of a banker who is by law prohibited from issuing genuine notes of the forged class.[4]

Nor need there be any immediate possible injury.

§ 694. Nor need there be any person capable of being immediately defrauded by the forgery. It is enough if injury may be possibly inflicted in the future.[5] This is strikingly illustrated in the cases to be presently cited

[1] See *infra*, §§ 714, 739; People *v.* Krummer, 4 Park. C. R. 217.

[2] R. *v.* Dodd, 18 L. T. (N. S.) 89; R. *v.* Smith, L. & C. 168; 9 Cox C. C. 162; R. *v.* Moody, L. & C. 173; 9 Cox C. C. 166. *Supra*, § 680; State *v.* Dufour, 63 Ind. 567.

[3] Wilcoxon *v.* State, 60 Ga. 184.

[4] See *infra*, §§ 698–700, and see Whart. Confl. of L. §§ 101, 110.

[5] *Infra*, §§ 713, 714, 739, 1200; R. *v.* Nash, 2 Den. C. C. 493; R. *v.* Sterling, 1 Leach, 99; though see R. *v.* Hodgson, D. & B. 3, 36; 7 Cox C. C. 122; *infra*, § 718, where it was held there must be some individuation of the person. *Infra*, § 709.

where it was held to be forgery to falsely make a will for a living person.[1]

Nor is it necessary that the instrument should be any more than *primâ facie* proof.

§ 695. It is enough if the party on whom the forgery is executed should be exposed to apparent risk.[2] Thus an instrument purporting on its face to be issued by a specific corporation or body politic is the object of forgery, though the names of the officers of such corporation or body politic are given erroneously in the forgery.[3] So it is forgery to make a false certificate of municipal indebtedness though the municipality has no power to incur such indebtedness.[4] It is forgery, also, to make a false note whose consideration, if the note were genuine, would be illegal.[5] That a forged instrument was on its face impeachable for usury is also no defence.[6] Nor is it a defence that the statute under which a forged bond purports to be issued, may on a contingency be declared to be unconstitutional.[7] And no matter how defective may have been the forgery, it is enough if there be a possibility of fraud.[8] Thus though a bill can only be negotiated by the indorsement of two payees, the false making of the indorsement of one of them is forgery;[9] and so of a note dated on Sunday.[10] And so a man may be convicted of forging the will of another who is still alive, as upon the latter's death the will, if genuine, would be the basis of legal procedure.[11] Yet, on the other hand, as will presently be seen, where a will is forged to devise

[1] *Infra*, § 697.

[2] *Supra*, § 680; R. *v.* Pike, 2 Moody C. C. 70; Com. *v.* Costello, 120 Mass. 358; Bishop *v.* State, 55 Md. 138; Langdale *v.* State, 100 Ill. 263; Harding *v.* State, 54 Ind. 359; Lemasten *v.* State, 95 Ibid. 367; State *v.* Fisher, 65 Mo. 437; Peete *v.* State, 2 Lea, 513; State *v.* Ferguson, 35 La. An. 1042. See Fadner *v.* People, 40 Hun, 695; Rembert *v.* State, 53 Ala. 467. *Supra*, §§ 182–5.

[3] U. S. *v.* Turner, 7 Peters, 132; R. *v.* Pike, 2 Moody C. C. 70. See *infra*, §§ 743–4; and as to fictitious banks, *supra*, § 660. *Infra*, § 746.

[4] State *v.* Eades, 68 Mo. 150.

[5] Dunn *v.* People, 4 Col. 126.

[6] People *v.* Fadner, 10 Abb. New Ca. 462; but see S. C. in error, 40 Hun, 240.

[7] Bowles *v.* State, 37 Ohio St. 85.

[8] R. *v.* Elliot, 1 Leach, 175; R. *v.* Fitzgerald, 1 Leach, 20; U. S. *v.* Turner, 7 Peters, 132; Com. *v.* Costello, 120 Mass. 358; Kegg *v.* State, 10 Ohio, 75; State *v.* Dennett, 19 La. An. 395; Harding *v.* State, 54 Ind. 359. See U. S. *v.* Sprague, 11 Biss, 376; Costley *v.* State, 14 Tex. Ap. 156.

[9] R. *v.* Winterbottom, 2 C. & K. 37; S. C., 1 Den. C. C. 41.

[10] Vansickle *v.* People, 29 Mich. 61.

[11] R. *v.* Sterling, 1 Leach, 99; R. *v.* Coogen, Ibid. 449; S. C., 2 East P. C. 948.

lands, without the formalities which the *lex rei sitae* prescribes as necessary to the validity of such an instrument, the offence is held not forgery at common law.[1] But, generally, no matter how good may be the defence that the party whose name is forged may have to the forged writing (*e. g.*, outlawry in case of a promissory note), if the forged writing be *primâ facie* capable of legal use, it is forgery.[2] And parol evidence is admissible to show that a document, when its ambiguity is latent, or when it is part of a general parol arrangement, is capable of sustaining a suit.[3] Hence, when by proof of extrinsic facts an apparently void document may be made effective, such document may be the subject of forgery.[4]

But an instrument that can in no possible case be sued on cannot be the object of forgery.

§ 696. But where an instrument is so palpably and absolutely invalid that it can under no circumstances be proof in a legal procedure, then falsely to make it is no forgery.[5] Thus a meaningless paper cannot be the subject of forgery;[6] nor an instrument so incomplete as to be obviously incapable of enforcement,[7] as a promissory note which has no signature;[8] nor a navy bill payable to —— or order;[9] nor a certificate of acknowledgment which does not state that the grantor made the acknowledgment;[10] nor a signature on its face so absurd a copy as to show that it was not intended to deceive.[11] As will be noticed in the next section, the same rule applies where the instrument forged has not the number of witnesses required by the applicatory law. But it is forgery to

[1] R. *v.* Wall, 2 East P. C. 953; R. *v.* Moffatt, 1 Leach, 481. *Infra*, § 697.

[2] See R. *v.* Teague, R. & R. 33.

[3] See Whart. on Ev. §§ 937 *et seq.*; and see R. *v.* Kay, L. R. 1 C. C. 257.

[4] State *v.* Briggs, 34 Vt. 503; Com. *v.* Ray, 3 Gray, 448; Com. *v.* Hinds, 101 Mass. 211; People *v.* Galloway, 17 Wend. 540; Carberry *v.* State, 11 Ohio St. 410; State *v.* Wheeler, 19 Minn. 98; Rembert *v.* State, 53 Ala. 467.

[5] Com. *v.* Dallinger, 118 Mass. 439; Henry *v.* State, 35 Ohio St. 128; Brown *v.* People, 86 Ill. 239; cited *infra*, § 683; John *v.* State, 23 Wis. 504; State *v.* Davis, 53 Iowa, 252; Roode *v.* State, 5 Neb. 174; Dunning *v.* Brown, 3 Col. 571; Howell *v.* State, 37 Tex. 591; Keeler *v.* State, 15 Tex. Ap. 112; People *v.* Head, 1 Idaho, N. S. 531.

[6] Henderson *v.* State, 14 Tex. 503; People *v.* Tomlinson, 35 Cal. 503; State *v.* Humphreys, 10 Humph. 442.

[7] Abbott *v.* Rose, 62 Me. 194; People *v.* Shall, 9 Cow. 778; Waterman *v.* People, 67 Ill. 91; State *v.* Wheeler, 19 Minn. 98; Howell *v.* State, 37 Tex. 591.

[8] R. *v.* Richards, R. & R. 193; R. *v.* Randall, Ibid. 195; R. *v.* Pateman, Ibid. 455. See R. *v.* Harper, cited *supra*, § 680.

[9] R. *v.* Burke, R. & R. 496.

[10] People *v.* Harrison, 8 Barb. 560.

[11] Abbott *v.* State, 59 Ind. 70.

falsely make a document which, though void and frivolous in itself, may be one of a chain of papers on which a *primâ facie* case may be sustained.[1]

Defects in seals, stamps, and attestations may not destroy legal efficacy.

§ 697. Defects as to legal formalities, *e. g.*, seals, or stamps, or due attestations, may not preclude such a prosecution. But when the law to which an instrument is subject makes it absolutely and everywhere inoperative without certain formalities, then falsely to make it without such formalties is not forgery.[2] Thus if certain witnesses are necessary to a deed or will, falsely making a deed or will without such witnesses is not forgery, if the law requiring such witnesses be as to realty the *lex rei sitae*, and as to personalty, the *lex domicilii*.[3] But it is otherwise when the law simply provides that without such formalities such instruments shall not be the foundation of a suit. In such case, according to the accepted doctrines of private international law,[4] the instrument could be sued on in a foreign land, without such formalities. Hence, falsely to make or alter such instrument, though without the due legal formalities, *e. g.*, *stamps*, is forgery.[5]

Forgery of void bank note not indictable, though otherwise when the intent and effect is to

§ 698. Making a bank note in the name of a bank which never existed, when there is no such similitude to any valid bank paper as would impose on a person of ordinary prudence, is not forgery,[6] though, as is elsewhere seen, to pass such a note renders the party concerned liable to an indictment for obtaining money by false pretences. So it is not forgery to counterfeit a bank note which, from

[1] Com. *v.* Costello, 120 Mass. 358; People *v.* Tomlinson, 55 Cal. 503; Howell *v.* State, 37 Tex. 591.

[2] Cunnigham *v.* People, 4 Hun, 455.

[3] R. *v.* Wall, 2 East P. C. 953; R. *v.* Rushworth, R. & R. 317; R. *v.* Burke, Ibid. 496; State *v.* Smith, 8 Yerg. 150; People *v.* Harrison, 8 Barb. 560.

[4] Whart. Confl. of Laws, § 685.

[5] R. *v.* Hawkeswood, 6 T. R. 606, note; R. *v.* Morton, 2 East P. C. 955; R. *v.* Pike, 2 Mood. C. C. 70; R. *v.* Teague, R. & R. 33; State *v.* Young, 47 N. H. 402; Carpenter *v.* Snelling, 97 Mass. 452; Penns. *v.* Misner, Addison, 44; Com. *v.* Searle, 2 Binn. 332; State *v.* Greenlee, 1 Dever. 523; People *v.* Frank, 28 Cal. 507; Horton *v.* State, 32 Tex. 79; State *v.* Haynes, 6 Cold. 550; Cross *v.* People, 47 Ill. 152; State *v.* Hill, 30 Wis. 416; though see John *v.* State, 23 Ibid. 504; State *v.* Mott, 16 Minn. 472.

An additional reason for the position in the text is to be found in those jurisdictions in which the revenue laws permit the stamp to be attached by any party wishing to use the paper. See Whart. on Ev. § 697.

[6] See *infra*, § 700; *supra*, § 660.

impose upon third person.

the law to which it is subject, is null and void.[1] If, however, a bank note is forged in the name of a bank purely fictitious, but with such skill and semblance to valid bank notes as to impose upon persons of ordinary prudence, the forgery, if the intent laid be to defraud the party on whom the note is passed, is indictable as forgery at common law.[2]

Notes of a prohibited denomination may be forged.

§ 699. Again, the fact that the circulation of notes below a particular denomination is forbidden by law does not relieve a person forging them from forgery, even though the intent laid be to defraud the bank. For (1) the banker may be made liable on such notes, the prohibition going only to circulation; and (2) there is also a possibility of defrauding third persons.[3] To forge even the notes of a person prohibited by a local law from issuing notes is indictable,[4] as he may be made extra-territorially liable,[5] and so, *a fortiori*, is the forgery of the notes of an expired bank.[6] As a consequence, if the bank note is so accurately counterfeited as to deceive, in the main, ordinary observers, it is no defence that the names of the officers nominally issuing the note were misrecited.[7]

A forged bank note must be such as to support a *primâ facie* case.

§ 700. It will be seen, therefore, that the instrument, in order to make it *primâ facie* proof, must appear, upon the face of it, to have been made to resemble a true instrument of the denomination mentioned in the indictment, so as to be capable of deceiving persons using ordinary observation,[8] although not those acquainted as experts with

[1] R. *v.* Moffatt, 1 Leach, 431.

[2] *Supra*, § 660; *infra*, § 749.

[3] State *v.* Vanhart, 2 Harr. (N. J.) 327; Butler *v.* Com., 12 S. & R. 237; Clary *v.* Com., 4 Barr, 210; Twitchell *v.* Com., 9 Ibid. 211; Thompson *v.* State, 9 Ohio St. 354. See Hendrick *v.* Com., 5 Leigh, 707; though see Van Horne *v* State, 5 Pike, 349.

[4] Butler *v.* Com., 12 S. & R. 237. See Cahoon *v.* State, 8 Ham. 537; and see Gutchins *v.* People, 21 Ill. 642, which holds that the doctrine of the text does not apply in cases where it is criminal to pass the bills whose forgery is attempted.

[5] Whart. Confl. of Laws, §§ 101, 110.

[6] White *v.* Com., 4 Binn. 418; Buckland *v.* Com., 8 Leigh, 732.

[7] U. S. *v.* Turner, 7 Peters, 132; R. *v.* Pike, 2 Mood C. C. 70.

[8] *Infra*, § 749. See Jervis's Arch. C. L. 6th ed. 305; R. *v.* Collicott, 2 Leach, 1048; 4 Taunt. 300; R. & R. 212, 219; R. *v.* Jones, 1 Leach, 204; U. S. *v.* Morrow, 4 Wash. C. C. 733; State *v.* McKenzie, 42 Me. 392; Dement *v.* State, 2 Head, 505. The bills should have the external appearance of those issued by the bank named; paper containing all the words and figures upon a genuine bank bill, with no other resemblance to it, cannot be said to be in the similitude of the latter, within the meaning of the Maine statute. State *v.* McKenzie, 42 Me. 392. The "similitude" exists, even though the banks in question issued no notes of the denomination forged. Com. *v.* Smith, 7 Pick. 137; State *v.* Carr, 5 N. H. 367; State *v.* Fitzsimmons, 30 Mo. 236.

such instrument.[1] Thus a person may be convicted of forging a cheque on a bank, although the counterfeit does not so much resemble the genuine cheque of the drawer as to be likely to deceive the officers of the bank on which it is drawn.[2] Were absolute similitude required, no indictment whatever could be maintained for forgery, for if the similitude were perfect, no forgery could be proved.

Hence if the offence be the imposition on another of the forged note of a fictitious bank, it is enough if the bank note be sufficiently like others of the same class to deceive the person on whom the note is passed, if prudent according to his lights.[3]

Fraud against public at large is sufficient to sustain indictment.

§ 701. An indictment may be maintained for forgery when the fraud is directed primarily against the public at large.[4] Several instances of this species of forgery have been already mentioned.[5] To these may be added that it is declared by Hawkins[6] to be forgery at common law to counterfeit a commission under the privy seal, and a license from the barons of the exchequer to compound a debt.

Not forgery to induce another to sign his name.

§ 702. As has been already shown, assent of the party injured, in most cases of private wrongs, bars a prosecution. In forgery it is no answer that this assent was procured by fraud. Thus it is not forgery to induce another, by misreading papers, to sign his name to an instrument he did not intend to sanction.[7] Even the prosecutor's laches may work an estoppel of his right to prosecute. Thus a party who permits another to use his name frequently and without rebuke cannot complain if the latter forge such name.[8]

[1] See R. *v.* Elliott, 2 East P. C. 950. And so of a photograph of a federal security under special federal statute. Holcomb, *ex parte*, 2 Dillon, 392. And so of being in any way concerned in manufacturing plates for forgery. U. S. *v.* Rossvalley, 3 Ben. 157.

[2] Com. *v.* Stephenson, 11 Cush. 481.

[3] *Supra*, § 660.

[4] *Infra*, § 717.

[5] *Supra*, § 683.

[6] 1 P. C. 31.

[7] R. *v.* Chadwick, 2 M. & Rob. 545; R. *v.* Collins, Ibid.; Com. *v.* Sankey, 22 Penn. St. 390; Hill *v.* State, 1 Yerg. 76; Putnam *v.* Sullivan, 4 Mass. 53. See *infra*, § 1131.

[8] See Weed *v.* Carpenter, 4 Wend. 219. *Supra*, §§ 147, 668.

IV. UTTERING, ETC.

Uttering and publishing is knowingly passing a document as good.

§ 703. To utter and publish a document is to offer directly or indirectly, by words or actions, such document as good.[1] Passing a paper, under the statute, it is said, is putting it off in payment or exchange.[2] To constitute the offence of uttering and publishing it is necessary that there should be a knowledge of the falsity of the document; and this is in itself implied in an intent to defraud.[3]

Uttering forged notes is indictable at common law.

§ 704. Uttering forged bank notes, as a rule, is indictable at common law under the limitations already given as to forgery.[4] Under statute, passing a counterfeit note in the name of a fictitious person, under an assumed name, or on a bank which never existed, has been made indictable. It is not necessary, it has been held under statute, that the note, if genuine, should be valid, if, on its face, it purports to be good.[5]

To uttering an intent to defraud is necessary.

§ 705. The uttering of a forged instrument, the forgery of which is only a forgery at common law, it has been said in England, is no offence, unless some fraud was actually perpetrated by it; and where, in such a case, the indictment contained some counts for forging the instrument and others for uttering it, and the defendant was acquitted on the counts for the forgery, and convicted on the counts for the uttering, the judgment was arrested.[6] Such, however, seems no longer to be the law, when there is an intent to defraud some person, known or

[1] Com. *v.* Searle, 2 Binney, 332. See R. *v.* Green, Jebb's C. C. 281; State *v.* Redstrake, 10 Vroom, 365; Leonard *v.* State, 29 Ohio St. 408. *Infra*, § 706.

[2] U. S. *v.* Mitchell, 1 Bald. C. C. 367. See *infra*, § 752. That mere offering is enough, see R. *v.* Welch, 4 Cox C. C. 430; People *v.* Caton, 25 Mich. 388. Under the federal statute, delivering spurious notes as spurious to a third person in order to pass them on the public is "uttering." U. S. *v.* Nelson, 1 Abb. U. S. 135.

Pledging a counterfeit note, which was to be redeemed at a future day, is not a passing within the meaning of the act in force in Tennessee. Gentry *v.* State, 3 Yerg. 451, Catron, J., diss. But see R. *v.* Birkett, R. & R. 86.

[3] *Infra*, §§ 713, 742. For passing bad notes as a cheat, see *infra*, § 1123.

[4] Lewis *v.* Com., 2 S. & R. 551; Com. *v.* Seer, 2 Va. Cas. 65; State *v.* Stroll, 1 Rich. 244.

[5] U. S. *v.* Mitchell, 1 Bald. C. C. 367; Butler *v.* Com., 12 S. & R. 237. See *supra*, §§ 660, 700.

[6] R. *v.* Boult, 2 C. & K. 604.

unknown,[1] which intent it is the duty of the prosecution to prove.[2] And the intent to defraud, as will presently be seen more fully, is to be inferentially proved.[3]

Uttering may be inferentially proved.

§ 706. Uttering has been held to be proved by staking at a gaming table;[4] paying to a woman as the price of illicit connection;[5] leaving on a shop counter, when this was preceded by the offer of the forged instrument in payment for goods, and the detection of its spuriousness by the shop-keeper;[6] exhibiting to others forged testimonials of character for the purpose of fraudulently obtaining an office of emolument;[7] putting a forged deed on record;[8] pledging with another a forged note payable to defendant's order, though such note is not indorsed, and hence not negotiable;[9] exhibiting to another, for the purpose of obtaining credit, a forged receipt, though the defendant refused to permit the paper to pass out of his hands;[10] passing a forged instrument on a creditor, though only conditionally;[11] exhibiting a forged note for the purpose of bringing suit;[12] and handing back to the prosecutor a bad shilling in place of a good one given defendant, pretending they were the same.[13]

No defence that instrument was obtained by a trap.

§ 707. It is not a defence that the forged instrument was obtained from the defendant by a trap by a detective employed for the purpose.[14]

§ 708. But uttering is not constituted by giving a forged engraving to another as a specimen of skill, there being no intention that it should be put in circulation;[15] nor by leaving forged notes sealed up as a deposit;[16] nor by exhibiting such

[1] R. *v.* Sharman, Dears. C. C. 285; 6 Cox C. C. 312; 24 Eng. L. & Eq. 553.

[2] *Infra*, § 713.

[3] Ibid.

[4] State *v.* Beeler, 1 Brev. 482.

[5] R. *v.* ——, 1 Cox C. C. 250.

[6] R. *v.* Welch, 1 Eng. L. & Eq. 588; 2 Den. C. C. 78; 4 Cox C. C. 430.

[7] R. *v.* Sharman, Dears. C. C. 285; 6 Cox C. C. 312; 24 Eng. L. & Eq. 553.

[8] U. S. *v.* Brooks, 3 McArthur, 315; Perkins *v.* People, 27 Mich. 387. See Paige *v.* People, 3 Abb. App. Dec. 441.

[9] R. *v.* Birkett, R. & R. 86. See R. *v.* Wicks, Ibid. 149.

[10] R. *v.* Radford, 1 C. & K. 707; 1 Den. C. C. 59. See R. *v.* Ion, 2 Ibid. 475; 6 Cox C. C. 1.

[11] R. *v.* Cooke, 8 C. & P. 582.

[12] Chahoon *v.* Com., 20 Grat. 734.

[13] R. *v.* Franks, 2 Leach. 644. *Infra*, § 752.

[14] R. *v.* Holden, R. & R. 154; 2 Taunt. 334. See *infra*, §§ 766, 770, 917, 1039; and *supra*, §§ 149, 231 *a*, to general question of connivance and trap.

[15] R. *v.* Harris, 7 C. & P. 428.

[16] R. *v.* Shukard, R. & R. 200.

notes to another when the object is not to obtain money, but to create a false idea of wealth or professional standing.[1] But offering with intent to defraud is uttering, though there be no acceptance.[2]

But there must be an offering of the instrument *lucri causa.*

We may therefore hold that an exhibition of a forged instrument, *lucri causa*, is uttering, though possession be retained; but that the mere exhibition of a forged instrument to another, or even passing it to another, not *lucri causa*, or with intent to defraud, is not uttering.[3]

So of capacity to injure.

§ 709. There must also be a capacity to injure. It is not an indictable offence to utter a paper which could in no case be the subject of suit.[4]

When offence is felony, parties counselling are accessaries before the fact.

§ 710. When the offence is a felony by statute, the defendant, to be a principal, must be either present when the act is done, privy to it, or aiding, consenting, or procuring it to be done under his immediate direction.[5] In such case, proof of uttering by a guilty agent employed by the defendant for that purpose, the defendant being present at the time, is the same as proving the act to have been done by himself.[6] But where several, by concert, are privy to the uttering of a forged note, which is uttered by one only in the absence of the others, he only who utters it, by the common law, is a principal; while the others are accessaries before the fact.[7] Under recent statutes, in many States, however, all are principals.[8]

[1] *Supra*, § 688. R. *v.* Shukard, *ut supra.* Mr. Greaves, in his note to this case (2 Russ. on Cr. 828), says that the ruling does not warrant the statement in the text, since "what the prisoner did was to show so much only of the notes as should lead to the supposition that they were bank notes, which they were not."

[2] *Infra*, § 752; R. *v.* Franks, 2 Leach, 736; R. *v.* Welch, 4 Cox C. C. 430; 2 Den. C. C. 78; People *v.* Caton, 25 Mich. 388; State *v.* Horner, 48 Mo. 520, and prior notes to this section.

[3] See *supra*, § 691; R. *v.* Hodgson, D. & B. C. C. 3; 7 Cox C. C. 122; 36 Eng. L. & Eq. 626, cited *supra*, § 688. See R. *v.* Page, and other cases cited *infra*, § 752.

[4] *Supra*, § 691; State *v.* Anderson, 30 La. An. Pt. I. 401.

[5] *Supra*, §§ 206–17, 655; U. S. *v.* Mitchell, 1 Bald. C. C. 367; Chahoon *v.* Com., 20 Grat. 734.

[6] *Supra*, §§ 209, 246; R. *v.* Palmer, 1 N. R. 96; R. & R. 72; U. S. *v.* Morrow, 4 Wash. C. C. 733; Com. *v.* Hill, 11 Mass. 136; Hopkins *v.* Com., 3 Met. 466. The instigator is principal where the agent was unconscious of the fraud. R. *v.* Giles, 1 Mood. C. C. 166. *Supra*, § 206.

[7] R. *v.* Soares, R. & R. 25; R. *v.* Badcock, Ibid. 249; R. *v.* Stewart, Ibid. 363; R. *v.* Davis, Ibid. 113. See R. *v.* Morris, Ibid. 210; 2 Leach, 1096; see, also, R. *v.* Harris, 7 C. & P. 416. *Supra*, § 217.

[8] *Supra* § 205.

Venue is place where forged instrument was passed.

§ 711. On the supposition that the crime of uttering and publishing is not complete until the paper is transferred and comes to the hands or possession of some person other than the forger, his agent or servant,[1] where a forged document is sent by the forger from one jurisdiction to an individual in another jurisdiction, the crime may be prosecuted both in the jurisdiction of uttering and in the jurisdiction in which the document is received by the person to whom it is sent.[2]

Uttering is an independent offence.

§ 712. To constitute the offence of uttering, it is in no case requisite to show that the defendant had been implicated in the forgery.[3] Nor under an indictment for forgery can there be a conviction of uttering.[4]

Intent to defraud to be inferred from facts.

§ 713. The intention to defraud[5] is at common law an essential to the completion of the offence,[6] though it is not necessary to show that the prosecutor was actually defrauded.[7] If the jury can infer from the circumstances that it was the defendant's intention to defraud the party averred, known or unknown,[8] there being an apparent possibility of fraud, it is sufficient to satisfy such allegation in the indictment,[9] though,

[1] *Supra*, §§ 287–9. Com. *v.* Searle, 2 Binn. 332; see Perkins's Case, 2 Lew. C. C. 150, where it was held that *mailing* is proof of uttering in the place mailed; *supra*, § 706, where *exhibition* to another was held enough.

[2] *Supra*, §§ 287–9. *Infra*, § 747. People *v.* Rathbun, 21 Wend. 509.

[3] Com. *v.* Houghton, 8 Mass. 107; Brown *v.* Com., Ibid. 59.

[4] State *v.* Snow, 30 La. An. Pt. I. 401. See State *v.* Burgson, 53 Iowa, 318. That the offences cannot be joined in one indictment, see State *v.* McCormack, 56 Iowa, 585. But see *contra*, Whart. Cr. Pl. & Pr. §§ 285 *et seq.*

[5] R. *v.* Hodgson, 36 Eng. L. & Eq. 626; 7 Cox C. C. 122. See *supra*, § 694, that *immediate* effect is not necessary.

In Pennsylvania, under an indictment for forgery under the Act of March 31, 1860, § 169, it is unnecessary to prove an intent to defraud any particular person. McClure *v.* Com., 86 Penn. St. 353.

[6] R. *v.* Powell, 2 W. Bl. 787; R. *v.* Holden, 2 Taunt. 334; State *v.* Redstrake, 10 Vroom, 365; Couch *v.* State, 28 Ga. 367; Stephens *v.* State, 56 Ibid. 604.

[7] *Supra*, §§ 695, 705; R. *v.* Crook, 2 Str. 901; R. *v.* Goate, 1 Ld. Ray. 737; Com. *v.* Ladd, 15 Mass. 526; Com. *v.* Goodenough, 1 Thach. C. C. 132; Penn. *v.* Misner, Add. 44; Hess *v.* State, 5 Ohio, 12; State *v.* Washington, 1 Bay, 120; Snell *v.* State, 2 Humph. 347.

[8] See *infra*, § 714.

[9] R. *v.* Jones, 12 East P. C. 991; R. *v.* Hill, 8 C. & P. 274; R. *v.* Vaughan, Ibid. 276; R. *v.* Cooke, Ibid. 582, 586; R. *v.* Geach, 9 Ibid. 499; U. S. *v.* Moses, 4 Wash. C. C. 726; Miller *v.* State, 51 Ind. 405; Schroeder *v.* Har-

from circumstances of which the defendant is not apprised, he could not have succeeded in the fraud;[1] though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him;[2] and though the object was to defraud whoever might take the instrument, and the intention of defrauding the person specially liable on the instrument if genuine, did not enter into the prisoner's contemplation.[3] And both intents (an intent to defraud the person whose name is forged, and an intent to defraud the person on whom the forgery is to be passed) may be laid in the same indictment, to meet either phase of proof,[4] and so may the intent to defraud any party actually defrauded,[5] or even to defraud an unknown person on whom the counterfeit might be passed.[6] An allegation of an intent to defraud an individual may be sustained, also, by proof of fraud on a firm of which the individual was a member.[7] Other forgeries, part of the same system, are admissible to prove intent.[8]

vey, 75 Ill. 638. See Whart. Crim. Ev. § 34, as to inductive proof in such cases.

[1] R. v. Holden, R. & R. 154; Jervis's Arch. 9th ed. 370; R. v. Marcus, 2 C. & K. 356.

[2] R. v. Sheppard, R. & R. 169. See R. v. Harvey, 2 B. & C. 257; 3 D. & R. 464. That fraud in such cases is to be inferred from facts, see Whart. Crim. Ev. § 53; and see People v. Marion, 29 Mich. 31. *Infra*, §§ 718, 743.

[3] R. v. Mazagora, R. & R. 291; R. v. Crowther, 5 C. & P. 316; R. v. Nash, 2 Den. C. C. 493; U. S. v. Shelmire, 1 Bald. C. C. 371. *Supra*, § 695.

[4] R. v. Hill, 8 C. & P. 274; R. v. Hanson, 2 Mood. C. C. 245; R. v. Mazagora, R. & R. 291; People v. Curling, 1 John. 320; Com. v. Carey, 2 Pick. 47; Brown v. Com., 2 Leigh, 769. *Infra*, §§ 742–6; Whart. Crim. Ev. § 135.

[5] R. v. Hanson, *ut supra*; People v. Curling, *ut supra*.

[6] State v. Phillips, 78 Mo. 49.

[7] State v. Hastings, 53 N. H. 452; Stoughton v. State, 2 Ohio St. 562.

It must be noticed, however, that there may be circumstances, the existence of which will tend to rebut the inference of guilty intention. Thus a coöbligor may be guilty of forgery, in assigning a bill given by himself and another; but his having it in his possession may be evidence of authority over it, and if there be no intention to defraud, it is not forgery. Penns. v Misner, Add. 44.

Where a forged bill of exchange, payable to the order of the defendant, while given as a pledge only, was given to obtain credit, it was held that there

[8] *Infra*, §§ 715, 717; Whart. Crim. Ev. §§ 39, 844; U. S. v. Brooks, 3 MacArthur, 315; U. S. v. Houghton, 14 Fed. Rep. 544; 4 Cr. L. Mag. 243; People v. Flanders, 18 Johns. 164; Com. v. Searle, 2 Binn. 332.

§ 714. The fact that no person is at the time legally in a situation to be defrauded by the act, is no defence,[1] if there is a possibility of such fraud. It is sufficient if the intent be laid to defraud persons unknown, or any person on whom the counterfeit is passed, or the public generally.[2]

No defence that there was no party at the time to be defrauded.

§ 715. As has been elsewhere shown,[3] if a party be charged with knowingly making, holding, or passing forged instruments, and the fact of his possession of the instruments be shown, but his knowledge of their character is disputed, it is admissible to prove that about the same time he held or uttered similar forged instruments to an extent which makes it improbable that he was ignorant of the forgery.[4] Nor, as it is now ruled, does it exclude such evidence if the offence thus introduced has been the subject of another indictment;[5] nor that it

Scienter may be proved by other forgeries or utterings.

was a fraudulent intent, within the meaning of the statute. R. v. Birkett, R. & R. 86.

A forged check, drawn on Worcester Old Bank, was presented by the prisoner to Rufford's Bank, at Stourbridge, and refused; and, upon an indictment for forging and uttering a cheque, with intent to defraud the Messrs. Rufford, it was objected, that as it was not drawn upon them, it could not defraud them; but Bosanquet, J., held, that as it was presented at their bank for payment, it was evidence of an intent to defraud them. R. v. Crowther, 5 C. & P. 316.

[1] *Supra*, §§ 693 *et seq.*; R. v. Nash, 2 Den. C. C. 493; R. v. Dodd, 18 L. T. N. S. 89; R. v. Crowther, 5 C. & P. 316. In R. v. Tylney, 1 Den. C. C. 319 (*supra*, § 682), there was a division of opinion as to whether a count charging an intent to defraud a person unknown to the grand jurors could be sustained. In R. v. Hodgson, D. & B. 3; 7 Cox C. C. 714, noticed *infra*, § 718, it was said that there must be some person capable of specification, who would have been defrauded or injured by the forgery. But see *supra*, §§ 688, 713. *Infra*, § 743 *a*.

[2] State v. Keneston, 59 N. H. 36.

[3] Whart. Cr. Ev. § 39.

[4] R. v. Ball, R. & R. 132; 1 Camp. 324; R. v. Hough, R. & R. 120; R. v. Balls, 1 Mood. C. C. 470; R. v. Fuller, R. & R. 308; R. v. Moore, 1 F. & F. 73; R. v. Salt, 3 Ibid. 834; U. S. v. Craig, 4 Wash. C. C. 729; U. S. v. Hinman, 1 Bald. 292; U. S. v. Doebler, 1 Bald. 519; State v. McAllister, 24 Me. 139; Com. v. Stearns, 10 Met. 256; Com. v. Hall, 4 Allen, 305; Com. v. Edgerly, 10 Ibid. 184; Spencer v. Com., 2 Leigh, 751; Hendricks v. Com., 5 Ibid. 708; Wash. v. Com., 16 Grat. 530; State v. Twitty, 2 Hawks, 248; State v. Odel, 3 Brev. 552; State v. Williams, 2 Rich. 418; Mason v. State, 42 Ala. 532; Reed v. State, 15 Ohio, 217; McCartney v. State, 3 Ind. 353; Steele v. State, 45 Ill. 152; Peek v. State, 2 Humph. 78; People v. Frank, 28 Cal. 507.

[5] R. v. Forster, Dears. C. C. 456; 6 Cox C. C. 521; Com. v. Stearns, 10

occurred subsequently to that under trial, if the two appear to be part of a common system.[1] But when the illustrative offence is a forgery of another class, perpetrated several years before, it is inadmissible.[2] It is not, however, made inadmissible, if it were part of the same system, by the fact that it is different as to parties injured from the case on trial.[3] The same inference is to be drawn from the possession of the machinery for forgery or coining by the defendant or his confederates.[4]

V. PROOF OF CHARTER OF BANK.

§ 716. So far as concerns *pleading*, this question is discussed in other volumes.[5] On the topic of evidence, the following points may be regarded as established:—

When bank is defrauded, existence of bank must be proved or judicially noticed.

If the indictment charge the intent to be simply to defraud the bank, and if by the statutes *delicti commissi* the bank must be one duly incorporated, then not only must the indictment aver, but the evidence must show the bank to have been so incorporated. So far as concerns *home* banks, this is done by implication of law. Each court takes notice of the statutes of its particular legislature as a matter of law.[6]

With regard to foreign banks, however, the divergence of opinion is marked. Can the charters of such banks be proved by parol? To this incline some courts, though in States where the statutory exactions on this point are not stringent.[7] But by strict practice it

Met. 256; Hoskins *v.* State, 11 Ga. 92; though see R. *v.* Smith, 2 C. & P. 633; R. *v.* Smith, 4 Ibid. 411.

[1] R. *v.* Forster, *ut supra;* Com. *v.* Price, 10 Gray, 472.

[2] Morris *v.* State, 8 S. & M. 762. See R. *v.* Salt, 3 F. & F. 834.

[3] R. *v.* Harris, 7 C. & P. 429; R. *v.* Oddy, 2 Den. C. C. 264; 5 Cox C. C. 210.

[4] R. *v.* Fuller, R. & R. 308; U. S. *v.* Hinman, 1 Bald. 292; U. S. *v.* Craig, 4 Wash. C. C. 729; People *v.* Thomas, 3 Parker C. R. 256; People *v.* Farrell, 30 Cal. 316; People *v.* Page, 1 Idaho, 114.

[5] Whart. Cr. Pl. & Pr. §§ 110, 167; Whart. Cr. Ev. § 102 *a*.

[6] See Com. *v.* Carey, 2 Pick. 47; Calkins *v.* State, 18 Ohio St. 236; Owen *v.* State, 5 Sneed, 493. As to analogy of larceny, see Smith *v.* State, 28 Ind. 321.

[7] People *v.* Davis, 21 Wend. 309; People *v.* Peabody, 25 Ibid. 472; Dennis *v.* People, 1 Parker C. R. 469; Reed *v.* State, 15 Ohio, 217; Sasser *v.* State, 13 Ibid. 458; Cady *v.* Com., 10 Grat. 776; People *v.* Hughes, 29 Cal. 257. Whart. Cr. Ev. §§ 102 *a et seq.*

is necessary to prove such foreign charters by certified copies of the acts of incorporation;[1] though in many States the authorized statutes of other States are admissible evidence.[2]

But if the intent be laid to be to defraud some third person, then all this strictness vanishes; and even though on the face of the record the bank is a myth, and though the prosecution fails to prove that any such bank exists; yet, if the *bank note* be correctly described and proved according to the description, and if the person intended to be defrauded be also accurately described and adequately proved, then the prosecution can be sustained. For, if these last two conditions hold good, it matters not that the bank was extinct, or even that such a bank never existed at all.[3]

VI. INTENTION.

§ 717. As has been already seen,[4] it is not forgery for a party to insert in a contract executed by the other side as well as by himself, a clause he understood the other side to have agreed to.[5] It is the essence of forgery that it should be with fraudulent intention.[6] It has also been shown that such intention is to be inferred from facts;[7] and that *scienter* may be shown by other forgeries and fraudulent utterings.[8] A general intent to defraud is enough. It is not necessary that it should appear that the intent was pointed at any particular person.[9]

Intention to defraud necessary to offence.

§ 718. When the intention to give effect to the forged document is established, it is no defence that the party intended to pay the debt secured thereby, or to save harmless the injured party,[10] or that

[1] Stone *v.* State, 1 Spencer, 401; Jones *v.* State, 5 Sneed, 346; State *v.* Morton, 8 Wis. 352. See State *v.* Newland, 7 Iowa, 242.

[2] Whart. Confl. of Laws, § 779.

[3] *Supra*, § 660; *infra*, § 742; and see, also, generally U. S. *v.* Foye, 1 Curtis C. C. 364; State *v.* Hayden, 15 N. H. 355; People *v.* Davis, 21 Wend. 309; People *v.* Peabody, 25 Ibid. 472; Com. *v.* Smith, 6 S. & R. 568; State *v.* Jones, 1 McM. 236.

[4] *Supra*, §§ 653 *et seq.*, 699; and see Com. *v.* Henry, 118 Mass. 400.

[5] Pauli *v.* Com., 89 Penn. St. 432.

[6] See Montgomery *v.* State, 12 Tex. Ap. 323.

[7] *Supra*, § 713.

[8] See Whart. Crim. Ev. §§ 39, 844; and see Francis *v.* State, 7 Tex. Ap. 501; Heard *v.* State, 9 Ibid. 1; Robinson *v.* State, 66 Ind. 331; Carver *v.* People, 39 Mich. 786.

[9] *Supra*, § 701. Whart. Crim. Ev. §§ 149, 734; R. *v.* Beard, 8 C. & P. 582; State *v.* Wooderd, 20 Iowa, 541; McClure *v.* Com., 86 Penn. St. 353.

[10] *Supra*, § 119. R. *v.* Forbes, 7 C. & P. 224; R. *v.* Cooke, 8 Ibid. 582; R. *v.* Geach, 9 Ibid. 499; Com. *v.* Henry,

he agreed to take it back if not genuine ;[1] or that the claim to support which the document was forged was just.[2] But the intention must in some way be proved. Thus, in an English case already noticed, A. forged a diploma of the College of Surgeons, intending to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and showed it to two persons with intent to induce that belief in them. This was held not to be an intent to defraud, though there was an intent to deceive.[3]

No defence that the party intended no harm, or that the claim was just.

VII. HANDWRITING.

§ 719. The subject of Handwriting is discussed in an independent treatise, to which reference is now made.[4]

VIII. HAVING COUNTERFEIT MONEY IN POSSESSION.

§ 720. *Having counterfeit money in possession with intent to pass the same* is a statutory offence in most jurisdictions in this country, and by some courts has been held an offence at common law.[5] To constitute this offence, it is not ordinarily necessary to prove that the intent in keeping the notes or coin is to pass them as *genuine*. It will be enough if it appear that the ultimate object is fraud; though the intermediate object may have been the supply of a co-conspirator.[6] But when the statute contains the words, "as true," the intent to utter as true must be averred and proved;[7] and under

Having counterfeit money in possession with intent a statutory offence.

118 Mass. 400; Perdue *v.* State, 2 Humph. 494. As to larceny, *infra*, § 906.

[1] Ibid. R. *v.* Portis, 40 Up. Can. Q. B. 214.

[2] R. *v.* Wilson, 1 C. & K. 527. See R. *v.* Forbes, 7 C. & P. 224; R. *v.* Cooke, 8 Ibid. 582; State *v.* Kimball, 50 Me. 409; State *v.* Cole, 19 Wis. 129. See *supra*, § 119.

[3] R. *v.* Hodgson, D. & B. 3; 7 Cox C. C. 122; cited Steph. Dig. art. 356. *Supra*, §§ 688, 714.

[4] See Whart. Cr. Ev. §§ 546 *et seq.*

[5] R. *v.* Sutton, 2 Stra. 1074; 1 East P. C. 170; R. *v.* Willis, Jebb. 48, note; but see *contra*, as to common law, R. *v.* Stewart, R. & R. 288; Dugdale *v.* R., 1 E. & B. 435; Dears. C. C. 64; and see U. S. *v.* Williams, 14 Fed. Rep. 550; Com. *v.* Morse, 2 Mass. 138. As cases on the statutory offence, in addition to those cited below, see Com. *v.* Price, 10 Gray, 472; State *v.* Benham, 7 Conn. 414; Stone *v.* State 1 Spencer, 404; Sasser *v.* State, 13 Ohio, 453; People *v.* Ah Sam, 41 Cal. 645.

[6] Hopkins *v.* Com., 3 Met. 460; State *v.* Harris, 5 Ired. 287. See Bevington *v.* State, 2 Ohio St. 160; People *v.* Ah Sam, 41 Cal. 645.

[7] People *v.* Stewart, 4 Mich. 655.

the federal statute, which requires that the counterfeit money should be after "the similitude" of an obligation of the United States, this similitude must extend to the signature.[1] The "similitude," under the statute, need not be perfect. It is enough if deception of non-experts is probable.[2]

§ 721. *Coin*, it has been said, may be generically described (*e. g.*, "a false and counterfeit coin, so in the similitude of the good and legal silver coin, etc., current in this commonwealth by the laws and usages thereof, called a dollar");[3] but if the indictment undertake to describe *notes* (without giving any reason, such as possession by the defendant, to excuse generality), it must describe the notes accurately, as in an indictment for forgery.[4]

Indictment in such cases must describe as in forgery.

Of course, when the forged money remains in the defendant's hands, or has been disposed of by him, this may be averred in the indictment;[5] and secondary evidence may be then offered at the trial. As is elsewhere seen,[6] there are authorities to indicate that in such case the indictment is by itself notice to produce. But by strict practice, notice to produce is necessary.[7] Where the notes are of a fictitious bank, it would seem that close description of the bank is unnecessary; and so has it been held.[8]

The names of the persons intended to be defrauded need not be given.[9]

§ 722. The *scienter* is material, and should, independently of the statute, be both alleged and proved.[10] It

Scienter in such case is material.

[1] U. S. *v.* Williams, 14 Fed. Rep. 550. So as to unexecuted bonds, which do not fall under the statute. U. S. *v.* Sprague, 11 Biss. 376. See as to counterfeit coin, U. S. *v.* Bicksler, 1 Mackey, 341.

[2] U. S. *v.* Sprague, 11 Biss. 376. *Supra*, § 695.

[3] Com. *v.* Stearns, 10 Met. 256; Fight *v.* State, 7 Ham. 180; Peck *v.* State, 2 Humph. 78. Still more liberal are State *v.* Williams, 8 Iowa, 534, and State *v.* Griffin, 18 Vt. 198; and see *infra*, § 751. In Com. *v.* Stearns, it was held that under the term "dollar," a *Mexican* dollar could be proved.

[4] Whart. Cr. Pl. & Pr. §§ 167 *et seq.*; State *v.* Callendine, 8 Iowa, 288; and see McMillin *v.* State, 5 Ohio, 268.

[5] Whart. Cr. Pl. & Pr. § 176.

[6] Ibid.; *infra*, § 730.

[7] See Whart. Cr. Ev. §§ 212 *et seq.*; People *v.* Stewart, 4 Mich. 655; Armitage *v.* State, 13 Ind. 441.

[8] People *v.* Peabody, 25 Wend. 472; Sasser *v.* State, 13 Ohio, 453.

[9] U. S. *v.* Bicksler, 1 Mackey, 341.

[10] Whart. Cr. Pl. & Pr. § 164; Owen *v.* State, 5 Sneed, 494; Powers *v.* State, 87 Ind. 97.

is a good defence that the money was received innocently in the course of business.[1]

Intent to be inferred.

§ 723. *Intent* may be inferred in the same way as intent in cases of uttering.[2] Mere possession of the document as a curiosity will not sustain a conviction.[3] But fraudulent selling is proof of fraudulent possession.[4]

Having in possession several kinds of notes is one offence.

§ 724. It has been ruled that having in possession several forged bank notes, of different banks, at one time, with intent to pass them, and thereby to defraud the person taking them, constitutes but one offence; and that the defendant cannot be pursued severally on each note.[5]

IX. INFERENCES OF FORGERY FROM EXTRINSIC FACTS.

Collateral mechanical evidences of forgery.

§ 725. It need scarcely be repeated, that collateral mechanical evidences of forgery are always to be received for what they are worth. Thus it is admissible to show by an expert that the writing was traced over pencil;[6] that the water-mark of the paper is repugnant; or that other circumstances exist which make it improbable that the writing is genuine.[7]

Presumption of forgery from uttering.

§ 726. Does the *uttering* of a forged instrument by a particular person justify a jury in convicting such person of *forgery?* This question, if put nakedly, must, like the kindred one as to the proof of larceny by evidence of possessing stolen goods, be answered in the negative. The defendant is presumed to be innocent until otherwise proved. In larceny this presumption is overcome by proof that the possession is so *recent* that it becomes difficult to conceive how the defendant

[1] U. S. *v.* Kenneally, 5 Biss. 122.

[2] See *supra*, §§ 713 *et seq.* Hopkins *v.* Com., 3 Met. 460; Hutchins *v.* State, 13 Ohio, 198; Miller *v.* State, 51 Ind. 405; Perdue *v.* State, 2 Humph. 494.

[3] R. *v.* Harris, 7 C. & P. 429; Fox *v.* People, 95 Ill. 71.

[4] U. S. *v.* Biebusch, 1 McCr. 42.

[5] State *v.* Benham, 7 Conn. 414; People *v.* Van Keuren, 5 Parker C. R. 66. See State *v.* Egglesht, 41 Iowa, 574; Whart. Cr. Pl. & Pr. §§ 468 *et seq.*

[6] R. *v.* Williams, 8 C. & P. 434. See Whart. Cr. Ev. §§ 844 *et seq.*, and compare article on Whittaker's Case, 2 Crim. Law Mag. 139.

[7] Whart. Cr. Ev. §§ 559, 764 *et seq.*, 844 *et seq.*; Crisp *v.* Walpole, 2 Hagg. 52; Warren's Miscell. 256; Wills Circ. Ev. 111; Mossam *v.* Joy, 10 St. Tr. 666. As to proof of other forgeries, see Whart. Cr. Ev. § 39.

could have got the property without being in some way concerned in the stealing. So it is with uttering. The uttering may be so closely connected in time with the forging, the utterer may be proved to have such capacity for forging, or such close connection with the forgers, that it becomes, when so accompanied, probable proof of complicity in the forgery.[1]

X. INDICTMENT IN FORGERY AND UTTERING.[2]

Not duplicity to state the offence in varying phases.

§ 727. A crime which may be committed by the agency of several means is well described if charged to be by the agency of any one.[3] Thus the indictment which charges a prisoner with the offences of falsely making, forging, and counterfeiting, of causing and procuring to be falsely made, forged, and counterfeited, and of willingly acting and assisting in the said false making, forging, and counterfeiting, is a good indictment, though all of those charges are contained in a single count, the words of the statute being pursued; and where there is a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct.[4] The description, also, of a bank note as "false, forged, and counterfeited" is not repugnant.[5] But where two distinct offences, separate as to operation, requiring different punishments, are charged in the same count, and the defendant is convicted, the judgment must be arrested.[6] It is otherwise when the several terms used are such as may each seve-

[1] *Supra*, §§ 713–15; *infra*, §§ 747, 848. See, as in the main substantiating this view, U. S. *v.* Britton, 2 Mason, 464; Spencer *v.* Com., 2 Leigh, 751; State *v.* Morgan, 2 Dev. & Bat. 348; State *v.* Outs, 30 La. An. Pt. II. 1155. In Massachusetts, the mere fact of *uttering* is properly held not to be proof of *forging*. Com. *v.* Parmenter, 5 Pick. 279. In England, the presumption of complicity is even more severely guarded. R. *v.* Parkes, 2 East P. C. 993.

[2] See, for forms of indictment, Whart. Prec., tit. FORGERY. Borrisford *v.* State, 66 Ga. 157.

[3] See Whart. Cr. Pl. & Pr. §§ 243 *et seq.* Compare State *v.* Haney, 2 Dev. & Bat. 381, 390; Hoskins *v.* State, 11 Ga. 92; Perkins *v.* Com., 7 Grat. 651.

[4] R. *v.* Middlehurst, 1 Burr. 399; State *v.* Hastings, 53 N. H. 452; State *v.* Morton, 1 Williams (Vt.), 310; Com. *v.* Thomas, 10 Gray, 483; Rasnick *v.* Com., 2 Va. Cas. 356; Hoskins *v.* State, 11 Ga. 92. See Whart. Crim. Ev. §§ 134, 138; Whart. Cr. Pl. & Pr. §§ 251, 742.

[5] Mackey *v.* State, 3 Oh. St. 362, overruling Kirby *v.* State, 1 Ibid. 185. Whart. Cr. Pl. & Pr. §§ 243, 283.

[6] People *v.* Wright, 9 Wend. 193. See Page *v.* Com., 9 Leigh, 683; Whart. Cr. Pl. & Pr. § 243.

rally describe the instrument, as in the case of "bond and obligation," or "warrant and order,"[1] or when one offence is an antecedent or corollary of the other.[2]

Variance as to general designation of instrument fatal.

§ 728. If the indictment declare the instrument to be of a particular class, a variance between the evidence and the indictment in this respect is, it seems, fatal.[3] In another volume the meaning of the designations in most general use is considered as follows:—

(*a*) "Purporting to be," Whart. Cr. Pleading & Practice, § 184. Compare *infra*, § 737.

(*b*) "Receipt," "Acquittance," Ibid. §§ 185–6.

(*c*) "Bill of exchange," Ibid. § 187.

(*d*) "Promissory note," Ibid. § 188.

(*e*) "Bank note," Ibid. § 189.

(*f*) "Money," Ibid. § 190.

(*g*) "Goods and chattels," Ibid. § 191.

(*h*) "Warrant, order, or request for the payment of money." Ibid. §§ 192–3–4.

(*i*) "Deed," Ibid. § 196.

(*j*) "Obligation," "Undertaking," "Guaranty," Ibid. §§ 198–200.

Where a full setting out of the instrument is given, a technical designation of its character may, at common law, be dispensed with,[4] and when several designations are given, one of which is correct, those which are incorrect may be rejected as surplusage.[5] But

[1] R. *v.* Dunnett, 2 East P. C. 985; State *v.* Jones, 1 McMull. 236. For other cases see *infra*, § 728.

[2] Whart. Cr. Pl. & Pr. § 291.

[3] Whart. Cr. Pl. & Pr. §§ 183 *et seq.*; Hart *v.* State, 20 Ohio, 49. See, as indicating extent of this rule, People *v.* Marion, 29 Mich. 31; State *v.* Maupin, 57 Mo. 205; Powers *v.* State, 87 Ind. 97.

[4] Whart. Cr. Pl. & Pr. §§ 184–198; People *v.* Ah Woo, 28 Cal. 205.

[5] State *v.* Crawford, 13 La. An. 300; R. *v.* Williams, 2 Den. C. C. 61; 1 T. & M. C. C. 382; 4 Cox C. C. 256; 2 Eng. L. & Eq. 533. In this case the indictment charged the defendant with having forged "a certain warrant, order, and request, in the words and figures following," etc. It was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order, and request. But it was held that there was no variance, as the document being set out in full in the indictment, the description of its legal character became immaterial. Parke, B., suggested that the correct course would have been, to have alleged the uttering of one warrant, one order, and one request. "The principle of this decision seems to be," says the reporter, "that where an instrument is described in an indictment by several designations, and then set out according to its tenor, either with or without a *videlicet*, the court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material only such designations as the tenor of the indictment shows to be really applicable. And where the indictment is so drawn as to enable the court to treat as material only the tenor of the indictment itself, all the descriptive averments may be treated as surplusage. The case seems reconcilable with R. *v.* Newton, 2 Mood. C. C. 59, but to overrule R. *v.* Williams, 2 C. & K. 51." See Bristow *v.* Wright, Doug. 665. In R. *v.* Charretie, 3 Cox C. C. 503 (1849), Davison, *amicus curiæ*, mentioned that Cresswell, J., in a subsequent case, had declined to act upon the authority of R. *v.* Williams, 2 C. & K. 51. See Tr. & H. Prec. 222; Whart. Cr. Pl. & Pr. §§ 183 *et seq.*

[1] 1 Stark. C. P. 104; R. *v.* Hunter, R. & R. 511; R. *v.* Birkett, Ibid. 251. See U. S. *v.* Trout, 4 Biss. 105. And a variance is fatal. Whart. Cr. Ev. § 114; Sharley *v.* State, 54 Ind. 168; State *v.* Bean, 19 Vt. 530; State *v.* Farrand, 3 Halst. 336; State *v.* Houseall, 3 Brev. 219; People *v.* Marion, 28 Mich. 255.

[2] As to pleading of instrument, see Whart. Cr. Pl. & Pr. §§ 168 *et seq.*; Whart. Cr. Ev. § 114; U. S. *v.* Corbin, 11 Fed. Rep. 238; U. S. *v.* Schoyer, 2 Blatch. 59; State *v.* Morton, 1 Williams (Vt.), 310; Com. *v.* Wilson, 2 Gray, 70; State *v.* McMillen, 5 Oh. 269; Dana *v.* State, 2 Oh. St. 91; State *v.* Twitty, 2 Hawks, 248; State *v.* Ruby, 61 Iowa, 87; State *v.* Bibb, 68 Mo. 286; Ham *v.* State, 4 Tex. Ap. 645; Labbaite *v.* State, 6 Ibid. 257; Murphy *v.* State, Ibid. 554.

[3] U. S. *v.* Fissler, 4 Biss. 59; Burress *v.* Com., 37 Grat. 934; Brown *v.* People, 66 Ill. 344; State *v.* Cook, 52 Ind. 574; Sharley *v.* State, 54 Ibid. 168; State *v.* Jones, 1 M'Mullen, 236; State *v.* Baumon, 52 Iowa, 68; Haslip *v.* State, 10 Neb. 590. As to pleading, see Whart. Cr. Pl. & Pr. §§ 167 *et seq.* As to variance see Whart. Cr. Ev. §§ 114 *et seq.* And see, as to undecipherable inscriptions, U. S. *v.* Mason, 12 Blatch. 497; Whar. Cr. Ev. § 117.

[4] See R. *v.* Szudurskie, 1 Mood. C. C. 419; R. *v.* Warshaner, Ibid. 466; R. *v.* Goldstein, R. & R. 473; R. *v.* Harris, 7 C. & P. 416, 429; Whart. Cr. Pl. & Pr. § 181.

when a statute makes the forgery of a particular kind of instrument indictable, the indictment must aver the instrument to be such, if it be intended to bring the case within the statute.[1]

Instrument must be accurately set forth.

§ 728 *a*. The indictment should not only set forth the tenor of the instrument forged, but should profess to do so.[2] And the setting forth must be in words and figures, so that the court may be able to judge from the record whether it is an instrument which can be forged.[3]

Of a foreign language

§ 729. If the instrument forged be in a foreign language, it must be set out in that language, and with it a complete and accurate translation.[4] But in California, when the

translation must be given.

writing is in Chinese, it is sufficient to set forth the translation.[1] And a signature in German handwriting may be given as it is.[2]

§ 730. If the forged writing is not set forth, a sufficient reason should be given in the indictment why such is not done; *e. g.*, that the instrument has been destroyed, or is in the possession of the defendant.[3] But an omission to set forth the names of the signers of an uncurrent bill is not cured by a mere averment that the jurors cannot give a more particular description.[4]

Lost or non-producible instruments.

§ 731. The number of a bank bill or note, its vignettes, mottoes, and devices, and the words and figures in the margin, need not be set forth in the indictment.[5] When, however, descriptive devices are given, a variance is fatal.[6] The copy of a bank bill must give the name of the State on the margin of the bill.[7]

Vignettes and mottoes need not be given.

§ 732. *Stamps*, though required by the local government to be affixed, need not, it would seem, be copied in the indictment, when their omission does not destroy the legal capacity of the instrument.[8]

Nor stamps.

§ 733. Matter purely extraneous need not be set forth.[9] Thus, in setting forth a counterfeit bank note literally, in an indictment

[1] People *v.* Ah Woo, 28 Cal. 205.

[2] Duffin *v.* People, 107 Ill. 113.

[3] R. *v.* Haworth, 4 C. & P. 254; R. *v.* Hunter, Ibid. 128; Com. *v.* Houghton, 8 Mass. 107; Com. *v.* Ross, 2 Ibid. 373; Com. *v.* Hutchinson, 1 Ibid. 7; People *v.* Badgeley, 16 Wend. 53; State *v.* Potts, 4 Halst. 26; Pendleton *v.* Com., 4 Leigh. 694; State *v.* Davis, 69 N. C. 313; U. S. *v.* Doebler, 1 Baldw. 519; State *v.* Munson, 79 Ind. 541. See fully Whart. Cr. Pl. & Pr. § 176.

[4] Com. *v.* Clancy, 7 Allen, 537.

[5] Whart. Cr. Pl. & Pr. § 167; Whart. Cr. Ev. § 114; U. S. *v.* Bennett, 17 Blatch. 357; State *v.* Flye, 26 Me. 312; State *v.* Carr, 5 N. H. 371; State *v.* Wheeler, 35 Vt. 261; Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Stevens, Ibid. 203; Com. *v.* Taylor, 5 Cush. 605; People *v.* Franklin, 3 Johns. Cas. 299; State *v.* Van Hart, 2 Harrison, 327; Com. *v.* Searle, 2 Binn. 332; Griffin *v.* State, 14 Ohio St. 55; Butler *v.* State, 22 Ala. 43.

It has been even ruled that an omission of the figures given in the margin of an order is not fatal when the amount is rightly given in the copy of the body of the document. Langdale *v.* State, 100 Ill. 263.

[6] Griffin *v.* State, 14 Oh. St. 55. See Buckland's Case, 8 Leigh, 732; Whart. Crim. Ev. § 114. That such devices may be material, see R. *v.* Keith, cited *supra*, § 682.

[7] Com. *v.* Wilson, 2 Gray, 70.

[8] *Supra*, § 697. See Com. *v.* McKean, 98 Mass. 9.

[9] Wh. Cr. Pl. & Pr. § 180.

for feloniously passing the same, it was held that the omission of an indorsement appearing to have been made on the note after it was issued was no variance.[1] And so of the omission of an irrelevant indorsement on a promissory note.[2] And the reason of this is obvious. As each obligor on a note is suable independently on his particular obligation, so an indictment for forgery lies for the forgery of each such obligation, all the rest of the note being surplusage. The same rule applies to the forgery of one of several obligors of a bond.[3] And whatever is surplusage need not be set out.[4]

Indorsements need not be given; nor surplusage.

§ 734. An omission of part of the date may be fatal.[5]

Otherwise as to date.

§ 735. Where the forgery is charged to consist in the insertion of words in a genuine document, the indictment must distinctly set forth the position of the inserted words, so that their effect upon the original meaning of the document may appear.[6] But the pleader may charge the whole document as a forgery, when this particularity is not required. The same distinction is applicable to alterations in a document.[7]

Altered and inserted words, when material, must be averred.

§ 736. *Sewing to the paper* on which the indictment is written impressions of forged notes taken from engraved plates is not a legal mode of setting out the notes in the indictment.[8]

Sewing to the paper not sufficient.

[1] Com. *v.* Ward, 2 Mass. 397; Buckland's Case, 8 Leigh, 732; Whart. Cr. Pl. & Pr. § 180.

[2] Com. *v.* Ward, 2 Mass. 397; Perkins *v.* Com., 7 Grat. 651; Hess *v.* State, 5 Ohio, 5; Buckland *v.* Com., 8 Leigh, 732; Cocke *v.* Com., 13 Grat. 750; See Com. *v.* Adams, 7 Met. 50; Whart. Cr. Pl. & Pr. § 180.

[3] State *v.* Davis, 69 N. C. 313.

[4] State *v.* Ballard, 2 Murphy, 186; State *v.* Gardiner, 1 Ired. 27.

[5] Com. *v.* Stow, 1 Mass. 54.

[6] *Supra*, § 678; R. *v.* Birkett, R. & R. 251; State *v.* Flye, 26 Me. 312; State *v.* Bryant, 17 N. H. 323; Com. *v.* Butterick, 100 Mass. 12; Com. *v.* Boutwell, 129 Mass. 124; Bittings *v.* State, 56 Ind. 101; State *v.* Fisher, 58 Mo. 256. See Com. *v.* Shissler, 9 Philada. 587. As to Virginia Statute, see Coleman *v.* Com., 25 Grat. 865.

[7] State *v.* Flye, 26 Me. 312; Com. *v.* Butterick, 100 Mass. 12; Com. *v.* Boutwell, 129 Ibid. 124; State *v.* Weaver, 13 Ired. 491; State *v.* Rowley, Brayton, 76; State *v.* Greenlee, 1 Dev. 523; Kahn *v.* State, 58 Ind. 168.

[8] Whart. Cr. Pl. & Pr. §§ 168, 173; Whart. Cr. Ev. § 114; R. *v.* Harris, 7 C. & P. 429; R. *v.* Warshaner, 1 Mood. C. C. 466.

§ 737. "*Tenor*" binds the pleader to the severest accuracy,[1] though mere clerical variations, if the sound be retained, do not vitiate.[2] "*Purport*" means the legal title of the instrument as a whole. Whenever it is declared that a certain paper "purports" to be a "bill" or a "bond," then if, on giving its tenor, it is not shown to possess this legal character, there is some authority to declare that the variance is fatal. But the preponderance of authority in such case is that where the tenor is exact and complete, and sufficiently shows the purport, then the "purporting" clause may be rejected as surplusage.[3] But even when the courts are disinclined to reject the "purporting" clause as surplusage, they will not be strict, in a purely arbitrary matter, in holding to an exact accordance between the "purport" and the "tenor."[4]

"Tenor," means words, "purport," character.

§ 738. If we look at the point closely there is a repugnancy on the face of an indictment which avers that the defendant "forged" the "note of A. B.," for, if the note is forged, it is not the note of A. B.; and if it is the note of A. B. it is not forged. Hence, in the old practice, there have been cases in which the courts, following a strict logical necessity, have declared that the omission of "purporting to be" is fatal.[5] Yet this sharpness of criticism is not now pressed; and the present rule is, that if "purporting to be" is omitted, yet the court, assuming it to be meant, will intend it, if the question of repugnancy be raised.[6] And it is now settled that "As follows" is a sufficient averment of citation in an indictment.[7]

"Purporting to be" not essential.

§ 739. It has been already seen that it is necessary, in order to make an instrument the subject of an indictment for forgery, that

[1] R. *v.* Powell, 2 East P. C. 976; State *v.* Morton, 1 Williams (Vt.), 310; Com. *v.* Parmenter, 5 Pick. 279; State *v.* Weaver, 13 Iredell, 491.

[2] See Whart. Cr. Pl. & Pr. §§ 167, 173; Whart. Cr. Ev. § 114.

[3] *Supra*, § 728. See Chamberlain *v.* State, 5 Blackf. 573; State *v.* Crawley, 13 La. An. 300. But where a single designation only is indictable by statute, then this must be accurately given. *Supra*, § 728; *infra*, § 738.

[4] State *v.* Jones, 1 M'Mullen, 236; Fogg *v.* State, 9 Yerg. 392.

[5] See R. *v.* Carter, 2 East P. C. 986.

[6] R. *v.* Birch, 1 Leach, 79; 2 W. Bl. 790; State *v.* Gardiner, 1 Ired. 27. See Whart. Cr. Pl. & Pr. § 184.

[7] Clay *v.* People, 86 Ill. 147; Whart. Cr. Pl. & Pr. § 168.

it should be capable of being used as a proof in a legal action.[1] We are not, however, to confine such capacity to suits in which the person whose name is forged is summoned as defendant—*e. g.*, actions on bills, bonds, etc. It equally answers the question if the forged instrument is, *primâ facie*, capable of being used as a defence (*e. g.*, as a receipt) in a suit against the forger by the person whose receipt is forged. But unless the instrument forged appears by the indictment to be capable of being used as legal proof, at some time, or in some way, or at some place, the indictment is bad.[2]

Indictment must show instrument to be capable of being used in legal process.

At some time.—It is not necessary, therefore, to the validity of the indictment that the forged instrument should appear to be one which could be used immediately as legal proof. It is enough if it can be so used at some future period. Thus, an indictment is good which charges the forgery of a will of a living person, although such will could not be the foundation of legal process until after the death of the person whose name is forged.[3]

In some way.—Nor need the indictment set out an instrument which is capable of being used against the party whose name is forged in an ordinary suit at common law. It is enough, as has been seen, if the instrument be one (*e. g.*, a receipt) which can be used against such party when suing for a debt; or if by any process of equity it can be used against him directly or indirectly.[4]

At some place.—And even if it appear that the instrument is one which could never be used by the *lex fori* against the prosecutor, yet the indictment will be sustained if the instrument is one which, in any foreign jurisdiction, could be sued upon.[5]

[1] See, also, State *v.* Cook, 52 Ind. 574; and see, generally, Whart. Cr. Pl. & Pr. §§ 184–8.

[2] See *supra*, §§ 680–696; R. *v.* Wilcox, R. & R. 50; Com. *v.* Ray, 3 Gray, 441; People *v.* Shall, 9 Cow. 778; Williams *v.* State, 51 Ga. 535.

An indictment for the forgery of an indorsement upon a note must contain an averment that the words alleged to have been forged bore such a relation to the note as to be the subject of forgery; and the necessity of such averment is not obviated by an averment that the note is lost. Com. *v.* Spilman, 124 Mass. 327.

[3] R. *v.* Sterling, R. *v.* Coogan, *supra*, § 695.

[4] See remarks of Ludlow, J., in Biles *v.* Com., 32 Penn. St. 529. *Supra*, § 667.

[5] *Supra*, § 693; Whart. Confl. of Laws, § 685.

§ 740. Where an instrument is incomplete on its face, so that as it stands it cannot be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force.[1] Thus, where an indictment charged that A. did feloniously and fraudulently forge a certain writing, as follows: "Mr. Bostick, charge A.'s account to us, B. and C.," with intent to defraud B. and C., it was held that the indictment was not valid without charging that A. was indebted to Bostick, as there could be no fraud unless a debt existed.[2] The same rule applies to a forged railway pass, when the alleged pass itself does not distinctly state its object,[3] and to a forged indorsement, which the indictment must aver to have been put on a document in such a way as to have a *primâ facie* binding effect.[4]

Must aver extraneous facts when necessary for this purpose.

But if the meaning of the transaction can be sufficiently extracted from the instrument itself, it will not be necessary to state matters of evidence so as to make out more fully the charge. Thus, it is not necessary, in an indictment for forging an indorsement, to aver the maker's name, nor the qualities of the original note;[5] nor, in averring the causing "uttering," to aver how the uttering was caused;[6] nor, in an indictment for forging a receipt, to aver indebtedness of the defendant to the person whose name was forged;[7] nor need the indictment, in case of acquittance, aver presentation or delivery to any person as a genuine acquittance for goods delivered, and in consideration thereof;[8] nor, in case of sale of counterfeit notes, need it be averred that the sale was for a consideration, or the injury of any one, or that the notes were indorsed.[9] And where the indictment sets forth the instrument or writing alleged to have been forged, averring it to have been falsely made, with the intent to injure or defraud some person or body corporate, it is not

[1] See fully, Whart. Cr. Pl. & Pr. §§ 184–190; Henry *v.* State, 35 Ohio St. 128; Sanabria *v.* People, 24 Hun, 270; Com. *v.* Mulholland, 12 Phila. 608.

[2] State *v.* Humphreys, 10 Humph. 442. *Supra*, §§ 695 *et seq*

[3] Com. *v.* Ray, 3 Gray, 441; and see Clark *v.* State, 8 Ohio St. 630. *Supra*, § 685; *infra*, § 745. For other cases as to receipts, see Whart. Cr. Pl. & Pr. §§ 85–6.

[4] Com. *v.* Spilman, 124 Mass. 327.

[5] Cocke *v.* Com., 13 Gratt. 750. But see Com. *v.* Spilman, *supra*, § 739.

[6] Brown *v.* Com., 2 Leigh, 769.

[7] Snell *v.* State, 2 Humph. 347; though see Rice *v.* State, 1 Yerg. 432.

[8] Com. *v.* Ladd, 15 Mass. 526.

[9] Hess *v.* State, 5 Ohio, 5.

necessary that the facts and circumstances of the case showing the intent should be specially set forth in the indictment.[1]

§ 741. As general rules, subject to modification in local practice by the applicatory statutory law, the following may be here announced:—

In setting forth charters of banks, indictments must conform to statute.

(1) When the object is to charge the forgery of a bank note as a statutory offence, to be visited by the statutory penalty, and where the statute includes within its range only banks duly incorporated, then the indictment must aver the bank whose notes have been forged to have been duly incorporated. This allegation is material, and any variance in this respect is fatal.[2]

(2) Where, however, the statute does not thus make incorporation an essential requisite in the case of the prosecution, then it would seem that it is enough to describe the bank, if a home institution, simply as a bank by its title. This, however, is loose pleading, and by strict practice would be condemned. And of foreign banks, if the intent be laid to defraud the bank, the charter should be averred.[3]

(3) But if the pleader elect to pursue the defendant on a count charging the offence to be the forging or uttering a certain bank note with the intent to defraud A. B., the party on whom the note was passed, then it is not necessary to aver the incorporation of the bank. The bank may be no bank at all, either technically or potentially, and yet the offence is made out.[4]

How the incorporation of a bank may be proved has been already shown.[5]

§ 742. Intent to defraud is necessary to be averred even under statutes not prescribing such requisite.[6]

[1] People *v.* Stearns, 21 Wend. 409. See, as to general pleading of intent, Whart. Cr. Pl. & Pr. §§ 164–5.

[2] *Supra*, § 716; State *v.* Wilkins, 17 Vt. 151; Com. *v.* Simonds, 11 Gray, 306; People *v.* Stearns, 21 Wend. 409; State *v.* Van Hart, 2 Harrison, 327; Murray's Case, 5 Leigh, 720; Cady *v.* Com., 10 Grat. 776; State *v.* Ward, 2 Hawks, 443; Jones *v.* State, 5 Sneed, 345; Owen *v.* State, Ibid. 493.

[3] State *v.* Van Hart, 2 Harrison, 327; Owen *v.* State, 5 Sneed, 493; Jones *v.* State, Ibid. 346.

[4] *Infra*, § 749; *supra*, § 716. See State *v.* McKiernan, 17 Nev. 224.

[5] *Supra*, § 716.

[6] Whart. Cr. Pl. & Pr. §§ 164–5; Whart. Crim. Ev. § 135; R. *v.* Powner, 12 Cox C. C. 230. See *infra*, § 746.

Intent to defraud must be specially averred, and so of *scienter*.

"Falsely" is not necessary when "forged" is used.[1] At common law, to constitute forgery, the intent to defraud must either be apparent from the false making, or become so by extrinsic facts. Therefore an indictment which charged the false making to have been in the alteration of an order given by the defendant, without charging that the alteration was made after it was circulated and had been taken up by him, has been held to be fatally defective.[2]

In cases of uttering and publishing a *scienter* must be averred; though it is sufficient that this averment should be given in general terms.[3]

Possibility of fraud is enough to sustain the averment.

§ 743. *Possibility of fraud*, as has been heretofore shown,[4] is enough to complete the offence.[5] Thus, even the forgery of a name to an assignment of a bond is indictable though there is no seal to the bond, as there still is a chance of fraud.[6] As has already been mentioned, it is not essential that an actual fraud should have been committed.[7] If, from circumstances, the jury can presume that it was the defendant's intention to defraud V., or if, in fact, V. might have been defrauded if the forgery had succeeded, it is sufficient to satisfy this allegation in the indictment; for where the intent to defraud exists in the mind of the defendant, it is sufficient, though, from circumstances of which he is not apprised, he could not in fact defraud the prosecutor;[8] and this even though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him.[9] On the other hand, if the instrument is one which could not possibly be used for fraud, the indictment cannot be sustained.[10]

[1] State v. McKiernan, 17 Nev. 224.

[2] State v. Greenlee, 1 Dev. 523. *Supra*, §§ 696, 739–42; Whart. Cr. Pl. & Pr. §§ 164–5.

[3] U. S. v. Carll, 105 U. S. 611; State v. Burgson, 53 Iowa, 318; People v. Page, 1 Idaho, 189.

[4] *Supra*, §§ 695 *et seq.*

[5] People v. Rathbun, 21 Wend. 509.

[6] Penns. v. Misner, Add. 44.

[7] R. v. Crooke, 2 Strange, 901; R. v. Goate, 1 Lord Raym. 737. *Supra*, §§ 653, 694.

[8] R. v. Holden, R. & R. 154.

[9] R. v. Sheppard, R. & R. 169. See R. v. Harvey, 2 B. & C. 261.

[10] See *supra*, §§ 696, 739 *et seq.*; and, also, People v. Stearns, 21 Wend. 499; S. C., 23 Wend. 634; Penns. v. Misner, Add. 44; West v. State, 2 Zab. 212; Clarke v. State, 8 Ohio St. 630; Colvin v. State, 11 Ind. 361.

Party defrauded must be specified.

§ 743 *a*. At common law, indictments for forgery or uttering forged instruments must charge the offence to have been done with intent to defraud some particular person or corporation, when this is practicable.[1] How this averment is sustained has been already seen.[2] Although the party actually defrauded was a firm, yet, under the rule just stated, it is enough to aver an intent to defraud a member of the firm.[3] It is not necessary that the person primarily defrauded should be averred in the indictment. It is enough if the party averred as intended to be defrauded were in the scope of the fraud, and might possibly have been defrauded if the forgery succeeded.[4]

When notes of fictitious bank are forged, party on whom

§ 744. If a bank whose notes are forged be fictitious or extinct, the indictment must aver the person on whom the attempt is made to pass the notes as the person whom it was intended to defraud. Any variance as to the name of the person intended to be defrauded being fatal,[5] it is essential, if the bank whose name is forged be extinct or

[1] *Supra*, § 714; *infra*, § 746; 3 Ch. C. L. 1042; R. v. Marcus, 2 C. & K. 356; State v. Odel, 2 Tr. Con. Rep. 758; 3 Brev. 552; State v. Greenlee, 1 Dev. 523; State v. Harrison, 69 N. C. 143; Cunningham v. State, 49 Miss. 685; West v. State, 2 Zab. 212; Buckley v. State, 2 Greene, 162. See, as to general averment of intent, Whart. Cr. Pl. & Pr. §§ 164–5. As to practice under Georgia statute, see State v Calvin, Charlton, 151. And see generally State v. Jones, 1 McM. 236; Com. v. Smith, 6 S. & R. 568; People v. Davis, 21 Wend. 309; People v. Peabody, 25 Wend. 472.

[2] *Supra*, §§ 713, 714.

[3] R. v. Hanson, C. & M. 334; People v. Curling, 1 Johns. 320. *Supra*, §§ 717, 718; *infra*, § 1226.

[4] *Supra*, §§ 713, 714, 743.

In U. S. v. Morris, before Benedict, J., 1879, 19 Alb. L. J. 403 (7 Rep. 581), the prisoner was indicted under section 5443 of the Revised Statutes, being charged with having forged a material indorsement upon a post-office money-order with intent to defraud C. M. Cady. This was sustained, the court saying, "In United States v. Shellmire (Bald. 377) it is said that an indictment for forging an order upon the Bank of the United States, with intent to defraud a private person, would lie in the courts of the United States."

In Iowa, under statute, it is not necessary to specify the person intended to be defrauded. State v. Maxwell, 27 Iowa, 454.

In Pennsylvania, under the 19th section of the Act of 31st of March, 1860, in an indictment for forgery under the 169th section of the same act, it is not necessary to prove an intent to defraud any particular person, but it is sufficient to prove a general intent to defraud. McClure v. Com. 86 Penn. St. 353.

[5] See Whart. Cr. Pl. & Pr. §§ 164–65; Whart. Cr. Ev. §§ 94–102.

notes are passed must be averred.

fictitious, to aver the fraud to be intended upon the person on whom the note was attempted to be passed.[1] In fact, in view of the danger of the misrecital of the names of corporations, it is always expedient to insert a count of this character. The party thus sought to be defrauded, if unknown, may be so described.[2] The intent may be cumulatively varied in separate counts.[3]

Actual damage need not be averred or proved.

§ 745. It is not necessary to aver or prove damage or injury to have accrued. It is enough if the instrument were calculated to defraud.[4]

Not always necessary to aver person on whom paper is passed.

§ 746. As a general rule, unless otherwise required by statutory construction, it is sufficient, when the party intended to be defrauded is in existence, to aver that the defendant uttered or forged the instrument as true, without saying to whom the uttering was made;[5] nor, when forgery is charged, is it necessary to specify the parties whom it was intended to defraud when such parties cannot be individuated; due excuse being made[6]. When, however, an intent to defraud a particular person is a part of the case of the prosecution, the indictment must specify such person, or excuse his non-specification by the averment that he was unknown.[7]

The name of a corporation when pleaded, must be accurately given.[8]

§ 747. To the general discussion of venue heretofore given[9] it is now requisite to add a single observation as to the inference to be drawn in forgery, as to venue, from the proof of uttering in a

[1] *Supra*, §§ 660, 698. See People *v.* Curling, 1 Johns. 320; Com. *v.* Carey, 2 Pick. 47; U. S. Shellmire, Bald. 370.

[2] See *supra*, § 716; Buckley *v.* State, 2 Greene (Iowa), 162; 1 East P. C. 180.

[3] *Supra*, § 713; R. *v.* Hanson, C. & M. 334; People *v.* Curling, 1 Johns. 320.

[4] R. *v.* Crooke, 2 Str. 901; R. *v.* Goate, 1 Ld. Ray. 737; R. *v.* Holden, R. & R. 154; Com. *v.* Ladd, 15 Mass. 526; People *v.* Rynders, 12 Wend. 425; People *v.* Stearns, 21 Ibid. 409; S. C., 23 Ibid. 634; West *v.* State, 2 Zabr. 292; Hess *v.* State, 5 Ohio, 5; Snell *v.* State, 2 Humph. 347.

[5] R. *v.* Trenfield, 1 F. & F. 43; U. S. *v.* Bejandio, 1 Woods, 294.

[6] *Supra*, § 714.

[7] Buckley *v.* State, 2 Greene (Iowa), 162. *Supra*, §§ 292 *a*, 714, 743 *a*.

[8] Whart. Cr. Pl. & Pr. § 110. *Supra*, § 741.

Charging the defendant with passing counterfeit coin in payment to A. will not be sustained by evidence that the defendant passed it in payment to B., through A., who was the innocent agent of the defendant in the transaction. Rouse *v.* State, 4 Ga. 136.

[9] *Supra*, §§ 288, 711.

Place of uttering may be laid to be place of forgery.

particular place. Does *uttering* in a particular county justify a conviction of *forging* in such county? As thus baldly put, certainly not; and so has it been judicially held.[1] A naked utterance in a particular county is not *per se* proof of forgery in such county. But, as has been already shown, there are inculpatory incidents which so strongly intensify in such cases the presumption of guilt as to compel a conviction of forgery; and when so, the conviction may be had for forgery as committed in the venue of the uttering.[2]

XI. COINING.[3]

State courts take jurisdiction of coining.

§ 748. Whatever may be said on the vexed question of the exclusive jurisdiction of the federal government of the counterfeiting of federal currency as such,[4] it may be safely declared that coining or uttering bad money, of whatever class, is an offence at common law in the State where the bad money is coined or uttered.[5] Such an offence, if not indictable as counterfeiting or uttering in the technical sense, in consequence of the absorption of the offence by federal statutes, is certainly indictable as a cheat, or attempt to cheat, at common law. Of jurisdiction of this aspect of the offence, the State courts cannot be deprived.[6]

In the federal courts the offence is to be prosecuted as a misdemeanor.[7]

§ 749. Coining (or counterfeiting) in its present sense, is the making of a false coin in the similitude of a genuine coin.[8] In a

[1] R. *v.* Parkes, 2 East P. C. 993; Com. *v.* Parmenter, 5 Pick. 279.

[2] *Supra*, § 726; Lindsay *v.* State, 38 Ohio, 369; State *v.* Poindexter, 24 W. Va. 805; People *v.* Cohen, 7 Col. 274.

[3] See for forms of indictment, Wh. Prec. tit. "FORGERY," "COINING."

[4] See this question discussed, *supra*, § 266; Whart. Com. Am. Law, § 524. And see Com. *v.* Fuller, 8 Met. 313; State *v.* Tutt, 2 Bailey, 44; Chess *v.* State, 1 Blackf. 198. *Supra*, § 264.

[5] *Supra*, § 266. That a forged instrument or coin may be a false token, see R. *v.* Button, 11 Q. B. 929; R. *v.* Inder, 1 Den. C. C. 325; R. *v.* Thorn, C. & M. 206; Com. *v.* Boynton, 2 Mass. 77; Com. *v.* Speer, 2 Va. Cas. 65; State *v.* Groome, 5 Strobh. 158; *infra*, §§ 1123, 1344.

[6] See Whart. Com. Am. Law, § 524; *supra*, §§ 224–61; U. S. *v.* Hargrave, 17 Int. Rev. Rec. 39. That counterfeiting is but a misdemeanor at common law, see *supra*, §§ 22, 654; R. *v.* Greenwood, 2 Den. C. C. 453.

[7] U. S. *v.* Coppersmith, 2 Flip. 546; 1 Crim. L. Mag. 741.

[8] Punching out a hole is not coining, when none of the pure metal is removed;

Counterfeit must be likely to deceive.

prosecution for coining, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person using due caution, to be gauged by all the circumstances of the case.[1] Thus in an English case, where the defendant had counterfeited the resemblance of a half guinea upon a piece of gold previously hammered, but it was not round nor would it pass in the condition in which it then was, the judges held that the statutory offence was incomplete.[2] Where, also, the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely, immersion in diluted *aqua fortis*, before they could pass as shillings; the judges held that the statutory offence was not yet consummated.[3] The same general view has been taken in this country.[4] But if there be a similitude likely to impose even on the simple or inattentive, this is enough.[5]

All participants are principals.

§ 750. All participants in the work of coinage are principals.[6]

otherwise, when pure metal is removed and base metal inserted. U. S. *v.* Lissner, 12 Fed. Rep. 840. *Infra*, § 755.

[1] R. *v.* Varley, 1 East P. C. 164; 2 W. Bl. 682; R. *v.* Robinson, Leigh & C. 604; 10 Cox C. C. 107; U. S. *v.* Morrow, 4 Wash. C. C. 733; U. S. *v.* Burns, 5 McLean, 24; U. S. *v.* Bogart, 9 Ben. 314; Rasnick *v.* Com., *infra*. *Supra*, § 700. As to "due caution," see *infra*, §§ 1186 *et seq.*

[2] R. *v.* Varley, 1 East P. C. 164; 2 W. Bl. 682.

[3] 1 Leach, 175; and see R. *v.* Bradford, 2 Cr. & D. 41.

[4] U. S. *v.* Burns, 5 McLean, 24.

[5] R. *v.* Herman, L. R. 4 Q. B. D. 284; 14 Cox C. C. 279; U. S. *v.* Marigold, 9 How. U. S. 560; U. S. *v.* Abrams, 21 Blatch. 553; U. S. *v.* Bricker, 3 Phila. 426.

[6] A person who takes base pieces of coin, which are brought to him ready made, having the impression and appearance of real coin, though of different color, and brightens them so as to give them the resemblance of real coin and render them fit for circulation, is guilty of counterfeiting. Rasnick *v.* Com., 2 Va. Cas. 356. See R. *v.* Case, 1 East P. C. 166; R. *v.* Lavey, 1 Leach, 154; R. *v.* Case, 1 East P. C. 115; *supra*, § 213.

The prisoner, with intent of coining counterfeit half dollars of Peru, procured dies in England for stamping and imitating such coin. He was apprehended before he had obtained the metal and chemical preparations necessary for making counterfeit coins. It was held that the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence intended, and sufficiently evidencing the criminal intent, to support an indictment founded on it for a misdemeanor, although the same facts would not have supported an indictment for attempting to make counterfeit coin. R. *v.* Roberts, 33 Eng. L. &

§ 751. As a rule, *coin*, in an indictment for forgery, is to be described by general designation.[1]

General description enough.

Eq. 553; 7 Cox C. C. 39; Dears. C. C. 539. (See R. *v.* Weeks, 8 Cox C. C. 455. *Supra*, §§ 152 *et seq.*)

The jury also found that the prisoner intended to make only a few counterfeit coins in England, with a view merely of testing the completeness of the apparatus before he sent it out to Peru. It was held that even to make a few coins in England with that object would be to commit the offence of making counterfeit coins within the statute. R. *v.* Roberts, *ut sup.*

If the process be carried far enough to deceive, the offence of making a false coin is complete. U. S. *v.* Abrams, 17 Rep. 56.

An indictment under the federal statute does not lie for forging a Spanish head pistareen, as it is not a coin of Spain made current by law in the United States. U. S. *v.* Gardner, 10 Pet. 618. And so, under the Massachusetts statute, of an indictment for forging a coin of California coined in violation of law. Com. *v.* Bond, 1 Gray, 564.

A statute making it indictable to have in possession an instrument for the purpose of coining covers an instrument for the purpose of perfecting a portion of a coin. Com. *v.* Kent, 6 Metc. (Mass.) 221. See R. *v.* Ridgeley, 1 East P. C. 171; 1 Leach, 189.

Under the Connecticut statute, aiding in the act of counterfeiting is within both the letter and reason of the law, as much as assisting in making the implement. State *v.* Stutson, Kirby, 52. Gilding base coin is within the statute. U. S. *v.* Russell, 22 Fed. Rep. 390.

Milled money is money put through a mill or press, a mint being the building in which such milling or minting is carried on. Jacob's Case, 1 East P. C. 181; R. *v.* Burning, 1 East P. C. 181.

[1] Whart. Cr. Pl. & Pr. § 218; Whart. Cr. Ev. § 122; State *v.* Griffin, 18 Vt. 198; Com. *v.* Stearns, 10 Met. (Mass.) 256; State *v.* Williams, 8 Iowa, 534; Daily *v.* State, 10 Ind. 536; Peek *v.* State, 2 Humph. 78; State *v.* Shoemaker, 7 Mo. 177.

In an indictment for uttering counterfeit coins, it is sufficient to describe them as "made and counterfeited" to the likeness and similitude of the good, true, and correct money and silver coins currently passing in the State and commonly called Spanish dollars. Fight *v.* State, 7 Ham. 180.

An indictment on the Virginia statute of 1834–35, c. 66, charging that the prisoner "did knowingly have in his custody, without lawful authority or excuse, one die or instrument, for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half dollar" (not further describing the die or instrument), is sufficient. Scott's Case, 1 Robinson, 695.

An indictment charging the defendant with having passed counterfeit "dollars" describes with sufficient certainty the character of the coin counterfeited. Peek *v.* State, 2 Humph. 78.

An indictment which alleges that the defendant had in his possession a coin, counterfeited in the similitude of the good and legal silver coins of this Commonwealth, called a dollar, with intent to pass the same as true, knowing it to be counterfeit, is supported by proof that the defendant had in his possession a coin counterfeited in the similitude of a Mexican dollar, with such intent and knowledge. Com. *v.* Stearns,

§ 752. Any offering of counterfeit coin with intent to defraud is uttering.[1] Thus, where a good shilling was given to a Jew boy for fruit, and he put it into his mouth, under pretence of trying whether it was good, and then taking, instead of it, a bad shilling out of his mouth, gave the bad coin to the prosecutor saying it was not good; this (which is called ringing the changes) was held to be an uttering within the meaning of the statute 16 Geo. II. c. 28.[2] It has, however, been held by Lord Abinger that the giving of a piece of counterfeit coin in charity is not uttering within the statute, although the party knew it to be a counterfeit; but this case can no longer be regarded as law.[3] On the other hand the staking counterfeit coin at a gaming table as good money is an attempt to utter or pass the same, and losing it at play is a passing of the same against law;[4] and so is the giving of counterfeit coin to a woman, as the price of connection with her.[5] And it is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered.[6]

Offering with intent to defraud is uttering.

§ 753. The presumption to be drawn from other attempts to pass counterfeit coin, or its possession on the person, has been already noticed.[7]

Guilty knowledge to be inferred from facts.

§ 754. If the coin forged be a common coin, legal in the United States, it is not necessary to prove that there is an original which the forged coin counterfeits.[8]

Existence of genuine original not necessary to be proved.

§ 755. A genuine sovereign reduced in weight by filing off nearly all the original milling, and fraudulently making a new milling, is a "false and counterfeit coin."[9]

Fraudulent diminution is coining.

supra. But see under later statute, Com. *v.* Bond, 1 Gray, 564.

[1] *Supra*, §§ 703, 705. U. S. *v.* Nelson, 1 Abb. U. S. 135; State *v.* Horner, 48 Mo. 520.

[2] R. *v.* Franks, 2 Leach, 644. *Supra*, § 706.

[3] R. *v.* Page, 8 C. & P. 122, Lord Abinger, C. B. Mr. Greaves properly holds that R. *v.* Page cannot be sustained in reason; 1 Russ. on Cr. 126; and by Alderson, B., in R. *v.* Ion, 2 Den. C. C. 484, it is said to be overruled. See Anon., 1 Cox C. C. 250; R. *v.* Heywood, 2 C. & K. 352. *Supra*, §§ 706, 708.

[4] State *v.* Beeler, 1 Brev. 482.

[5] R. *v.* ——, 1 Cox C. C. 250.

[6] R. *v.* Welch, 2 Den. C. C. 78. See R. *v.* Radford, 1 Ibid. 59; R. *v.* Ion, 2 Ibid. 475. See *supra*, § 706.

[7] *Supra*, § 715.

[8] See Daily *v.* State, 10 Ind. 536; U. S. *v.* Burns, 5 McC. Lean, 24.

[9] R. *v.* Herman, 14 Cox C. C. 279; 40 L. T. (N. S.) 263; L. R. 4 Q. B. D. 284. See U. S. *v.* Lissner, 12 Fed. Rep. 840, cited *supra*, § 749.

CHAPTER X.

BURGLARY.

Burglary is breaking into another's house by night with felonious intent.

§ 758. Burglary, at common law, is the breaking and entering the dwelling-house of another in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not.[1]

I. BREAKING.

§ 759. There must be an actual or constructive breaking into the house.[2] Every entrance into the house by a trespasser is not a breaking. Should a door or other aperture be partially or wholly

[1] Hale's Sum. 49; 1 Russ. on Cr. (6th Am. ed.) 786; 4 Bla. Com. 227; Com. v. Newell, 7 Mass. 247; State v. Wilson, Coxe, 439; Cole v. People, 37 Mich. 544; State v. Branham, 13 S. C. 389; Ray v. State, 66 Ala. 281; Hamilton v. State, 11 Tex. Ap. 116. By §§ 496–500 of the New York Penal Code of 1882, burglary is divided into three degrees, the second of which includes breaking into an inhabited house in the daytime.

[2] 1 Russ. on Cr. (6th Am. ed.) 786; Rolland v. Com., 82 Penn. St. 306; Clarke v. Com., 25 Grat. 908.

open, and the thief enter, this is not a breaking.[1] When the window of the house is open, and a thief, with a hook or other instrument, draws out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief break the glass of a window, or make an aperture in wall or floor, and, with a hook or other instrument, draw out some of the goods of the owner, this is burglary, for there was an actual breaking of the house.[2] But where a window was a little open, and not sufficiently so to admit a person, and the defendant pushed it wide open and got in, this was held to be no sufficient breaking.[3]

Breaking must be actual or constructive.

Opening a latch is breaking;[4] and if a door be closed, it is not necessary, to constitute burglary, that the door should be latched.[5] That the door entered was closed at the time of the attempt, may be inferentially shown.[6] And making an opening by fire,[7] taking glass out of a door,[8] bursting a glass already cracked,[9] and breaking more fully one already partially broken,[10] have each been considered to constitute breaking.[11]

§ 760. Where the prisoner opened the area gate with a skeleton key, and from the area passed into the kitchen through a door which it appeared was open at the time, it was ruled that opening the area gate was not a breaking of the dwelling-house, as there was a free passage at the time from the area into the house.[12]

Breaking an outside disconnected gate is not burglary.

Removing a loose plank (not fixed to the freehold) in a partition wall of a building is not a breaking.[13]

[1] R. v. Johnson, 2 East P. C. 488; R. v. Lewis, 2 C. & P. 628; State v. Wilson, Coxe, 439; Stone v. State, 63 Ala. 115.

[2] 3 Inst. 64; 1 Hale, 551. *Infra*, § 769. In Walker v. State, 63 Ala. 49, the doctrine of the text was applied to the statutory offence of breaking into a corn-crib.

[3] R. v. Smith, Car. Cr. L. 293; 1 Mood. C. C. 178; R. v. Hyams, 7 C. & P. 441; R. v. Lewis, 2 Ibid. 628; R. v. Spriggs, 1 M. & R. 357; Com. v. Strupney, 105 Mass. 588. *Infra*, §§ 767, 769.

[4] 1 Hale, 552.

[5] State v. Boon, 13 Ired. 244; State v. Reid, 20 Iowa, 413. *Infra*, § 767.

[6] People v. Bush, 3 Parker C. R. 552.

[7] White v. State, 49 Ala. 344.

[8] R. v. Smith, R. & R. 417.

[9] R. v. Bird, 9 C. & P. 44.

[10] R. v. Robinson, 1 Mood C. C. 327; R. v. Bird, 9 C. & P. 44.

[11] See Pugh v. Griffith, 7 Ad. & El. 827; R. v. Jordan, 7 C. & P. 432; R. v. Wheeldon, 8 C. & P. 747.

[12] R. v. Davis, R. & R. 322.

[13] Com. v. Trimmer, 1 Mass. 476. See R. v. Paine, 7 C. & P. 135, and remarks of Mr. Greaves, 1 Russ. on Cr. 790.

The breaking of the outside fence of the curtilage of a dwelling-house, which opened not into any building, but into a yard only, has been held not to be the breaking of the dwelling-house.[1]

§ 761. Cutting and tearing down a netting of twine, which is nailed to the top, bottom, and sides of a glass window, so as to cover it, and entering the house through such window, though it be not shut, constitute a sufficient breach and entry,[2] and so where a glass window was broken but the inside shutters were not moved.[3] But where a shutter-box partly projected from a house, and adjoined the side of a shop window, which side was protected by wooden panelling, lined with iron, it was held that the breaking and entering the shutter-box did not constitute burglary.[4] And where the only covering to an open space in a dwelling-house was a cloak hung upon two nails at the top and loose at the bottom, and it was removed from one of the nails, Field, J. held that this was not a sufficient breaking.[5]

And so of detached outer covering to window.

§ 762. A burglary may be committed by a breaking on the inside; for though a thief enter the dwelling-house in the night-time, through the outer door left open, or by an open window, yet if, when within the house he turn the key, or unlatch a chamber door, with intent to commit felony, this is burglary.[6] Hence where a servant, who sleeps in an

Breaking into inside room is burglary.

[1] In this case the premises consisted of a dwelling-house, warehouse, and stable, surrounding a yard; there was an immediate entrance to the dwelling-house from the street, and a gate and gateway, under one of the warehouses, leading into the yard; the prisoner entered the premises by breaking this gate; the judges held that this was not burglary; that breaking this gate, which was part of the outward fence of the curtilage, and not opening into any of the buildings, was not a breaking of any part of the dwelling-house. R. *v.* Bennett, R. & R. 289.

[2] Com. *v.* Stephenson, 8 Pick. 354. See People *v.* Nolan, 22 Mich. 229.

[3] R. *v.* Davis, R. & R. 499; R. *v.* Perkes, 1 C. & P. 300; though see 2 East P. C. 487.

[4] R. *v.* Paine, 7 C. & P. 135. In Timmons *v.* State, 34 Ohio St. 426, it was held that the force necessary to push open a closed, but unfastened, transom, that swings horizontally on hinges over an outer door of a dwelling-house, is sufficient to constitute a breaking in burglary under a statute which requires a *forcible* breaking. S. P., Dennis *v.* People, and other cases cited *infra*, § 767.

[5] Hunter *v.* Com., 7 Grat. 641, 645.

[6] R. *v.* Johnson, 2 East P. C. 488; Denton's Case, Fost. 108; State *v.* Scripture, 42 N. H. 485; State *v.* Wilson, Coxe, 439; Rolland *v.* Com., 85 Penn. St. 66. In this case, while the law in the text was conceded, it was contended that in the case of the opening of an inner door, it must be accompanied with an intent to commit a felony in the very room so entered.

To this, however, the court (Paxson, J.) replied: "We do not assent to this qualification of the common law rule. If a burglar, entering by an outer door or window incautiously left open, with the intent to commit a felony in a particular room in the house, as if he intends to rob a safe, with the location of which he is familiar, and in furtherance of his design, and to enable him to accomplish it successfully, opens the door of the adjoining room in the same house to gag and bind the owner sleeping therein, it is a breaking within the meaning of the law defining the offence of burglary. Yet in such case there would be an entire absence of an intent to commit a felony in the bedroom. The binding of the owner, standing alone, would be a mere assault and battery, punishable as a misdemeanor. Taken in connection with the main object, it assumes a different character, and becomes a necessary incident of the felony, as much so as the lifting of a latch or the breaking of the door of the safe." See Rolland *v.* Com., 82 Penn. St. 306. See, however, People *v.* Fralick, Hill & D. 63, where it was held, under the N. Y. statute, not burglary where the thief, after entering an open door, got into an upper room by opening a trap-door.

adjacent room, unlatches his master's door and enters his apartment, with intent to kill him,[1] or to commit a rape on his mistress,[2] it is burglary. And so where a person left in charge of a house enters, and steals from, a closed room which, from his employment, he has no right to enter.[3]

§ 763. Whether a guest at an inn is guilty of a burglary by rising in the night, opening his own door, and stealing goods from other rooms, was once doubted;[4] but the true rule is, that if the entrance into such other rooms be by opening doors which are shut, this is a burglarious entrance.[5] But mere opening with felonious intent without entering, though an attempt, is not burglary.[6] And it has been said not to be burglary, but larceny, for such guest to steal from a bar-room where he had a right to enter.[7]

And so when defendant is guest at an inn.

§ 764. Breaking open a chest or trunk is not in itself burglarious;[8] and according to the views of Mr. Justice Foster, the same rule holds good in relation to all other fixtures, which, though attached to the freehold, are intended

Breaking chest or trunk not burglary.

[1] 1 Hale, 544; 2 East P. C. 488; U. S. *v.* Bowen, 4 Cranch C. C. 604.

[2] Gray's Case, 1 Strange, 481; 2 East P. C. 488.

[3] Hild *v.* State, 67 Ala. 39.

[4] 1 Hale, 554. See R. *v.* Wheeldon, 8 C. & P. 747; State *v.* Clark, 42 Vt. 629; People *v.* Bush, 3 Parker C. R. 552; Mason *v.* People, 26 N. Y. 200. See *infra*, § 771.

[5] State *v.* Clark, 42 Vt. 629.

[6] 1 Hale, 554. See *contra*, 2 East P. C. 503.

[7] State *v.* Moore, 12 N. H. 42.

[8] Fost. 108, 109; 2 East P. C. 488.

only the better to supply the place of movable depositories.[1] Thus, when the doors are open and the thief thereby enters, though he afterwards break open a chest or cupboard, it is not such a breaking as to constitute burglary.[2]

Entrance by trick may be a breaking.

§ 765. In cases where the offender, with intent to commit a felony, for the purpose of effecting it gains admission by some trick, the offence is burglary, for this is a constructive breaking.[3] Thus, where thieves, having intent to rob, raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they robbed the owner and bound the constable; this was held a burglary. So if admission be gained under pretence of business; or if one take lodgings with a like felonious intent, and afterwards rob the landlord; or get possession of a dwelling-house by false affidavits, without any color of title, and then rifle the house; such entrance, being gained by fraud, will be burglarious.[4] The entry in such case, however, must be immediate.[5]

And so of entrance by conspiracy with servant.

§ 766. If a servant conspire with a robber, and let him into the house by night, this is burglary in both;[6] for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open.[7]

[1] Fost. 109. See, on this point, 1 Ben. & H. Lead. Cas. 531–2.

[2] State *v.* Wilson, Coxe, 439.

[3] 2 East P. C. 486; Rolland *v.* Com., 82 Penn. St. 306; Johnston *v.* Com., 85 Ibid. 54; Dutcher *v.* State, 18 Ohio St. 308; State *v.* Johnson, Phillips, 186; State *v.* Mordecai, 68 N. C. 207.

"When a person rings a door-bell of a house, the owner has a right to presume that his visitor calls for the purpose of friendship or business. If, in obedience to the summons, he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner, and constitutes a constructive breaking." Paxson, J., Johnston *v.* Com., *ut supra*.

[4] 2 East P. C. 485. *Supra*, §§ 140 *et seq.*, 150.

[5] State *v.* Henry, 9 Ired. 463.

[6] 1 Hale, 553; 1 Hawk. c. 38, s. 14; R. *v.* Cornwall, 2 Strange, 881.

[7] R. *v.* Johnson, C. & M. 218. See Allen *v.* State, 40 Ala. 334; R. *v.* Egginton, 2 Leach, 913. *Supra*, §§ 141, 231 *a*; *infra*, §§ 770, 915.

Locks or nails not a necessary protection.

§ 767. While there must be a breaking, removing, or putting aside something material, which constitutes a part of the dwelling-house, and is relied on as a security against intrusion, yet if the door or window opened were at the time of the attempt shut, being kept in its place only by its own weight,[1] it is no matter, as we have seen, that there was no fastening by locks or bolts; a latch to the door, or the weight of the window or door, is sufficient,[2] and, as has been noticed, if a door be firmly closed, it is not necessary that it should be bolted or latched.[3]

Entrance by chimney is breaking.

§ 768. Entrance by a thief through the chimney is a breaking; for that is as much closed as the nature of things will permit. And this rule holds though the burglar were detected before a chamber was entered.[4]

[1] R. *v.* Haines, R. & R. 450; R. *v.* Hyams, 7 C. & P. 441; State *v.* Carpenter, 1 Houst. C. C. 367; Frank *v.* State, 39 Miss. 705. *Supra*, § 759.

[2] 1 Russ. on Cr. by Greaves, 787; R. *v.* Hall, R. & R. 355; R. *v.* Russell, 1 Mood. C. C. 377; People *v.* Bush, 3 Park. C. R. 552; State *v.* Reid, 20 Iowa, 413; Dennis *v.* People, 27 Mich. 151; State *v.* Boon, 13 Ired. 244; Hild *v.* State, 67 Ala. 39; Carter *v.* State, 68 Ibid. 96; Frank *v.* State, 39 Miss. 705.

At one time the English judges were divided on the question whether when the heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, was opened, it was burglary; the door having bolts by which it might have been fastened on the inside, but it did not appear that it was so fastened at the time. R. *v.* Callan, R. & R. 157. Formerly the case was held within the definition of the offence. Brown's Case, 2 East P. C. 487. Perhaps, however, there was a difference between these two cases in this: that in the latter case there were no interior fastenings, but in the former there were, though not used. At a nisi prius case, in 1830, before Bolland, J., it was held that the lifting up, from inside, of a trap-door covering a cellar which was merely held in its place by its own weight, and which had no fastenings, is not a sufficient breaking to constitute a burglary. R. *v.* Lawrence, 4 C. & P. 231. But it is now held otherwise. R. *v.* Russell, 1 Mood. C. C. 377; Timmons *v.* State, 34 Ohio St. 426.

Removing a covering constitutes the offence, though it is otherwise if there be a partial opening. R. *v.* Smith, 1 Mood. C. C. 178; R. *v.* Hyams, 3 Russ., 9th ed., 3; 7 C. & P. 441; Com. *v.* Strupney, 105 Mass. 588. *Supra*, § 759.

[3] State *v.* Reid, 20 Iowa, 413; State *v.* Carter, 1 Houst. C. C. 402. See State *v.* Boon, 13 Ired. 244.

Removal of an iron grating may be burglary as much as opening a window. People *v.* Nolan, 22 Mich. 229.

[4] 1 Hawk, c. 33, s. 4; 4 Bla. Com. 226; R. *v.* Brice, R. & R. 450; State *v.* Willis, 7 Jones (N. C.), 190; Donohoo *v.* State, 36 Ala. 281; Walker *v.* State, 52 Ibid. 376. And see distinctions taken *infra*, § 777.

§ 769. If the window of a house be left open,[1] in whole or in part, so as to admit the person,[2] or if there be an aperture in the wall, roof, or cellar, to admit light or air, through which the entry is made, this is no breaking.[3] As has been observed, the opening of a folding or trap-door, covering such aperture by its own weight, though itself unlatched, is burglary.[4]

But not entering through aperture in wall, or open door.

§ 770. If a servant, with his master's assent, pretend to agree with a robber, and open the door and let the latter in, this, as has been already seen, is no burglary.[5] Where the owner voluntarily assents to the entrance, this is a defence; but the owner giving a key to an outdoor servant to enter for special purposes, is no defence when the latter is charged with a burglarious entry.[6] A wife's consent to her paramour to break into her husband's house in order to commit adultery with her, is not, where adultery is a felony, a defence.[7]

Nor entering by assent.

§ 771. Doubts having been entertained whether, when a thief got into a house without breaking, it was burglary to break out, the stat. 12 Anne, c. 1, s. 7, makes such a breaking out burglary.[8] Under this statute it has been held burglary to break open a door, window, or skylight in the attempt to escape, though the defendant only get his head through;[9] and even for a lodger, who enters lawfully, to break out after committing a felony.[10] But it was subsequently held that it is not burglary, under the statute of Anne, as expanded by those of 7 & 8 Geo. IV. and 24 & 25 Victoria, simply to open an outside door from inside, without passing through such door, when the original

Breaking out of house is not burglary at common law.

[1] R. *v.* Smith, 1 Mood. C. C. 178; Green *v.* State, 68 Ala. 539.

[2] Com. *v.* Strupney, 105 Mass. 588; White *v.* State, 51 Ga. 285; Williams *v.* State, 52 Ibid. 580; Pines *v.* State, 50 Ala. 153.

[3] R. *v.* Lewis, 2 C. & P. 628; R. *v.* Spriggs, 1 M. & R. 357; State *v.* Boon, 13 Ired. 244. *Supra*, § 759; *infra*, § 777

[4] *Supra*, § 767.

[5] *Supra*, §§ 141, 231 *a*, 766; R. *v.* Johnson, C. & M. 218; Roscoe's Cr. Ev. 345. See R. *v.* Egginton, 2 Leach, 913; Allen *v.* State, 40 Ala. 334; *infra*, § 915. See People *v.* Collins, 53 Cal. 185. As to Texas statute, see Brown *v.* State, 7 Tex. Ap. 501; Mace *v.* State, 9 Ibid. 110.

[6] Lowder *v.* State, 63 Ala. 143.

[7] Forsythe *v.* State, 6 Ohio, 19; *supra*, § 121.

[8] See similar statute in Georgia. White *v.* State, 51 Ga. 285.

[9] R. *v.* McKearney, Jebb's C. C. 99; R. *v.* Lawrence, 4 C. & P. 231; R. *v.* Compton, 7 Ibid. 139.

[10] R. *v.* Wheeldon, 8 C. & P. 747. See *supra*, §§ 762, 765.

entrance into the house was effected without breaking.[1] At common law, it is held that such posterior breaking out cannot be tacked to the prior entrance so as to make the offence burglary. Hence, a breaking out of a house has been held not to be burglary at common law.[2]

§ 772. Where the owner, either from apprehension of force, or with the view more effectually to repel it, opens the door through which the robber enters, this is burglary.[3] It is otherwise, however, if money be thus obtained outside of the house, the defendant not entering.[4]

Owner's opening produced by fright no defence.

II. ENTRY.

§ 773. The entry is essential to the constitution of the offence.[5] But when both entry and breaking take place in the night, it is not necessary that both should be at the same time.[6] Hence, if thieves break a hole in the house one night with intent to enter another night, and commmit felony, which they execute accordingly, it is burglary.[7]

Need not be simultaneous with breaking.

§ 774. When the thief breaks the house, and his body or any part thereof, as his foot or his arm, is within any part of the house, it is deemed an entry; or when he puts a gun into a window which he has broken (though the hand be not in), or into a hole of the house which he has made, with intent to murder or kill, this is an entry and breaking of the house; but if he barely break the house, without any such entry at all, this is no burglary.[8]

But without entry breaking not enough.

[1] R. *v.* Davis, 6 Cox C. C. 369. See State *v.* McPherson, 70 N. C. 239.

[2] Clarke's Case, 2 East P. C. 490; 1 Hale, 554; Rolland *v.* Com., 82 Penn. St. 306; Adkinson *v.* State, 5 Baxt. 569; Ray *v.* State, 86 N. C. 662. See State *v.* McPherson, 70 Ibid. 239; 1 Ben. & H. Lead. Cas. 540; Brown *v.* State, 55 Ala. 123. See *contra*, under statute of Anne; State *v.* Ward, 43 Conn. 489.

[3] 2 East P. C. 486; Hawkins, c. 38, s. 4; R. *v.* Swallow, 1 Russ. Cr. 792. *Supra*, § 150. In People *v.* Collins, 53 Cal. 185, A. informed the sheriff that he (A.) had been asked by B. to enter a house in order to steal certain money in it. By the sheriff's advice A. entered alone and took the money, which he gave to B. outside. This was held not to be burglary in B. *Supra*, §§ 211 *a*, 231 *a*.

[4] 2 East P. C. 486. *Infra*, § 779.

[5] *Infra*, § 771.

[6] 2 East P. C. 508; R. *v.* Smith, R. & R. 417.

[7] 1 Hale, 551. See R. *v.* Bird, 9 C. & P. 44. *Infra*, § 806.

[8] 3 Inst. 54; 2 East P. C. 490; Pines *v.* State, 50 Ala. 153; State *v.* Whitby, 15 Kans. 402. See Ray *v.* State, 66 Ala. 281.

§ 775. Where the defendant introduced his hand through a pane of glass, which he had broken, between an outer window and an inner shutter, for the purpose of undoing the window-latch, it was considered a sufficient entry.[1] The same is true of the mere introduction of the offender's finger.[2] Where thieves came by night to rob a house, and the owner went out and struck one of them; whereupon another made a pass with a sword at persons he saw in the entry, and in so doing his hand was over the threshold, this was deemed burglary.[3]

Entrance of hand sufficient.

§ 776. It has been said that discharging a loaded gun into a house is a sufficient entry.[4] And when the intent is to effect a personal burglarious entrance, for the purpose of homicide, this is sound law.[5] Otherwise the offence may be a felonious assault.

And so of discharging gun.

§ 777. An entry down a chimney, as has been seen, is a sufficient entry, for the chimney is a part of the house.[6] An entry, however, through a hole in the roof left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening, and needs protection; whereas if a man choose to leave a hole in the wall or roof of his house instead of a fastened window, he must take the consequences.[7]

And so of entrance by chimney.

§ 778. If the sole entrance into the house is effected by an instrument by which a hole is made, such instrument not being suitable to draw out or injure anything inside, and without felonious intent, though this is an attempt, it is not a sufficient entry to constitute burglary.[8]

But not so of merely boring hole.

[1] R. *v.* Bailey, R. & R. 341; R. *v.* Jordan, 7 C. & P. 432; R. *v.* Wheeldon, 8 Ibid. 747; R. *v.* Bird, 9 Ibid. 44; R. *v.* O'Brien, 4 Cox C. C. 398; Fisher *v.* State, 43 Ala. 717.

[2] R. *v.* Davis, R. & R. 499; and see 1 Hale, 533; Franco *v.* State, 42 Tex. 276; Post. 107; 2 East P. C. 490.

[3] 2 East P. C. 490.

[4] 1 Hawk. c. 38, s. 11; 1 Hale, 555; Pickering *v.* Rudd, 1 Stark. 48.

[5] 1 Russ. on Cr. 796. See, however, 2 East P. C. 490.

[6] R. *v.* Brice, R. & R. 450; State *v.* Willis, 7 Jones (N. C.), 190; Donoboo *v.* State, 36 Ala. 281; Franco *v.* State, 42 Tex. 276. *Supra*, § 768.

[7] R. *v.* Spriggs, 1 M. & R. 357. *Supra*, § 768.

[8] R. *v.* Rust, 1 Mood. C. C. 184; Car. C. L. 293; S. C. by the name of R. *v.* Roberts, 2 East P. C. 487. See R. *v.* Hughes, Ibid. 491; State *v.* McDaniel, 1 Wins. (N. C.) No. 1, 248. See *supra*, § 187. *Infra*, § 780.

§ 779. In a case where the house was broken and not entered, and the owner for fear threw out his money, which the assailant took, it was held to be no burglary; though clearly robbery, if taken in the presence of the owner.[1]

Nor of mere taking money without entry.

§ 780. Where the prisoner raised a window which was not bolted, and thrust a crow-bar under the bottom of the shutter (which was about half a foot within the window), so as to make an indent on the bottom of the shutter, but from the length of the bar his hand was not inside the house, there was held not to be a sufficient entry to constitute burglary.[2] And so *a fortiori* where he merely broke open the outer shutter, but did not get his hand through the glass pane.[3]

Some entrance must be effected.

The entrance by guests at inns has been previously discussed.[4]

III. DWELLING-HOUSE.

§ 781. The breaking and entering, to constitute a burglary, must be ordinarily into the dwelling-house of another; that is to say, a house in which the occupier and his family usually *reside*, or, in other words, dwell and lie in.[5]

Dwelling-house is a house in which occupiers usually reside.

§ 782. It has been said that a church edifice may be the subject of burglary at common law;[6] but this has been doubted.[7] In most States it is so by statute.

Church edifice.

§ 783. As an introduction to the cases hereafter to be given in detail, it may be now stated generally that no matter to what use an out-building may be put, it is burglary to break and enter it, if it is appurtenant or ancillary to the dwelling-house, and is within such convenient distance from the same as to make passing and repassing an ordinary household occurrence. What this convenient

Burglary to break into an out-building which is appurtenant to dwelling-house.

[1] 2 East P. C. 486, 490. See *infra*, § 846.

[2] R. *v.* Rust, 1 Mood. C. C. 184; S. C., by the name of R. *v.* Roberts, 2 East P. C. 487. *Supra*, § 778.

[3] State *v.* McCall, 4 Ala. 643.

[4] *Supra*, § 762.

[5] See 2 Russ. on Cr. (6th Am. ed.) 797; Hollister *v.* Com., 60 Penn. St. 103. See, for larger definition, People *v.* Stickman, 34 Cal. 242. Under N. Y. statute, see Quinn *v.* People, 71 N. Y. 561. *Infra*, § 791.

[6] 3 Inst. 64; 1 Hale, 556; R. *v.* Baker, 3 Cox C. C. 581—Alderson, B. See 2 Bennett & Heard's Lead. Cas. 54; 1 Russell, by Greaves, 826. As to theatres, see Lee *v.* State, 56 Ga. 478. As to school-houses, State *v.* Bailey, 10 Conn. 144.

[7] 1 Hawk. c. 38, s. 17.

distance, is varies with the state of the neighborhood. In a city, a store on the opposite side of a street could not be considered an appurtenant to a dwelling-house from which it might be only forty feet distant. In a well settled country, a barn which no common inclosure embraced in the same cluster as the dwelling-house, and which was a hundred feet distant from it, would not, for the same reason, be regarded as appurtenant.[1] On the other hand, on an open prairie, neither a common inclosure, nor close proximity, would be necessary to constitute the offence. The question is, is it probable that the building is under the immediate personal care of its owner? If so, in view of the peril to life consequent upon a nocturnal attack on it, the offence is one against family peace and safety as well as against property, and consequently rises to burglary.[2]

Hence, burglary may be committed in a building standing near enough to the dwelling-house to be used with it as appurtenant to it; or when standing close to it in the same yard, whether the yard be inclosed or open.[3] And a building used with a dwelling-house, and opening into an inclosed yard belonging thereto, was deemed parcel of the dwelling-house, though it also opened into an adjoining street, and though it had no internal communication with the dwelling-house.[4] In another case the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined, all of which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, etc., making altogether an inclosed yard. The workshop had no internal communication

[1] State *v.* Langford, 1 Dev. 253; State *v.* Ginns, 1 N. & McC. 583. See *infra*, § 784.

[2] R. *v.* Westwood, R. & R. 495; R. *v.* Burrows, 1 Mood. C. C. 274; Pitcher *v.* People, 16 Mich. 142; Hollister *v.* Com., 60 Penn. St. 103; State *v.* Twitty, 1 Hayw. 102; State *v.* Wilson, Ibid. 242; Armour *v.* State, 3 Humph. 379. "Shops," "store-house," "store," "counting-house," "warehouse," and "out-house," as statutory terms, are the subjects of future distinct definition. *Infra*, § 792. As limiting the text, see State *v.* Evans, 18 S. C. 137.

[3] See 1 Hale, 558; Brown's Case, 2 East P. C. 493; Garland's Case, Ibid.; People *v.* Snyder, 2 Parker C. R. 23; Quinn *v.* People, 2 Hun, 336; S. C., 71 N. Y. 561; State *v.* Langford, 1 Dev. 253; State *v.* Wilson, 1 Hayw. 242; State *v.* Twitty, Ibid. 102. That this includes the "smoke-house," which may be proved under averment of "mansion-house," see Fletcher *v.* State, 10 Lea, 338.

[4] R. *v.* Lithgo, R. & R. 357.

with the house, and it had a door opening into the street; its roof was higher than that of the dwelling-house. The street door of the workshop was broken open in the night. It was held that this workshop was parcel of the dwelling, and that the conviction was right.[1] And so as to a barn, part of the same group of buildings as the dwelling-house, and not separated from it by a public road.[2]

[1] R. *v.* Chalking, R. & R. 334.

The provision of the New York Revised Statutes (2 R. S. 668, § 16), declaring that no building shall be deemed a dwelling-house within the meaning of the provision relating to burglary, unless the same be found to be joined to, immediately connected with, and part of a dwelling-house, is intended to mean no structure, itself a building separate from, and independent of, the dwelling-house of the owner, *i. e.*, uninhabited out-houses, isolated from the dwelling, and does not apply to the lower story of a dwelling used as a store, although having no internal communication with the upper stories. Quinn *v.* People, 71 N. Y. 561.

[2] Pitcher *v.* People, 16 Mich. 142.

Adjoining the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house; and adjoining the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roofs of the dwelling-house, kiln, and dairy were of different heights. It was held, that the dairy was not a part of the dwelling-house, and that a burglary could not be committed by breaking into it. R. *v.* Higgs, 2 C. & K. 321. See Fisher *v.* State, 43 Ala. 717.

Again, a storehouse, two hundred and fifty yards distant from the dwelling (in which last the owner usually slept), which was on the opposite side of the road, in which there was no chimney and no bed or bedstead, though the owner sometimes slept in it, was held not to be the subject of burglary. State *v.* Jenkins, 5 Jones (N. C.), 430. And so as to mill-house similarly situated. State *v.* Sampson, 12 S. C. 567.

A smoke-house opening into the yard of a dwelling-house, and used for its common and ordinary purposes, is, in law, a part of the dwelling-house, and in the breaking and entering it a burglary may be committed. State *v.* White, 4 Jones (N. C.), 349. But it is otherwise if the smoke-house be detached, and in a distinct lot. State *v.* Jake, 1 Wins. (N. C.) No. 2, 80.

The prisoner broke into a goose-house opening into the prosecutor's yard, into which his house also opened, and the yard was surrounded partly by other buildings of the homestead and partly by a wall; some of the buildings had doors opening backward, and there was a gate in one part of the wall opening upon a road. The goose-house was held to be a part of the dwelling-house. R. *v.* Clayburn, R. & R. 660.

A barn fifteen rods from a dwelling-house, and separated from it by a highway, is not within the same curtilage. Curkendall *v.* People, 36 Mich. 309.

The breaking into a store, in the night-time, when there was no fence inclosing the dwelling-house and the store, so as to bring them under one inclosure, and when the store was not appurtenant or ancillary to the dwelling-house, and the two were twenty

House not yet occupied not the subject of burglary.

§ 784. A building constructed for use as a dwelling-house, under repair, in which no one at the time lives, though the owner's property is deposited there, is not a place in which burglary can be committed until he has taken possession, and begun to inhabit it.[1] If one of the workmen engaged in the repairs sleep there in order to protect it, it will not make any difference;[2] nor though the house is ready for the reception of the owner, and he has sent his property into it preparatory to his own removal, does it become for this reason his mansion.[3] And where the landlord of a house purchased the furniture of his out-going tenant, and procured a servant to sleep there in order to guard it, but without any intention of making it his own residence, a breaking into the house was not considered to be a burglary.[4] It is otherwise when the house is occupied by servants as part of the owner's family.[5]

feet apart, has been held to be no burglary. People *v.* Parker, 4 Johns. 424. See Hollister *v.* Com. 60 Penn. St. 103; State *v.* Ginus, 1 N. & McC. 583.

An area gate, opening into the area only, is said, as we have seen, not to be part of the dwelling-house, so as to make the breaking thereof burglary, if there is any door or fastening to prevent persons in the area from entering the house, although such door or fastening might not be secured at the time. R. *v.* Davis, R. &. R. 322.

In an English case, where a centre building was allotted to a variety of trades, and there were two wings annexed to it, both of which were used as dwelling-houses, and were occupied by different persons, but had no internal communication with the building, though the roofs of all were connected, and the entrances of all were out of the same common inclosure, the centre building was held not to be the subject of burglary, being viewed as a distinct tenement, the adjoining houses being the respective abodes of individuals. Egginton's Case, 2 East P. C. 494; 2 B. & P. 508; S. C., 2 Leach, 913. But this case rests on the supposition that the buildings were absolutely separate.

A two-storied house, of which the front room on the first floor was used as a storehouse, and the back room (which also contained a few boxes of goods, and communicated with the front by a door in the partition) as a sleeping-room by the owner, while the clerks, who were unmarried men, and took their meals at a hotel, slept in the rooms on the second floor, is a dwelling-house, both within the common law definition of burglary, and under §§ 3308–9 of the Alabama Code. *Ex parte* Vincent, 26 Ala. 145.

[1] 1 Leach, 185; Fuller's Case, 2 East P. C. 498; 1 Leach, 196; Elsmore *v.* St. Braivells, 2 Man. & R. 514; S. C., 8 B. & C. 461. But see *infra*, § 791.

[2] 1 Leach, 186.

[3] R. *v.* Hallard, 2 East P. C. 498; R. *v.* Thompson, Ibid.; 2 Leach, 771. *Infra*, § 815.

[4] R. *v.* Davis, 2 Leach, 876; R. *v.* Smith, 2 East P. C. 497; R. *v.* Fuller, Ibid. 498; 1 Leach, 196.

[5] *Infra*, § 790.

Nor building casually used.

§ 785. The mere casual use of a tenement will not suffice.[1] Where neither the owner nor any of his family have slept in the house, it is not his dwelling-house, though he had used it for his meals and all the purposes of his business, and so a breaking into it is not a burglary.[2]

Otherwise as to building occupied by executors.

§ 786. If a man die in his leasehold house, and his executors put servants in it, and keep them there at board wages, burglary may be committed in breaking into it, and it may be laid to be the executor's property.[3]

"Chambers" and "lodging rooms" may constitute a dwelling.

§ 787. A dwelling-house is deemed any permanent building in which a party may dwell and lie, and as such, burglary may be committed in it. A set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose.[4] So even a loft over a stable, used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken.[5]

Burglary may be also committed by breaking into a lodging-room, even by a person who lawfully entered the house of which such lodging-room is part;[6] or into a garret used for a workshop, and rented together with an apartment for sleeping; and if the landlord does not sleep under the same roof, the place may be laid as the mansion of the lodger.[7]

When a landlord breaks and enters a guest's chamber, if the chamber was the guest's dwelling-house as a settled abode, the landlord may be indicted for burglary; but not otherwise.[8]

And so of apartments in tenement houses.

§ 788. What has been said with regard to "chambers" and "lodgings" applies more strongly to apartments in hotels or tenement houses in which families reside separately as in a permanent home, though with a common

[1] 1 Hale, 557. Though see State *v.* Wilson, 1 Hayw. 242; Armour *v.* State, 3 Humph. 379.

[2] R. *v.* Martin, R. & R. 108; Fuller *v.* State, 48 Ala. 273.

[3] 2 East P. C. 499.

[4] 1 Hale, 556; 1 Hawk. c. 38, s. 11.

[5] R. *v.* Turner, 1 Leach, 305.

[6] *Supra*, §§ 762, 763; 1 Leach, 89; R. *v.* Wheeldon, 8 C. & P. 747; State *v.* Clark, 42 Vt. 629; Com. *v.* Bowden, 14 Gray, 103; People *v.* Bush, 3 Parker, C. R. 552; Mason *v.* People, 26 N. Y. 200.

[7] 1 Leach, 237. *Infra*, § 802.

[8] Ibid.; Dalt. C. 151. See R. *v.* Picket, 2 East P. C. 501; R. *v.* Ball, 1 Mood. C. C. 30; Ashton *v.* State, 68 Ga. 25, and cases cited *infra*, § 802. And see *infra*, § 936, as to analogous case of general owner stealing from special.

street door and hall. Each "apartment" or section of this common building is so distinct and independent that burglary may be committed by breaking into it. There is, however, a distinction between such "apartments" and ordinary chambers in inns which are transiently occupied. The latter, at least according to the old authorities, must be laid as the landlord's dwelling, though it is now safer to insert counts charging the ownership both ways. But when the residence of the lodger is permanent, it is now clear that the apartment must be laid to be his dwelling-house.[1] Nor does it make any difference in principle that the owner occupies an apartment in the same building. The apartments of the lessees must be laid as their dwelling-houses, and, as a consequence, he is indictable for burglary in breaking into and entering the same.[2]

§ 789. The offence cannot be committed in a tent or booth in a market or fair, even though the owner lodge in it;[3] because it is not a permanent but a temporary edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling-house.[4] And so of a log-cabin occupied by an agent.[5]

And so of permanent tents and log-cabins.

§ 790. The occupation of a servant as such, and not as a tenant, is the occupation of the master, and will be a sufficient residence to render it the dwelling-house of the master.[6]

Occupation of servant may be occupation of master.

§ 791. It is not necessary that any person should be actually within the house at the time the offence is committed. For if the owner leave it *animo revertendi*, though no person reside in it in his absence, it will still be his mansion.[7] It has been even ruled, though with doubtful accuracy, that burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, to which, on going into

Not necessary that some one should be at the time in the house.

[1] R. *v.* Carrell, 1 Leach, 237; R. *v.* Bailey, 1 Mood. C. C. 23; R. *v.* Wheeldon, 8 C. & P. 747; People *v.* Bush, 3 Parker C. R. 552; People *v.* Smith, 1 Ibid. 329; Mason *v.* People, 26 N. Y. 200; Houston *v.* State, 38 Ga. 165; People *v.* St. Clair, 38 Cal. 137.

[2] See *infra*, §§ 801–3.

[3] 1 Hawk. c. 38, s. 35; 1 Hale, 557.

[4] R. *v.* Smith, 1 M. & Rob. 256.

[5] State *v.* Jake, 1 Wins. (N. C.) No. 2, 80.

[6] R. *v.* Stock, R. & R. 185; R. *v.* Wilson, Ibid. 115; State *v.* Wilson, 1 Hayw. 242; Armour *v.* State, 3 Humph. 379. *Supra*, § 786.

[7] 1 Hawk. c. 37, s. 11.

the country, he had removed his furniture from his former residence in town, though neither the prosecutor nor his family had ever lodged in such house, but merely visited it occasionally.[1] And though a man leave his house and never mean to live in it again, yet if he use part of it as a shop, while his servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling-house.[2] It is otherwise where the house is finally abandoned by the owner, who leaves persons in it, not as domestic servants but as care-takers.[3]

IV. DEFINITIONS OF STATUTORY TERMS.

§ 792. (*a*) *Shop*.—Under the English statutes, this must be a place for the sale of goods. A mere working apartment is not such "a shop."[4] But this has been qualified even in England, so as to make a blacksmith's workshop to be a shop;[5] and in the United States, the term includes, popularly, any place where goods are sold, or work done, for which money is on the spot received.[6] This, however, excludes a counting-room, where goods are not exhibited, nor the work done for which the money is paid.[7]

"Shop" is a place for the sale of goods.

§ 793. (*b*) *Warehouse*.—This term includes a cellar for the storage of goods intended for removal and sale;[8] and any place of temporary storage for commercial use meets the description.[9] But the term does not cover a slight structure in a garden used for garden seeds.[10]

"Warehouse" is a place for business storage.

[1] Com *v.* Brown, 3 Rawle, 207. In this case, Gibson, C. J., concedes that the conclusion conflicts with modern English rulings. *Supra*, § 784; Foster, 77; 2 East P. C. 496; R. *v.* Murray, Ibid.; and R. *v.* Martin, R. & R. 108; R. *v.* Harris, 2 Leach, 701; 2 East P. C. 498; Vincent, *ex parte*, 26 Ala. 145. See *supra*, § 781.

[2] R. *v.* Gibbons, R. & R. 442.

[3] R. *v.* Flanagan, R. & R. 187.

[4] R. *v.* Sanders, 9 C. & P. 79.

[5] R. *v.* Carter, 1 C. & K. 173.

[6] State *v.* Carrier, 5 Day, 131. See State *v.* Canney, 19 N. H. 135; State *v.* Brooks, 4 Conn. 446; People *v.* Humphrey, 1 Root, 63.

[7] People *v.* Marks, 4 Parker C. R. 153; and, as to "school-house," see State *v.* Bailey, 10 Conn. 144. As to "place of business," see Bethune *v.* State, 48 Ga. 505.

[8] R. *v.* Hill, 2 M. & R. 458.

[9] Wilson *v.* State, 24 Conn. 57; Allen *v.* State, 10 Ohio St. 287. See Com. *v.* Pennock, 3 S. & R. 199. See, as to the buildings of railroad depot, State *v.* Bishop, 55 Vt. 287.

[10] State *v.* Wilson, 47 N. H. 101.

"Storehouse" is a place for family as well as business storage.

§ 794. (*c*) *Storehouse.*—This is a still wider term, and includes a storage for family as well as for business purposes, and for retailing, as well as for commission or wholesale business.[1] A building for storage, however, which is slept in continually, is a dwelling-house.[2]

"Store" is place for keeping and sale of goods.

§ 795. (*d*) *Store*, has been defined to be a place where goods are exhibited for sale;[3] but this is too narrow a definition, as, when used as a *nomen generalissimum*, the term includes "storehouse."[4]

"Counting-house" is a building where accounts are kept.

§ 796. (*e*) *Counting-house.*—This, in England, has been held to include a building connected with a chemical factory; in which building is a weighing machine, where the goods are weighed, and a book kept in which the weights are entered; and in the same building the time of the workmen is entered, and they are accustomed to be paid, though the books for this purpose, except when so used, are kept in the "office," with the general books of the concern.[5]

"Out-houses" are buildings in proximate relation to building in chief.

§ 797. (*f*) *Out-houses.*—These are defined as at common law in another section.[6] Under the statutes the term has a wider meaning, including all buildings in business dependence on the building in chief; supposing there be relative proximity, such as contiguity, or juxtaposition within the same inclosure, or, if in the open country, within the same field or lot.[7] But the out-house must be a *house*, *e. g.*, something, though a mere cow-house or pig-sty, complete in itself.[8]

"Barn" includes buildings for storage of grain.

§ 797 *a*. (*g*) *Barn.*—The word "barn," in a statute, covers all buildings used for the storage of grain;[9] and it does not cease to be a barn because it is sometimes used to store tobacco.[10]

[1] See State *v*. Sandy, 3 Ired. 570.

[2] State *v*. Potts, 75 N. C. 129.

[3] State *v*. Canney, 19 N. H. 135. See Moore *v*. People, 47 Mich. 639. That under a statute specifying "storehouse," there can be no conviction for breaking into a "store-room," see Hagar *v*. State, 35 Ohio St. 268.

[4] See Com. *v*. Whalen, 131 Mass. 419; Moore *v*. People, 47 Mich. 639.

[5] R. *v*. Potter, 2 Den. C. C. 235; 3 C. & K. 179; 5 Cox C. C. 187.

[6] *Supra*, § 783.

[7] See § 783, and State *v*. Brooks, 4 Conn. 446; Swallow *v*. State, 20 Ala. 30. That under "other buildings" in a statute a stable is included, see Orrell *v*. People, 94 Ill. 456.

[8] See R. *v*. Janes, 1 C. & K. 303.

[9] Barnett *v*. State, 38 Ohio St. 7.

[10] Ratekin *v*. State, 26 Ohio St. 420.

V. OWNERSHIP.[1]

Occupier is to be generally regarded as owner.

§ 798. "If the rule," remarks Mr. East,[2] "by which to ascertain the ownership may be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person, there, if he inhabit it either by himself, his family, or servants, or even by his guests, the indictment must lay the offence to be committed against his mansion. And so it is if he let out apartments to inmates who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicil there, without any interference on the part of the proper owner, or if they be only in possession of parts of the house as inmates to the owner, and have a distinct and separate entrance, then the offence of breaking, etc., their separate apartments, must be laid to be done against the mansion-house of such occupiers, respectively." And, as a general rule, the ownership, so far as burglary is concerned, is in a lessee or other tenant having title, and not in the owner of the fee.[3]

And so of servant who occupies his master's house at a yearly rent.

§ 799. Where it appeared that a servant lived in the house of his master at a yearly rent, it was ruled that the house could not be described as the master's house, though it was on the premises where the master's business was carried on, and although the servant had it because of his service.[4] It is otherwise where the servant pays no rent, or is a *locum tenens* for the master.[5] But whenever the servant occupies the house for his own benefit, and not for that of his master, then the servant is to be regarded as owner.[6]

[1] As to the manner of averring the names of owners, etc., see Whart. Cr. Pl. & Pr. §§ 109 *et seq.*; Whart. Crim. Ev. § 94.

[2] 2 East P. C. 499, 500. See *supra*, § 787.

[3] *Infra*, §§ 799, 803, 816; Ashton *v*. State, 68 Ga. 25. See as to ownership of a railway car, State *v*. Parker, 10 Nev. 79.

[4] R. *v*. Jarvis, 1 Mood. C. C. 7; and see R. *v*. Smythe, 5 C. & P. 202. *Supra*, §§ 789, 790; *infra*, § 803.

[5] R. *v*. Rawlins, 7 C. & P. 150; R. *v*. Gibbons, R. & R. 442; R. *v*. Wilson, Ibid. 115.

[6] R. *v*. Jobling, R. & R. 525; and see R. *v*. Smythe, 5 C. & P. 202; R. *v*. Jarvis, 1 Mood. C. C. 7; R. *v*. Camfield, Ibid. 42; R. *v*. Witt, Ibid. 248; R. *v*.

House occupied by married woman to be laid as husband's.

§ 800. If a house be tenanted by a married woman, it is at common law the house of her husband and not of herself, although she live separate from her husband.[1] Even if a married woman live apart from her husband, upon an income arising from property vested in trustees for her separate use, a house that she has hired to live in is, at common law, properly described as the dwelling-house of her husband, though he has never been in it, and she paid the rent out of her separate property.[2] And if a wife be living apart from her husband, in a house built by him, though she be living in adultery with another man, who paid the house-keeping expenses, it may be laid as the dwelling-house of the husband; even if the husband expected the criminal intercourse when he placed her in the house.[3] But under recent statutes the ownership may be laid in the wife.[4]

Public building may be described as property of occupant.

§ 801. A public hall may be described as the residence of the clerk of the company to whom it belongs, and who resides in it;[5] the apartments occupied by a banking corporation as the property of the bank;[6] and when the house of a charitable institution is entered, ownership is implied in the statement that the house is the house of the institution.[7]

Turner, 1 Leach, 305; R. *v.* Flannagan, R. & R. 187. *Infra*, § 816.

Where the servant of three partners in trade had weekly wages, and particular rooms assigned to him, as lodging for himself and family, over the bank and brewery office of his employers, with which his lodging communicated by a trap-door and a ladder, it was ruled by the twelve judges that a burglary committed in the banking-room was well laid as in the dwelling-house of the three partners. R. *v.* Stockton, 2 Taunt. 349; 2 Leach, 1015; S. C., R. & R. 185.

A gardener lived in a house of his master, quite separate from the dwelling-house of his master, and had the entire control of the house he lived in, and kept the key; it was held that, on an indictment for burglary, the house might be laid either as his or his master's. R. *v.* Rees, 7 C. & P. 568. As to proof of ownership, see Jackson *v.* State, 55 Wis. 589; People *v.* Edwards, 59 Cal. 359.

[1] Far's Case, Kel. 43; 2 East P. C. 504; and see Bogett *v.* Frier, 1 East, 301; R. *v.* Smythe, 5 C. & P. 202; but see *contra*, Dutcher *v.* State, 18 Ohio, 308. And under the married woman's acts, where the statute vests such property in the wife, it may be so described. But see Snyder *v.* People, 26 Mich. 106.

[2] R. *v.* French, R. & R. 491.

[3] R. *v.* Wilford, R. & R. 517.

[4] State *v.* Trapp, 17 S. C. 469. *Infra*, § 815.

[5] 2 Leach, 931; 2 East P. C. 501.

[6] State *v.* Rand, 33 N. H. 216.

[7] Davis *v.* State, 38 Ohio St. 505.

Transient guests' chambers are to be laid as the landlord's dwelling, otherwise with permanent guests.

§ 802. According to the strict common law rule, where the chamber of a guest at an inn is forced open and his goods stolen, the burglary must be laid in the dwelling-house of the landlord,[1] and in all cases where the occupier has the transient use merely and no interest in the apartments he occupies, it is the same.[2] But if the lodgers lease their apartments for definite periods, the old rule ceases to be applicable, and the apartment may be laid as the tenant's dwelling.[3]

Permanent apartments are dwellings of occupants.

§ 803. It was once held that where lodgers have rooms of which they keep the keys, and inhabit them severally with their families, yet if they enter at one outer door with the owner, these rooms cannot be said to be the dwelling-house of the inmates, but the indictment ought to be for breaking the house of the owner. On the other hand, it was said that if the owner inhabit no part of the house, or even if he occupy a shop or cellar in it, but do not sleep therein, the apartments of such inmates were to be considered as their respective dwelling-houses.[4] This restriction, however, as to the owner not sleeping in the house, cannot now be maintained, and if there be separate apartments leased on long terms to lodgers, the ownership may be laid in the lodger.[5] And it has even been held that a tenant at will may be such an occupant.[6]

A fortiori, if all internal communication be cut off by an actual severance, the apartments become distinct houses, so that if one house be divided to accommodate the families of two partners, though the rent and taxes of the whole be paid out of the common fund, each part will be regarded as a mansion.[7] But a house, the joint property of partners in trade, in which their business is car-

[1] 1 Hale, 557; R. *v.* Prosser, 2 East P. C. 502; R. *v.* Witt, 1 Mood. C. C. 248; R. *v.* Wilson, R. & R. 115; Rodgers *v.* People, 86 N. Y. 360; but see Mason *v.* People, 26 Ibid. 200; People *v.* St. Clair, 38 Cal. 137. *Supra*, § 707.

[2] 1 Hawk. c. 38, s. 26.

[3] R. *v.* Bailey, 1 Mood. C. C. 23; R. *v.* Jenkins, R. & R. 23. *Supra*, §§ 787–8.

[4] Carrell's Case, 1 Leach, 237; Trapshaw's Case, Ibid. 427; and see 1 Hawk. c. 38, s. 26; R. *v.* Ball, 1 Mood. C. C. 30.

[5] People *v.* Bush, 3 Parker C. R. 552; Mason *v.* People, 26 N. Y. 200; State *v.* Fish, 3 Dutch. 323. *Supra*, §§ 787–8.

[6] Ashton *v.* State, 68 Ga. 25.

[7] R. *v.* Jones, 1 Leach, 537; 2 East P. C. 504; Tracy *v.* Talbot, Salk. 532.

ried on, may be described as the dwelling-house of all the partners, though only one of the partners resides in it,[1] and although the lower part of the house is occupied as a store, which is the part entered, and the upper part, which is occupied as a home by one of the partners, is approached only from outside through a yard.[2]

Possession is sufficient as against burglars.

§ 804. It is enough if the owners averred in the indictment have lawful possession *as against burglars*. It is not necessary to consider what title they have against the landlord or other legal claimants.[3] But ownership of some kind must be stated.[4]

Owner may be indicted for burglary in his lodger's apartments.

§ 805. A man cannot be indicted for burglary in his own house. Hence it was once held that, if the owner of a house break and enter into the room of his lodger and steal his goods, he can only be convicted of larceny.[5] But now, where the lodger has separate and permanent apartments, the law is otherwise.[6]

VI. TIME.

Breaking must be in night-time.

§ 806. The breaking and entering must be in the night, though they need not be both in the same night,[7] for if the defendants break a hole in the house one night, with the intent to enter another night and commit felony, and they accordingly do so through the hole they so made the night

[1] R. *v.* Athea, 1 Mood. C. C. 329.

[2] Quinn *v.* People, 71 N. Y. 561.

In a case where the prosecutor, having a dwelling-house with a shop adjoining, with separate entrances from the street, but the shop having a back door into a passage in the house, let the shop to his son, who used it as a place of business only, and did not reside there, a burglary having been committed in the shop, the judges held that it was properly described in the indictment as the dwelling-house of the father. R. *v.* Sefton, R. & R. 202.

Where a lodger occupied a sleeping-room on the first floor, and a workshop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the workshop was held by the judges to be well laid to have been committed in the dwelling-house of the lodger who rented it. R. *v.* Carrell, 1 Leach, 237. See, also, People *v.* Smith, 1 Parker C. R. 329. *Supra*, §§ 787, 801.

[3] Houston *v.* State, 38 Ga. 165; State *v.* Golden, 49 Iowa, 48.

[4] Davis *v.* State, 38 Ohio St. 56.

[5] Kel. 84; 2 East P. C. 502, 506.

[6] State *v.* Fish, 3 Dutch. 323. See *supra*, § 788.

[7] *Supra*, § 773. This is the rule under Georgia statute. Jones *v.* State, 63 Ga. 141; Lassiter *v.* State, 67 Ibid. 739.

before, this has been held burglary.[1] Nor is it any defence that the entrance was not consummated until daytime, if the breaking and the beginning of the entry were by night.[2]

Night is from twilight to twilight.

§ 807. The night-time, according to the old English common law, extends from the termination of daylight, beginning at the time when the countenance ceases to be reasonably discerned, and extending to the earliest dawn of the next morning.[3] But there are some moonlight nights, in which the countenance can be discerned more accurately than on some foggy days; and besides this, what such light is depends upon the vision of the witness. The jury must determine the question independently of this capricious test.[4] When twilight has ceased, allowing for this an hour after the setting of the sun, night may be considered to have begun.

The method of averring time, in indictments for burglary, is elsewhere stated.[5]

Time is to be inferred from facts.

§ 808. Whether the offence was committed in the night is to be inferred from facts,[6] and no presumption of law will suffice for this purpose.[7] The question of time is for the jury.[8]

§ 809. Statutes have frequently been passed defining night-time.[9] When a statute so directs, it is sufficient to aver the offence

[1] R. *v.* Smith, R. & R. 417; R. *v.* Jordan, 7 C. & P. 432; R. *v.* Polley, 1 C. & K. 77. *Supra*, § 773.

[2] Com. *v.* Glover, 111 Mass. 395.

[3] State *v.* Bancroft, 10 N. H. 105. See Lewis *v.* State, 16 Conn. 32; Com. *v.* Chevalier, 7 Dane's Ab. 134; People *v.* Griffin, 19 Cal. 578. Compare Thomas *v.* State, 5 How. (Miss.) 20.

[4] *Infra*, § 808; State *v.* Morris, 47 Conn. 179; Thomas *v.* State, 5 How. (Miss.) 20.

[5] Whart. Cr. Pl. & Pr. § 130. *Infra*, § 817.

[6] State *v.* Bancroft, 10 N. H. 105; Howser *v.* State, 58 Ga. 78.

[7] State *v.* White, 4 Jones (N. C.), 349; Waters *v.* State, 53 Ga. 567. See People *v.* Schryver, 42 N. Y. 1; Whart. Crim. Ev. § 106.

[8] State *v.* Leaden, 35 Conn. 515. See Adams *v.* State, 31 Ohio St. 462; People *v.* Burgess, 35 Cal. 115.

[9] In Massachusetts, "Whenever, in any criminal prosecution, an offence is alleged to have been committed in the night-time, the time called night-time shall be deemed and considered to be the time which existed between one hour after the sun-setting on one day, and one hour before sun-rising on the next day; and in all cases the time of sun-setting and sun-rising shall be ascertained according to the mean time, in the place where the offence was committed." Gen. Laws Mass. Sess. 1847, c. 13.

Time as defined by statute.

to have been committed in the night-time generally, which is also good at common law.[1] In some jurisdictions it is burglary to break into a dwelling with felonious intent in the day-time.[2]

VII. INTENTION.

§ 810. The indictment, where no consequent felony is laid, must not only aver the breaking to be with an intent to commit a felony, common law or statutory, but such intent, as laid, must be proved beyond reasonable doubt.[3]

Felonious intent must be averred and proved.

It is a defence that the object of the defendant was to expose as a detective the parties really guilty.[4]

If the breaking and entering be at different times, both must appear to have been done with the same felonious intent.[5]

[1] See Com. *v.* Williams, 2 Cush. 582; Butler *v.* People, 4 Denio, 68; People *v.* Burgess, 35 Cal. 115; People *v.* Taggart, 43 Cal. 81; *infra*, § 817.

[2] See State *v.* Newbegin, 25 Me. 509; Conoly *v.* State, 2 Tex. Ap. 412.

[3] *Infra*, § 818; 1 Hawk. c. 38, s. 18; 3 Inst. 65; 1 Hale, 561; R. *v.* Brice, R. & R. 450; R. *v.* Furnival, Ibid. 445; R. *v.* Cobden, 3 F. & F. 833; Jones *v.* State, 11 N. H. 269; State *v.* Ayer, 3 Fost. 301, 318; State *v.* Cooper, 16 Vt. 551; Com. *v.* Newell, 7 Mass. 247; Osborne *v.* People, 2 Park. C. R. 583; McCourt *v.* People, 64 N. Y. 583; State *v.* Eaton, 3 Harrington, 554; State *v.* Carpenter, 1 Houst. C. C. 367; State *v.* Carter, Ibid. 402; State *v.* Cody, Winston, N. C. 197; State *v.* Cowell, 12 Nev. 337; Reeves *v.* State, 7 Tex. Ap. 276.

In Robinson *v.* State, 53 Md. 151, where the defence was that the intent was to have sexual connection with an inmate of the house, the court said: "If it be true as offered to be shown, that the prisoner had knowledge, at the time of his entry into the house, of the lewd and lascivious habits and character of the witness, or that he had had improper intimacy or intercourse with her, these were circumstances proper to be left to the jury for their consideration in passing upon the question of intent, with which the act was done."

A breaking and entering with intent to cut off an ear of a person in the house is not felony by the common law, nor by the Massachusetts statute of 1804, c. 123. Com. *v.* Newell, 7 Mass. 247. See *supra*, § 810. So breaking into a house with intent to *embezzle*, but not *steal* (where embezzlement is not a felony), is not burglary. R. *v.* Dingley, 1 Show. 53; 2 Leach, 841. *Infra*, § 820.

In People *v.* Collins, 53 Cal. 185, it was held that if the defendant act through an agent, who is a decoy, and who enters the building without intending to steal, the offence is not made out. *Supra*, § 231.

As to inference from other attempts see Whart. Cr. Ev. §§ 31–2.

[4] Price *v.* People, 109 Ill. 109; *supra*, §§ 149, 231 *a*.

[5] R. *v.* Smith, R. & R. 417.

The violent breaking into the dwelling-house of another, *with intent to disturb the peace*, may be indictable at common law as malicious mischief, but is not burglary;[1] nor is it burglary to enter a house for adulterous purposes, where adultery is not a felony.[2]

§ 811. Intent in burglary, as in other criminal offences, is to be inferred from facts.[3] If the defendant actually committed a felony when in the house, or took unequivocal steps toward such a commission, this gives a strong inference that his entrance was with intent to commit the felony.[4] But a variance as to the intent stated may be fatal;[5] and it has been held that an allegation of an intent to steal will not be sustained by proof of an intent to have sexual intercourse.[6]

To be inferred from facts.

§ 812. Whether the felonious intent be executed or not is immaterial, supposing that it can be inferred. It is in this point that burglary differs from robbery, which requires that something be taken, though it be not material of what value.[7]

Felonious intent need not be executed.

Where a man burglariously entered a room in which a young woman was sleeping, and grasped her ankle without any attempt at explanation, when she screamed and he fled, this is evidence of an attempt to commit a rape, and must be submitted by the court to

[1] *Supra*, § 173; Hackett *v.* Com., 15 Penn. St. 95; Com. *v.* Taylor, 5 Binney, 281.

Under the Ohio statute, which prescribes the punishment for breaking and entering in the night a mansion-house in which any person shall reside or dwell, and committing or attempting to commit any personal violence or abuse, the intent with which the party enters forms no part of the offence. Forsyth *v.* State, 6 Ham. 22.

It is not burglary where the object is to take goods under claim of title. R. *v.* Knight, 2 East P. C. 570; *infra*, § 884.

[2] State *v.* Cooper, *ut sup.*

[3] See Whart. Crim. Ev. §§ 734–799; R. *v.* Brice, R. & R. 450; R. *v.* Cobden, 3 F. & F. 833; Com. *v.* Williams, 2 Cush. 582; People *v.* Larned, 3 Selden, 445; Osborne *v.* People, 2 Parker C. R. 583; Hackett *v.* Com. 15 Penn. St. 95; State *v.* Manluff, 1 Houst. C. C. 208; Johnson *v.* Com. 29 Grat. 796; Brown *v.* State, 59 Ga. 456; State *v.* Woods, 31 La. An. 267; Franco *v.* State, 42 Tex. 276; People *v.* Beaver, 49 Cal. 57.

[4] State *v.* Squires, 11 N. H. 37; Com. *v.* Tuck. 20 Pick. 356; People *v.* Marks, 4 Parker C. R. 153; Stoops *v.* Com., 7 S. & R. 491.

[5] Neubrandt *v.* State, 53 Wis. 89.

[6] Robinson *v.* State, 53 Md. 151; *supra*, § 810. But see People *v.* Soto, 53 Cal. 415; Whart. Cr. Ev. § 149.

[7] 2 East P. C. 513; Olive *v.* Com., 5 Bush, 376.

the jury.[1] But a mere touching the foot of a woman is not ground from which such an intent can be inferred.[2]

It is no defence that the intent was impossible of execution;[3] as where the thing sought was not in the house,[4] or that it was frustrated by extrinsic agencies.[5]

Possession of stolen goods sustains inference of burglary.

§ 813. Mere possession of stolen goods, without other evidence of guilt, is not to be regarded as *primâ facie* evidence of the burglary.[6] But where goods have been feloniously taken by means of a burglary, and they are immediately or soon after found in the actual and exclusive possession of a person, who gives a false account, or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct may sustain the inference not only that he stole the goods, but that he made use of the means by which access to them was obtained.[7] There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of the larceny.[8] But extrinsic mechanical indications may constitute such additional evidence.[9]

It is not necessary, in order to put proof of goods stolen in evidence, that they should be specified in the indictment.[10]

[1] State *v.* Boon, 13 Ired. 244.

[2] Hamilton *v.* State, 11 Tex. Ap. 116. See Robinson *v.* State, cited *supra*, § 810.

[3] *Supra*, § 186; State *v.* Beal, 37 Ohio St. 108; though see R. *v.* Lyons, 2 East P. C. 497; R. *v.* McPherson, Dears. & B. 197, discussed *supra*, § 186, and see more fully *infra*, § 820.

[4] State *v.* Beal, 37 Ohio St. 108.

[5] *Supra*, § 187; State *v.* McDaniel, Wins. (N. C.) No. 1, 249.

[6] People *v.* Gordon, 40 Mich. 716; State *v.* Hayden, 45 Iowa, 11; People *v.* Beaver, 49 Cal. 57.

[7] Com. *v.* McGorty, 114 Mass. 299; Davis *v.* People, 1 Parker C. R. 447; Walker *v.* Com., 28 Grat. 969; Stuart *v.* People, 42 Mich. 255; Brown *v.* State, 61 Ga. 311; Bryan *v.* State, 62 Ibid. 179; Smith *v.* State, 62 Ibid. 663; Neubrandt *v.* State, 53 Wis. 89. See, as to the presumption generally arising from the possession of stolen goods, Whart. Crim. Ev. § 758.

[8] Ibid.; R. *v.* Coots, 2 Cox C. C. 188.

[9] Com. *v.* Williams, 2 Cush. 582; People *v.* Larned, 3 Seld. 445; Knickerbacker *v.* People, 43 N. Y. 177; State *v.* Harrold, 38 Mo. 496; Frank *v.* State, 39 Miss. 705; People *v.* Winters, 29 Cal. 658; see State *v.* Owens, 79 Mo. 619; Whart. Cr. Ev. §§ 764 *et seq.*

[10] *Infra*, § 820; Com. *v.* McGorty, 114 Mass. 299. See Foster *v.* People, 49 How. Pr. 69.

VIII. INDICTMENT.[1]

Proper technical terms should be used.

§ 814. The offence must not only be laid to be done feloniously, but also *burglariously;* which is a term of art, and cannot be expressed by any other word or circumlocution.[2] It must be stated, also, that the offender broke and entered the house; a breaking without an entry, or *vice versa*, is insufficient.[3] The want of owner's consent need not be alleged.[4]

House must be averred to be dwelling-house.

§ 815. It must be laid to be done in a mansion or dwelling-house; and, therefore, if it be only said to be in the house of such a one, it is not sufficient.[5] The words mansion-house sufficiently describe a dwelling-house.[6]

In Ohio, under the statute, the indictment must allege or imply that some person resided or dwelt in the house.[7]

Where the burglary is in any out-house which by law is considered part of the dwelling-house, it must still be laid to be done in the dwelling-house.[8]

§ 816. It is material to state to whom the mansion belongs with accuracy in the indictment.[9] The ownership, as has already been seen,[10] is to be stated to be in the occupant, if a lessee or other tenant

[1] For forms of indictment, see Whart. Prec. tit. BURGLARY.

[2] 1 Hale, 550; 4 Co. 39 *b*; 5 Ibid. 121 *b*; State *v.* McDonald, 9 W. Va. 456; State *v.* Hughes, 22 Ibid. 766; Portwood *v.* State, 29 Tex. 47; Whart. Cr. Pl. & Pr. § 265. As to Illinois, see Lyons *v.* People, 68 Ill. 271. As to immateriality of surplusage, see Harris *v.* People, 44 Mich. 305. That non-consent need not be averred, see Buntain *v.* State, 15 Tex. Ap. 485.

[3] 1 Hale, 550; R. *v.* Compton, 7 C. & P. 139. In Massachusetts, under the Rev. Stats., the term is no longer necessary. Tully *v.* Com., 4 Met. 357. See Tr. & H. Prec. 67. That the entrance need not be averred to be burglariously, see Reed *v.* State, 14 Tex. Ap. 662.

[4] Sullivan *v.* State, 13 Tex. Ap. 462; Reed *v.* State, 14 Ibid. 662; overruling Brown *v.* State, 7 Ibid. 619.

[5] 1 Hale, 550, 566; 1 Hawk. c. 38, s. 10; 4 Blac. Com. 224, 225. *Supra*, § 784. As to meaning of dwelling-house, see Quinn *v.* People, 71 N. Y. 561.

[6] Com. *v.* Pennock, 3 S. & R. 199.

[7] Forsyth *v.* State, 6 Ham. 22.

[8] 2 East P. C. 512; McElrath *v.* State. 55 Ga. 562.

[9] *Supra*, §§ 783 *et seq.*; Wilson *v.* State, 34 Ohio St. 199; State *v.* Fockler, 22 Kan. 542.

[10] See *supra*, §§ 787, 798, 804–7; White's Case, Leach, 216; Cole's Case, Moor, 466; 1 Hale, 558. See Doan *v.* State, 26 Ind. 495; State *v.* Morrissey, 22 Iowa, 158; *Cf.* People *v.* Van Blarcom, 2 Johns. 105; Quinn *v.* People, 71 N. Y. 561; Houston *v.* State, 38

entitled to possession,[1] though it is said that ownership may be laid in either landlord or tenant.[2] Under the Married Woman's Act, the ownership may be laid in a married woman, when it is taken and occupied by her.[3] When the ownership is unknown, it may be so stated.[4]

Ownership must be correctly stated.

§ 817. The indictment must not only state the offence to have been committed in the night, but it was once thought that it should state the particular hour of the night; though it was not held necessary that the evidence should strictly correspond with the latter allegation.[5] The better opinion now seems to be, that it is enough to aver the offence to have been in the night.[6] It is also enough to say "about the hour of twelve in the night of the same day."[7] It is certainly insufficient to aver the offence to have been committed between the hours of twelve at night and nine the next morning.[8] But the date, in other respects, is immaterial, unless affected by the statute of limitations.[9]

Offence must be averred to have been in the night.

Ga. 165. As to occupation by tenant, see *supra*, §§ 780, 789, 799.

An unoccupied house of A. may be averred to be the dwelling-house of A., on an indictment for breaking and entering. Com. *v.* Reynolds, 122 Mass. 454.

That proof of the *de facto* existence of a corporation may sustain the allegation of ownership, see Whart. Cr. Ev. 9th ed. §§ 164 *a*, 527. *Infra*, § 941; *supra*, § 716.

[1] See *supra*, § 798. State *v.* Short, 54 Iowa, 392; McCrellis *v.* State, 69 Ind. 159; State *v.* Ashton, 68 Ga. 25.

Under Alabama statute see Anderson *v.* State, 48 Ala. 665; Murray *v.* State, Ibid. 675. As to joint ownership see Webb *v.* State, 52 Ibid. 422.

[2] Kennedy *v.* State, 81 Ind. 379.

[3] State *v.* Trapp, 17 S. C. 467; *aliter* at common law, *supra*, § 800.

[4] State *v.* McIntire, 59 Iowa, 264.

[5] 2 East P. C. 515. See Lewis *v.* State, 16 Conn. 32; Com. *v.* McLaughlin, 11 Cush. 598; Com. *v.* Marks, 4 Leigh, 658; Hall *v.* People, 43 Mich. 417; State *v.* Tazwell, 30 La. An. Pt. II. 884; see State *v.* Ruby, 61 Iowa, 86.

[6] Whart. Cr. Pl. & Pr. § 130. This is clearly the case under statutes which specify simply "the night" as the predicate. See Com. *v.* Williams, 2 Cush. 582; People *v.* Burgess, 35 Cal. 115. But at common law, as has been already shown, the reason of the case is to the same effect. *Supra*, § 810.

[7] State *v.* Seymour, 36 Me. 225; Methard *v.* State, 19 Ohio St. 363.

[8] State *v.* Mather, Chipman, 32.

An indictment charging that the goods were feloniously and burglariously taken from a dwelling-house, without charging that this was done in the night-time, is not a good indictment for burglary, but is only an indictment for a larceny. Thompson *v.* Com., 4 Leigh, 652. The *noctanter* must be expressly alleged. Lewis *v.* State, 16 Conn. 32; Mark's Case, 4 Leigh, 658; Whart. Cr. Pl. & Pr. § 130.

[9] State *v.* Branham, 13 S. C. 385.

§ 818. It must be alleged and proved, either that a felony, which must be specified, was committed in the dwelling-house, or that the party broke and entered with intent to commit some felony within the same;[1] and the averment of intent will be enough, without an averment of stealing.[2] Where the averment of larceny is made, it is not necessary, it is said, to aver the intent to be felonious, the presumption being that it was so.[3] But it is unsafe to leave out the felonious intent, since in such case if the consummated act be not proved, the defendant must be acquitted.[4]

Intent to commit felony must be averred, and so of entrance.

The same burglary may be laid to have been committed, in several counts, each with a distinct intent.[5]

If, however, no committed felony being averred, the indictment neglect to specify the felony which the defendant intended to commit, the defect is fatal.[6] But when this is well laid, surplusage in describing things stolen may be rejected.[7]

Entrance, as well as breaking, must be averred.[8]

[1] *Supra*, § 810; Webster *v.* State, 9 Tex. Ap. 75; Jones *v.* State, 18 Fla. 889.

[2] *Supra*, § 810; 2 Hale, 513; State *v.* Moore, 12 N. H. 42; State *v.* Brady, 14 Vt. 353; Com. *v.* Tuck, 20 Pick. 356; Murray *v.* State, 48 Ala. 675; Snow *v.* State, 54 Ala. 138, and cases next cited. See Pardue *v.* State, 4 Rawt. 10; Stevenson *v.* State, 5 Ibid. 681.

That under Iowa statute, "burglarious," is not necessary to qualify intent, see State *v.* Short, 54 Iowa, 392.

[3] Jones *v.* State, 11 N. H. 269; State *v.* Squires, Ibid. 37; State *v.* Moore, 12 Ibid. 42; Com. *v.* Brown, 3 Rawle, 207; People *v.* Shaber, 32 Cal. 36. See Edwards *v.* State, 62 Ind. 34. *Supra*, § 810.

[4] R. *v.* Furnival, R. & R. 445; Jones *v.* State, 11 N. H. 269; State *v.* Ayer, 3 Fost. 301; State *v.* Brady, 14 Vt. 353; Com. *v.* Tuck, 20 Pick. 356; Stoops *v.* Com., 7 S. & R. 491. See *supra*, §§ 811–12; State *v.* Curtis, 30 La. An. Pt. II. 814; Reed *v.* State, 14 Tex. Ap. 662.

[5] 1 East P. C. 515; State *v.* Eaton, 3 Harring. 554; Whart. Cr. Pl. & Pr. §§ 386–90. As to intent to ravish, see People *v.* Burns, 63 Cal. 614. *Infra*, § 821.

[6] State *v.* Lockhart, 24 Ga. 420; Portwood *v.* State, 29 Tex. 47; People *v.* Nelson, 58 Cal. 104. If the larceny be defectively averred, it may be rejected as surplusage, supposing the intent to be well laid. Larned *v.* Com., 12 Met. 240; State *v.* Dooley, 64 Mo. 146; and see *infra*, § 820. But a general verdict in such case is bad. State *v.* Dooley, *supra*.

[7] *Infra*, § 820; Burke *v.* State, 5 Tex. Ap. 74.

[8] *Supra*, §§ 773, 818; Pines *v.* State, 50 Ala. 153; State *v.* Whitby, 15 Kans. 402; Whart. Cr. Pl. & Pr. §§ 243, 465.

§ 819. That burglary and larceny may be joined, is elsewhere seen.[1] When larceny is joined to burglary, the defendant may be acquitted of one, and found guilty of the other, if the offence on which there is a conviction is properly pleaded.[2] Thus, if the prisoner be charged that he feloniously and burglariously broke and entered the dwelling-house of J. S., and then and there certain goods of J. S. feloniously and burglariously did steal, etc.; the indictment comprises two offences, namely, burglary and larceny; and therefore he may be acquitted of the burglary if in accordance with the evidence, and found guilty only of the larceny.[3] But in such case, if the prisoner be acquitted of the larceny, he cannot, as has been seen, be found guilty of the burglary, unless there be an intent to steal charged; because, unless intent be charged, the larceny constitutes part of the burglary.[4] And if larceny be not charged, there can be no conviction of larceny,[5] nor can there be any conviction of larceny except of the articles specified in the indictment.[6] Whether the sentence, in case of a conviction of the double offence, can be for burglary *plus* larceny, depends upon local practice and sometimes statutory prescription.[7]

Defendant may be acquitted of burglary and convicted of larceny.

[1] Whart. Cr. Pl. & Pr. § 244; *supra*, § 818; Harris *v.* State, 61 Miss. 304.

[2] *Supra*, § 27; R. *v.* Vandercom, 2 East P. C. 519; State *v.* Squires, 11 N. H. 37; Com. *v.* Hope, 22 Pick. 1; Crowley *v.* Com., 11 Met. 575; Stoops *v.* Com., 7 S. & R. 491; Com. *v.* Brown, 3 Rawle, 207; Com. *v.* Solby, 15 Weekly Notes, 392; State *v.* Hayden, 45 Iowa, 11; Clarke *v.* Com., 25 Grat. 908; Berry *v.* State, 10 Ga. 511; Bush *v.* State, 65 Ibid. 658; Bell *v.* State, 48 Ala. 684; State *v.* Alexander, 56 Mo. 131; State *v.* Turner, 63 Ibid. 436; State *v.* Owens, 79 Ibid. 619; Harris *v.* State, 61 Miss. 304; Dunham *v.* State, 9 Tex. Ap. 330. See State *v.* Butterfield, 75 Mo. 297. That the conviction of larceny and acquittal of burglary is a bar to another trial for the burglary, see Whart. Cr. Pl. & Pr. §§ 455, 465, 896.

In Mississippi it has been ruled that on an indictment for burglary and larceny a general verdict of guilty is a verdict of guilty of burglary alone. Roberts *v.* State, 55 Miss. 421.

[3] See, also, State *v.* Brady, 14 Vt. 353; Shaffer *v.* State, 59 Iowa, 290; State *v.* Cocker, 3 Harring. 554; State *v.* Johnson, 34 La. An. 49; Shepherd *v.* State, 42 Tex. 501.

[4] See Whart. Cr. Pl. & Pr. §§ 465-8; R. *v.* Furnival, R. & R. 445; Jones *v.* State, 11 N. H. 269.

[5] State *v.* Warner, 14 Ind. 572; Fisher *v.* State, 46 Ala. 717; Roberts *v.* State, 14 Ga. 8.

[6] State *v.* McGraw, 74 Mo. 573.

[7] See Kite *v.* Com., 11 Met. 581; State *v.* Henley, 30 Mo. 509, sustaining double sentence; and Breese *v.* State, 12 Ohio St. 146, declaring for burglary alone; and see Lyons *v.* People, 68 Ill. 271. When the conviction is for larceny, the grade is determined by value, as in other cases of larceny. State *v.* Barker, 64 Mo. 282.

On a conviction for breaking and entering a store, and stealing therefrom, the prosecuting officer may enter a *nolle prosequi* as to the breaking and entering, and thereby leave the defendant punishable for the simple larceny alone. Anon., 31 Me. 592.

Petit larceny, when a felony can be joined with burglary.[1]

A general verdict of guilty, on an indictment for burglary and larceny, will be regarded as exclusively applying to the charge of burglary.[2]

§ 820. If the indictment charge generally an intent to steal the goods "in the said dwelling-house then and there being," this is good,[3] and may be sustained by proof of stealing the goods of C. D., a stranger in said house,[4] or by proof of intent to steal whatever was in the house;[5] and this holds good even though the indictment should aver, besides the intent, an actual stealing of the goods of E. F., which goods belonged only to E. F. as joint owner with G. H., or to G. H. exclusively.[6] For the averment of stealing may be rejected as surplusage,[7] and the burglary left to stand supported solely by the intent, and it is enough to aver the intent to be generally to steal the goods which are in the house. There are English authorities, as we have seen, to the effect that if the intent be averred to be to steal the goods of A. B., it is a fatal defect if no goods of A. B. are in the house.[8] This is no doubt true when there is no separate averment of intent, and when the ownership in the averment of

Goods intended to be stolen need not be specified.

[1] But see Short *v.* State, 63 Ind. 376; State *v.* Ford, 30 La. An. Pt. I. 311; Adams *v.* State, 55 Ala. 143; People *v.* Murray, 8 Cal. 519.

As to conviction of petit larceny, see Borum *v.* State, 66 Ala. 468. *Infra*, § 862 *a*. See, also, People *v.* Murray, 8 Cal. 519; *infra*, § 802 *a*.

[2] Roberts *v.* State, 55 Miss. 421. See State *v.* Christian, 30 La. An. Pt. I. 367; Robertson *v.* State, 6 Tex. 669.

[3] Com. *v.* McGorty, 114 Mass. 299; Jones *v.* State, 18 Fla. 889. See, generally, Bluett *v.* State, 12 Tex. Ap. 39.

[4] R. *v.* Lawes, 1 C. & K. 62; Hall *v.* State, 48 Wis. 688; State *v.* Clifton, 30 La. An. Pt. II. 951; but see Wilburn *v.* State, 41 Tex. 237.

[5] Osborne *v.* People, 2 Parker C. R. 583; State *v.* McDaniel, Wins. (N. C.) 249; Olive *v.* State, 5 Bush, 376; and see *supra*, §§ 101 *et seq.*

[6] See *supra*, §§ 120, 186; R. *v.* Clarke, 1 C. & K. 421; Larned *v.* Com., 12 Met. 240; State *v.* Brady, 14 Vt. 353.

[7] *Supra*, § 818.

[8] R. *v.* Jenks, 2 Leach, 774; 2 East P. C. 514; R. *v.* Lyons, Ibid. 497; R. *v.* McPherson, Dears. & B. 197. See as parallel case, R. *v.* Parfit, 8 C. & P. 288; State *v.* Shaffer, 59 Iowa, 290. *Supra*, §§ 186, 644.

larceny is wrongly stated.[1] But the weight of authority, as has been noticed, is that it is no defence that the burglar was mistaken as to the ownership of the goods.[2] And it may be regarded as a rule that when the intent is distinctively averred, it is not necessary to specify the goods stolen,[3] or their value.[4]

Counts varying intent may be introduced.

§ 821. It has been already seen that if the intent be proved to be to commit a misdemeanor (*e. g.*, assaulting instead of killing, or embezzlement instead of larceny), an acquittal must be had, not merely on account of variance, but because no felonious intent is proved.[5] To avoid such variances, it is important to have several counts in cases of doubt, so as to adapt, as has been already observed, the intent to any contingency of the trial.[6] Different phases of statutory burglary may be also joined.[7]

IX. ATTEMPTS.

Attempts indictable at common law.

§ 822. An attempt at burglary is indictable at common law,[8] and breaking the yard of a dwelling-house with intent to commit burglary is such an attempt.[9]

[1] State *v.* Manluff, 1 Houst. C. C. 208; State *v.* Lee, Ibid. 335.

[2] *Supra*, §§ 186, 812; R. *v.* Clarke, 1 C. & K. 421; State *v.* Brady, 14 Vt. 523; State *v.* Beale, 37 Ohio St. 108.

[3] Spencer *v.* State, 13 Ohio, 401; Hillsman *v.* State, 68 Ga. 836; State *v.* Beckworth, 68 Mo. 82. See State *v.* Bartlett, 55 Me. 200; Com. *v.* Williams, 2 Cush. 582; Hunter *v.* State, 29 Ind. 80; Boose *v.* State, 10 Ohio St. 575; Burke *v.* State, 5 Tex. Ap. 74.

[4] Spears *v.* State, 2 Ohio St. 585; State *v.* Beckworth, 68 Mo. 82; Kelly *v.* State, 72 Ala. 244; Henderson *v.* State, 70 Ibid. 23; *contra*, People *v.* Murray, 8 Cal. 519; the reason given being that *petit* larceny is a misdemeanor only. But if the intent be to steal the goods of A. B., this intent is irrespective of value, and hence this distinction is not good. In any view it does not hold where petit larceny is a felony. Short *v.* State, 63 Ind. 376.

[5] *Supra*, § 810; R. *v.* Dingley, 2 Leach, 841; R. *v.* Knight, 2 East P. C. 510; R. *v.* Dobbs, Ibid. 513.

[6] 2 East P. C. 515; 2 Leach C. C. 1105, note. See Bell *v.* State, 48 Ala. 684.

[7] Whart. Cr. Pl. & Pr. § 290; Gonzales *v.* State, 12 Tex. Ap. 657.

[8] *Supra*, § 185; R. *v.* Spanner, 12 Cox C. C. 155; R. *v.* Bain, L. & C. 129; 9 Cox C. C. 98.

[9] Com. *v.* Smith, 6 Phila. 305.

CHAPTER XI.

ARSON.

ARSON AT COMMON LAW.[1]

Arson is the malicious burning of another's house.

§ 825. Arson is the malicious and wilful burning of another's house;[2] the gist of the offence being the danger to the life of persons who may be dwelling in the house fired.[3] When the firing of an out-house,[4] from the nature of things, is likely to communicate the flames to the house,

[1] See Wharton's Precedents, 389–409.

[2] 4 Blac. Com. 220. See People *v.* Fisher, 51 Cal. 319; Young *v.* Com., 12 Bush, 243.

[3] See cases cited *infra*, § 837.

[4] The common law in this respect is now absorbed in statutes making such offences specifically indictable. *Infra*, §§ 1065 *et seq.*

this is a firing of the house.[1] It is also said to be arson, at common law, maliciously and wilfully to burn another person's barn stored with hay or grain.[2] And the reasons for this position are: (1) that not only cattle are sheltered in barns, but that they are often occupied by persons who have charge of them; and (2) that their contiguity to dwelling-houses, and their inflammable character, render the fire which consumes them likely to spread to the dwelling-house. When such is the case, and when the fire thus maliciously started burns the dwelling-house, the offence is arson at common law.[3]

I. BURNING.

§ 826. The offence is consummated by the least burning of the house. The charring of floor or wall is sufficient,[4] and it makes no matter how soon the fire be extinguished.[5] "The burning necessary to constitute arson of a house at common law," says Sir William Russell,[6] "must be an *actual burning* of the whole or some part of the house;[7] . . . . but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offence will be complete though the fire should be put out, or go out of itself."[8] "Setting fire to" is, in this sense, equivalent to "burning."[9]

Any appreciable burning is sufficient.

To burning it is not necessary that there should be a flame.[10]

[1] R. *v.* Cooper, 5 C. & P. 535; Gage *v.* Shelton, 3 Rich. 242. See 2 East P. C. 1020; R. *v.* Jones, 2 Mood. C. C. 308; State *v.* Stewart, 4 Conn. 47; State *v.* Terry, 4 Dev. & Bat. 185; Overstreet *v.* State, 46 Ala. 30. In the New York Penal Code of 1882, §§ 486–493, this definition is modified and the offence divided into three degrees.

[2] 1 Hale P. C. 567; R. *v.* Reader, 1 Mood. C. C. 239; Sampson *v.* Com., 5 W. & S. 385. *Infra*, § 834. But see *contra*, as to stack of hay, Creed *v.* People, 81 Ill. 565. Compare Com. *v.* Macomber, 3 Mass. 254; Gibson *v.* State, 54 Md. 447; State *v.* Pope, 9 S. C. 273.

[3] R. *v.* Cooper, *ut sup.* See Overstreet *v.* State, 46 Ala. 30.

[4] R. *v.* Russell, C. & M. 541; Com. *v.* Tucker, 110 Mass. 403; People *v.* Cottrell, 18 Johns. 115; State *v.* Sandy, 3 Ired. 570; State *v.* Mitchell, 5 Ibid. 350; People *v.* Haggerty, 46 Cal. 354; People *v.* Simpson, 50 Ibid. 304.

[5] 1 Hawk. c. 39, s. 17; 3 Inst. 66; 1 Hale, 569; Dalt. 606; 2 Russ. on Cr. 558; State *v.* Babcock, 51 Vt. 570; Hester *v.* State, 17 Ga. 130.

[6] 2 Russ. on Cr. 548. As to attempt, see *supra*, § 181.

[7] See R. *v.* Judd, 2 T. R. 255.

[8] 3 Inst. 66; Dalt. 506; 1 Hale, 568, 569; 1 Hawk. P. C. c. 39, s. 16, 17; 2 East P. C. c. 21, s. 4; Com. *v.* Van Shaack, 16 Mass. 105.

[9] State *v.* Dennin, 32 Vt. 158.

[10] R. *v.* Stallion, 1 Mood. C. C. 398.

Whether a board, produced in court, is burned, is a question for the jury.[1]

Burning of personal property in a house is not, however, arson unless the building itself be in some way charred or burned.[2]

§ 827. As has been already shown,[3] there must be a causal connection between the ignition and combustion. The defendant is not responsible if the combustion take place from the agency of extraordinary and incalculable natural causes, or from the interposition of the independent, self-determined action of another person.[4] The defendant's participation must be proved beyond reasonable doubt.[5]

Must be causal connection between ignition and combustion.

The jury in some jurisdictions may be taken to view the house.[6] Experiments are admissible to show the character of the burning.[7]

How far a watchman, appointed to watch for fires, is responsible, if by negligence on his part he omits to give notice that a fire has begun, has been already discussed.[8]

§ 828. The instrument of burning is immaterial. To set on fire by hot shot would, no doubt, be arson; and so of kindling a fire in a stack, or other adjacent structure, likely to communicate to the dwelling, and which does so communicate.[9] Burning a series of houses by one ignition, though the periods of the conflagration of each were successive, may be charged as one act.[10]

Means of ignition are immaterial.

II. INTENT.

§ 829. The burning must be malicious,[11] otherwise it is not felony, but only a trespass, and therefore, as we have seen,[12] no negligence

[1] Com. *v.* Betton, 5 Cush. 427.

The *corpus delicti* includes both the burning of the house and the defendant's guilty agency, which should be established before confessions of an accused party should be received to show that he was the incendiary. Whart. Cr. Ev. §§ 439 *et seq.* See Sam *v.* State, 33 Miss. 347.

[2] *Supra*, § 826.

[3] *Supra*, § 153.

[4] McDade *v.* People, 29 Mich. 50.

[5] People *v.* Fairchild, 48 Mich. 31.

[6] Fleming *v.* State, 11 Ind. 234; Whart. Cr. Pl. & Pr. § 707.

[7] R. *v.* Haseltine, 12 Cox C. C. 404.

[8] *Supra*, § 130.

[9] R. *v.* Cooper, 5 C. & P. 535; Grimes *v.* State, 63 Ala. 166. See *infra*, § 834; *supra*, § 152.

[10] Woodford *v.* People, 62 N. Y. 117. But see Whart. Cr. Pl. & Pr., §§ 254, 296, 469.

[11] 2 East P. C. 1033; Jesse *v.* State, 28 Miss. 100. See R. *v.* Nattrass, 15 Cox C. C. 73; R. *v.* Harris, Ibid. 75; Davis *v.* State, 15 Tex. Ap. 594.

[12] *Supra*, § 827.

or mischance amounts to it. Thus, in England, if a person not properly qualified, by shooting at game, happen to set fire to the thatch of a house, or if a man shooting at the poultry of another do the same, the offence is not arson.[1] And it has been held that the setting fire by a prisoner to his cell is not arson, if the intent were merely to effect his own escape by making a hole, and not to burn down the building, though it is otherwise if the intention were to burn the house.[2] It has also been argued that if a man, intending to commit a felony, by accident set fire to another's house, this is arson at common law, and also within the statute;[3] and so if, intending to set fire to the house of A., he accidentally set fire to that of B.[4] But in the former case the better course is to prosecute the defendant, not for arson, but for an attempt to commit arson, and also for a negligent burning; and in the latter for attempt at arson of A.'s house, and the negligent burning of B.'s house, unless the burning of B.'s house was a natural consequence of the firing of A.'s house.[5] It is hard to see how the averment of an intent to burn A.'s house can be sustained, when there was no such intent either specifically or generically. In any view, however, it is not necessary that there should be a specific design to burn the particular house. The indictment is sustained if there be proof of a design to injure either the house fired, or an attached house, or the public generally, as where a general conflagration is designed.[6]

Burning must be malicious.

§ 830. The prevalent view is that if a man, by wilfully setting fire to his own house, with a malicious intent, burn also the house of one of his neighbors, it will be arson.[7]

Maliciously burning one's own

[1] 1 Hale, 567, 569; 3 Inst. 67.

[2] People *v.* Cottrell, 18 Johns. 115. See, also, State *v.* Mitchell, 5 Ired. 350; Jenkins *v.* State, 53 Ga. 33; Delany *v.* State, 41 Tex. 601; Com. *v.* Posey, 4 Call, 109; Stevens *v.* Com., 4 Leigh, 683; Luke *v.* State, 49 Ala. 30; Lockett *v.* State, 63 Ibid. 5; 22 Am. Rep. 255, and note. In Delany *v.* State, the distinction in the text is affirmed.

[3] See Foster, 258, 259; 1 Hale, 567–9; R. *v.* Regan, 4 Cox C. C. 335, cited *supra*, § 120. But see R. *v.* Faulkner, 11 Irish L. T. 13; 13 Cox C. C. 550, where it was rightly held not arson for a sailor to set fire to a ship by lighting spirits which he was trying to steal; and see Jesse *v.* State, 28 Miss. 100.

[4] 1 Hale, 569. See Woodford *v.* People, 62 N. Y. 117.

[5] See *supra*, §§ 317–18, 322.

[6] Ibid. People *v.* Orcutt, 1 Park C. R. 252; Lacy *v.* State, 15 Wis. 13; *supra*, §§ 106 *et seq.*

[7] See R. *v.* Probert, 2 East P. C. 1031; R. *v.* Isaac, Ibid.; R. *v.* Scofield, Cald. 397; McDonald *v.* People, 47 Ill.

This is no doubt true, if the defendant's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighborhood, and if there were grounds from which an intent to produce a general conflagration, or a burning of the neighbor's house, could be inferred.[1]

House and thereby burning another's is arson.

Subject to the above qualifications, it is not arson at common law, for a man to burn a house owned and occupied by himself;[2] nor, as will presently be seen,[3] for a lessee to burn the premises in his possession under the lease,[4] nor for a mortgagor in possession to

533; Gage *v.* Shelton, 3 Rich. 242. And see cases cited *supra*, § 829; *infra*, §§ 842, 3.

[1] See *supra*, § 120.

In New York it is said to be a high misdemeanor, although not arson at common law, to set fire to one's own house in a populous city, where the danger of the communication of the fire is necessarily great (Ball's Case, 3 City Hall Rec. 85. See State *v.* Elder, 21 La. An. 157. In New Hampshire it has been held that one's own dwelling-house falls under "any dwelling-house," in the statute, State *v.* Hurd, 51 N. H. 176), though no such communication actually takes place. 1 Hawk. c. 39, s. 1; Hale, 568, 569; Holmes's Case, Cro. Car. 376; 4 Bl. Com. 321. As to statute, see *infra*, § 843. In Massachusetts, it is true, in an action of slander, where the defendant was charged with having said of the plaintiff that he had set fire to his own house, it was held that such an offence was not *per se* indictable; Bloss *v.* Tobey, 2 Pick. 320; but it is clear that the court meant to go no further than to say that a charge of such burning, unless alleged to have been accompanied with wantonness or malice, was not sufficient to support a declaration in slander without a proper *innuendo* or *colloquium*. It may be conceded that, without a malicious intent, the offence is not felony at common law. R. *v.* Spalding, 1 Leach, 258; R. *v.* Probert, 2 East P. C. 1031; Roberts *v.* State, 7 Cold. 359. It is otherwise when the intent is malicious, as to burn a neighbor's house, or to produce a general conflagration; R. *v.* Scofield, Cald. 397; Holmes's Case, Cro. Car. 376; or, when supposing there are persons dwelling in the house, to maliciously imperil their lives. In the latter case the elements of a felonious assault are made out; and the firing of the house might, under some statutes, be arson. It would be monstrous to hold that a man could defend himself on the charge of burning an inhabited house by proving the house was his own. Hence, when the purpose is felonious, burning one's own house is held to be statutory arson in New York and Ohio. Shepherd *v.* People, 19 N. Y. 537; overruling People *v.* Henderson, 1 Parker C. R. 560. (As to N. Y. statute, see *infra*, § 835). See Com. *v.* Mokely, 131 Mass. 421; State *v.* Toole, 29 Conn. 342; Allen *v.* State, 10 Ohio St. 289.

[2] State *v.* Hurd, 51 N. H. 176; *infra*, § 843; State *v.* Hannett, 54 Vt. 83.

[3] *Infra*, §§ 836–37.

[4] 2 East P. C. 1029. *Infra*, § 837, 838. This applies even to a tenancy by sufferance. State *v.* Hannett, 54 Vt. 83; People *v.* Van Blarcum, 2 Johns. 105.

burn his own house,[1] nor for either husband or wife to burn the house of the other,[2] though in these cases the offence would be indictable as a misdemeanor.

Intent to be inferred from facts.

§ 831. The intent may be inferred, when the building fired is another's, from the conditions of the act;[3] or from threats, or quarrels,[4] or from other attempts bearing upon the arson under trial,[5] or even from other crimes, part of the same system.[6] In the statutory offence of setting fire to one's own house, with intent to defraud the insurers, the intent must be proved as laid; and if the policy of insurance or the defendant's knowledge of it cannot be proved, the case falls.[7]

§ 832. It is no defence that the defendant's motive was the obtaining a reward for notifying the fire, when his intent was to burn the house.[8]

III. PROPERTY BURNED.

§ 833. At common law the offence was considered to reach not only to the dwelling-house, but to all out-houses[9] which are parcel

[1] Ibid. See *infra*, § 1025; Roberts *v.* State, *supra*. R. *v.* Spalding, *ut sup.*

[2] *Infra*, § 838.

[3] R. *v.* Farrington, R. & R. 209; State *v.* Watson, 63 Me. 128; Com. *v.* Harney, 10 Met. 422; Com. *v.* McCarthy, 119 Mass. 354; Com. *v.* Bradford, 126 Ibid. 42; Brooks *v.* State, 51 Ga. 612; Brown *v.* State, 52 Ala. 345; Tullis *v.* State, 41 Tex. 598; People *v.* Shainwold, 51 Cal. 468.

As to mixture of intents, see R. *v.* Regan, 4 Cox C. C. 335. See *supra*, § 119.

[4] Hudson *v.* State, 61 Ala. 333; McAdory *v.* State, 62 Ibid. 154.

[5] See Whart. Crim. Ev. § 36; R. *v.* Dossett, 2 C. & K. 306; 2 Cox C. C. 243; R. *v.* Taylor, 5 Ibid. 138; Com. *v.* Bradford, 126 Mass. 42; Hall *v.* State, 3 Lea, 552; State *v.* Rohfrischt, 12 La. An. 382. See McDonald *v.* People, 47 Ill. 533, as to statutory offence of firing with intent to defraud insurers.

[6] Whart. Crim. Ev. § 32; Jones *v.* State, 63 Ga. 395.

[7] R. *v.* Gilson, R. & R. 138; Martin *v.* State, 28 Ala. 71. *Infra*, § 843. Upon a trial for arson, with intent to defraud an insurance company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred previously and in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident. But it is not admissible to prove the distinguishing features of such fires. R. *v.* Gray, 4 F. & F. 1102. See Whart. Cr. Ev. § 36.

[8] *Supra*, §§ 119, 120; State *v.* Regan, 4 Cox C. C. 335.

[9] That the term "out-house" has a technical meaning, and does not include detached structures, see State *v.* Roper, 88 N. C. 656.

thereof, though not adjoining thereto, from which fire could be caught.[1] How far a jail is, in this sense, a dwelling-house, has been already noticed.[2]

Arson to burn house and contiguous out-houses.

§ 834. The burning of a barn, though no part of the mansion, if it have corn or hay in it, is held, as we have seen, arson at common law.[3] By statute, in some States, burning cotton houses is made arson.[4]

And so of barn.

But not a deserted or unfinished building.

§ 835. Temporary absence of the occupants does not cause a building usually inhabited to cease to be a dwelling-house,[5] though the building must be usually dwelt in.[6] Where the indictment charges burning a "dwelling-house," when such is the statutory term, a building which was built for a dwelling-house and had been occupied as such, but not within some months previous to its being burned, nor was so occupied at that time, is not a dwelling-house, under the statute,[7] and a building designed for a dwelling-house, constructed in the usual manner, but not yet entirely finished, and not yet occupied, is not a "house" to be the subject of arson at common law,[8] and this rule applies to all houses which have not yet been occupied as residences,[9] or which,

[1] 1 Hale, 567–70; 3 Inst. 67, 69; 1 Hawk. c. 39, ss. 1, 2; 4 Bl. Com. 221. The test is, liability to communicate fire. R. *v.* Cooper, 5 C. & P. 535; State *v.* Shaw, 31 Me. 523; People *v.* Taylor, 2 Mich. 250; Gage *v.* Shelton, 3 Rich. 242. So under Pennsylvania statute, Hill *v.* Com., 98 Penn. St. 192. As to what is the correct distinction between the *domus* of arson, and the *domus mansionalis* of burglary, see a curious article in 13 Boston Law Rep. 157. *Cf.* People *v.* Fairchild, 48 Mich. 31.

[2] *Supra*, § 829.

[3] *Supra*, § 825.

[4] Washington *v.* State, 68 Ala. 85.

[5] Johnson *v.* State, 48 Ga. 116, under statute; and this is good at common law when the absence is casual, and return at any moment likely.

[6] Dick *v.* State, 53 Miss. 384.

[7] Com. *v.* Barney, 10 Cush. 478; Hooker *v.* Com., 13 Grat. 763; McLane *v.* State, 4 Ga. 335; State *v.* Sutcliff, 4 Strob. 372. *Supra*, § 1082 *a*. See Elsmore *v.* St. Briavals, 8 B. & C. 461.

In New York, in which State it is by statute required that the house should be inhabited, it is enough if a human being be within the house, irrespective of the liability of such person to danger. Woodford *v.* People, 62 N. Y. 117. But there must be somebody in the house. People *v.* Butler, 16 Johns. 203. See Shepherd *v.* People, cited *supra*, § 830.

[8] State *v.* McGowen, 20 Conn. 245.

[9] McGarie *v.* People, 45 N.Y.153; State *v.* Wolfenberger, 20 Ind. 242; State *v.* Sutcliff, 4 Strob. 372. See under Massachusetts statute, Com. *v.* Squire, 1 Met. 258; Com. *v.* Barney, 10 Cush. 478.

having been occupied, have been finally abandoned.[1] It is otherwise under statutes, however, making indictable the burning of "buildings."[2]

By statute offence is extended.

§ 835 *a*. In most jurisdictions statutes have been passed imposing severe penalties on burning various kinds of property not dwelling-houses, which statutes, so far as they do not fall under the head of arson, are hereafter considered.[3] In some jurisdictions the offence of arson is itself enlarged, by statute; in Alabama, as we have seen, to include cotton houses;[4] and in other jurisdictions to include buildings for public use, *e. g.*, churches,[5] and school-houses;[6] and "buildings" in general.[7]

IV. OWNERSHIP.

§ 836. At common law it was once thought essential to aver the possession to be that of the person at the time the legal owner,[8] but

[1] Hooker *v.* Com., 13 Grat. 763.

[2] R. *v.* Edgell, 11 Cox C. C. 132; R. *v.* Manning, L. R. 1 C. C. 338; 12 Cox C. C. 106. A store slept in by a servant may be the dwelling-house of the servant. State *v.* Williams, 90 N. C. 724. See State *v.* Outlaw, 72 Ibid. 598.

But what remains of a wooden dwelling-house, after a previous fire, which left only a few rafters of the roof, and injured the sides and floors so as to render it untenantable, and which was being repaired, is not a building, within sec. 7 of 32–33 Vict. c. 22, so as to be the subject of arson. R. *v.* Labadie, 32 Up. Can. Q. B. 429; 1 Green C. C. 257.

[3] *Infra*, §§ 1065 *et seq*.

[4] Washington *v.* State, 68 Ala. 85.

[5] R. *v.* Hickman, 1 Leach, 318; R. *v.* Parker, Ibid. 230; Com. *v.* Harrigan, 2 Allen, 159.

[6] See State *v.* O'Brien, 2 Root, 516.

[7] See last clause of § 835.

[8] See Glandfield's Case, 2 East P. C. 1034; Com. *v.* Wade, 17 Pick. 395.

In Glandfield's case it appeared that the out-houses burned were the property of Blanche Silk, widow, but were only made use of by John Silk, her son, who lived with her after his father's death, in the dwelling-house adjoining the out-houses, and took upon him the sole management of the farm with which these out-houses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother; that he paid all the servants, and purchased all the stock; but that the legal property, both in the dwelling-house and farm, was in the mother, and she alone repaired the dwelling-house and the out-houses in question. Heath, J., held that, as to the stable, pound, and hog-sties, which the son alone used, the indictment must lay them to be in his occupation; and as to the brew-house (another of the out-houses burned), the mother and her son both occasionally paying for ingredients, the beer being used in the family, to the expenses of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid in their joint occupation. The prisoner was

this is now modified, in some jurisdictions, by statute, in other jurisdictions by judicial revision. Thus, in New York, after an elaborate examination of the authorities, it was held that, under the Revised Statutes, the house or building set fire to or burned must be described as the barn or building of the *person in possession;* and it was accordingly decided, when the building burned was alleged in the indictment as the building of the owner, and the proof was that, at the time of the offence, it was in the possession of a tenant, that the defendant could not be convicted.[1] In England by statute 7 Wm. IV., and 1 Vict. c. 89, s. 3, it is immaterial whether the house be that of a third person or the defendant himself, for that statute applies, whether the house be in the possession of the offender, or in the possession of any other person. Under these statutes it has been held that a house, in part of which a man lives, but lets other parts to lodgers, may be described as his house, even though he be an insolvent debtor, and have assigned the house to his assignee, if the assignee have not taken possession: at all events the room in which he lives may be described as his house.[2] If the possession of a house be obtained wrongfully, it may be described as the house of the wrongful occupier.[3] Since at common law, as we have seen, a man cannot commit arson of his own house, it has been held that a tenant (occupancy being the test) cannot be guilty at common law of arson in burning the property he occupies on lease.[4] On the other hand, a landlord may be guilty of arson in burning his house in a tenant's possession.[5] But a mere servant, whose possession is

Ownership at common law must be established.

afterwards convicted on a second indictment (2 East P. C. 1034), drawn agreeably to this opinion, the first having improperly laid the whole premises as in the sole occupation of the mother; and he was executed.

[1] People *v.* Gates, 15 Wend. 159. See *contra*, Harvey *v.* State, 67 Ga. 639.

[2] R. *v.* Ball, 1 Mood. C. C. 30. See *infra*, § 841.

[3] R. *v.* Wallis, 1 Mood. C. C. 344.

[4] 2 East P. C. 1029; R. *v.* Spalding, 1 Leach, 258; R. *v.* Pedley, Ibid. 242. See Sullivan *v.* State, 5 Stew. & P. 175. *Supra*, § 830.

[5] 2 East P. C. 1029; Fost. 114. See Com. *v.* Erskine, 8 Grat. 635, where this point was held under a statute. Sullivan *v.* State, *ut supra*.

Where a parish pauper set fire to a house in which he was put to reside by the overseers, and it was not known who the trustees were in whom the legal ownership was vested, it was holden that it might be described as the house of the overseers, or of persons unknown. R. *v.* Rickman, 2 East P. C. 1034.

Where a part of the house is occupied by a tenant habitually lodging

that of his master, is guilty of arson in burning the house which he is occupying for his master.[1]

Possession is the test.

§ 837. Although there is some confusion in the earlier cases, the authorities now concur in accepting the position, to adopt the language of Cooley, J., in a Michigan case decided in 1872,[2] that "arson is an offence against the habitation, and regards the possession rather than the property.[3] The house, therefore, must not be described as the house of the owner of the fee, if in fact at the time another has the actual occupancy, but it must be described as the dwelling-house of him whose dwelling it then is,[4] even, it seems, though the occupation be wrongful.[5] It follows that a lessee, even for a year, could not be guilty of arson in burning the premises occupied by him as such,[6] while the landlord, during such occupation, might be."[7] And it is not arson at common law for a man to burn a house of which he is rightfully in possession.[8]

Husband and wife not guilty of arson in burning own house.

§ 838. The law with regard to the statement of ownership by married women is generally the same as in burglary.[9] It must be remembered, however, that arson touches distinctively the rights of possession rather than of property; and hence it has been held in Michigan,[10] that a husband

therein at night, and the residue by the owner, the building is well described in the indictment as the dwelling-house of such tenant. Shepherd *v.* People, 19 N. Y. 537. See *infra*, §§ 841–3.

[1] R. *v.* Gowen, 2 East P. C. 1027.

[2] Snyder *v.* People, 26 Mich. 106; 1 Green C. R. 547.

[3] See State *v.* Toole, 29 Conn. 344; Shepherd *v.* People, 19 N. Y. 537; People *v.* Van Blarcum, 2 Johns. 105; State *v.* Burrows, 1 Houst. Cr. C. 74; People *v.* Fairchild, 48 Mich. 31; State *v.* Sandy, 3 Ired. 570; State *v.* Gailor, 71 N. C. 88; State *v.* Moore, 61 Mo. 276; Young *v.* Com., 12 Bush, 243; Davis *v.* State, 52 Ala. 357; Adams *v.* State, 62 Ibid. 177; Tuller *v.* State, 8 Tex. Ap. 501; People *v.* Wooley, 44 Cal. 494.

[4] 2 East P. C. 1034; 4 Bl. Com. 220; Holmes's Case, Cro. Car. 376; Spalding's Case, 1 Leach, 258; Com. *v.* Wade, 17 Pick. 395; State *v.* Bradley, 1 Houst. C. C. 164.

[5] Rex *v.* Wallis, 1 Mood. C. C. 344; State *v.* Toole, 29 Conn. 344.

[6] 2 East P. C. 1029; 2 Russ. on Cr. 550; McNeal *v.* Woods, 3 Blackf. 485; State *v.* Lyon, 12 Conn. 487; State *v.* Fish, 3 Dutch. 323; State *v.* Sandy, 3 Ired. 570. Otherwise under statute. Allen *v.* State, 10 Ohio St. 287; Sullivan *v.* State, 5 St. & P. 175; State *v.* Moore, 61 Mo. 276; People *v.* Simpson, 50 Cal. 304.

[7] 2 East P. C. 1023–4; Sullivan *v.* State, 5 Stew. & P. 175. *Supra*, § 830.

[8] State *v.* Hannett, 54 Vt. 83.

[9] See *supra*, §§ 800, 816.

[10] Snyder *v.* People, 26 Mich. 106; 1 Green C. R. 547.

living with his wife, and having a rightful possession jointly with her of a dwelling-house which she owns and they both occupy, is not guilty of arson in burning such dwelling-house. It was further said that the Michigan statutes for the protection of the rights of married women have not changed the common law rule as to arson when the burning is by the husband of the house of the wife, occupied as a dwelling or residence by both. And it is also held that a wife cannot be convicted of arson in burning her husband's house, though at the time living separate from him.[1]

V. INDICTMENT.[2]

Indictment must contain technical terms.

§ 839. The indictment for arson at common law must lay the offence to have been done wilfully (or voluntarily) and maliciously,[3] as well as feloniously. The word wilfully may be implied from other fit epithets.[4] "Burn" at common law is essential.[5] If it appears, expletory terms may be rejected as surplusage.[6] In Maine, however, "set fire to" has been held to be equivalent to "burn."[7]

At common law building may be laid as a house.

§ 840. Laying the burning to be of a house is sufficient even at common law, without saying a dwelling-house.[8] But where the statutory term is "dwelling-house," the latter term should appear in the indictment.[9] In Glandfield's case the indictment, which was framed on the stat. 9 Geo. I., stated the burning to be of out-houses generally, which was ruled by Heath, J., to be sufficient, without stating of what denomination of out-houses, such being the description in the statute 9 Geo.

[1] R. *v.* March, 1 Mood. C. C. 182.

[2] For forms of indictment, see Whart. Prec., tit. Arson.

[3] R. *v.* Turner, 1 Mood. C. C. 239; Jesse *v.* State, 28 Miss. 100; Kellenbeck *v.* State, 10 Md. 431. Though see Chapman *v.* Com., 5 Whart. 427; and see, generally, State *v.* Dodson, 16 S. C. 453.

[4] 1 Hawk. c. 89, s. 5; 2 East P. C. 1036. See Whart. Cr. Pl. & Pr. § 269.

[5] Cochran *v.* State, 6 Gill, 400; Mary *v.* State, 24 Ark. 44; Howell *v.* Com., 5 Grat. 664.

[6] Polsten *v.* State, 14 Miss. 463. See Hester *v.* State, 17 Ga. 130.

[7] State *v.* Taylor, 45 Me. 322, *sed quære*. As to indictment generally, see Woodford *v.* People, 62 N. Y. 117; Page *v.* Com., 26 Grat. 943; State *v.* Keel, 54 Mo. 182; State *v.* Moore, 61 Mo. 276; Wolf *v.* State, 53 Ind. 30; Davis *v.* State, 52 Ala. 357; Mott *v.* State, 29 Ark. 147; People *v.* Shainwold, 51 Cal. 468; Thomas *v.* State, 41 Tex. 27.

[8] See 1 Hale. 567; Com. *v.* Posey, 4 Call, 109.

[9] McLean *v.* State, 4 Ga. 335; State *v.* Sutcliff, 4 Strobh. 372. *Supra*, § 835.

I.[1] The special locality of the house need not be stated, when it is averred to be within the jurisdiction.[2]

Ownership must be laid, and proved as laid.

§ 841. The house must at common law ordinarily be laid to be the house of another.[3] Ownership must be laid, and proved as laid.[4] "Belonging to" is a sufficient averment of ownership.[5] But a special ownership is sufficient; it not being necessary that the ownership should be in fee.[6] A mere servant, however, should not be laid as owner,[7] though generally, as we have seen, proof of possession will sustain averment of ownership.[8] But at the same time, if there are several tenants of a building, separated in distinct apartments, the burning must be averred to be of the property of the particular tenant of the part burned.[9] And the apartment of a tenant of a tenement house may be averred to be his "dwelling-house" or "house."[10]

[1] 2 East P. C. 1036. *Supra*, § 836. See Hester *v.* State, 17 Ga. 130.

[2] Smith *v.* State, 64 Ga. 605.

[3] 2 East P. C. 1034; Martha *v.* State, 26 Ala. 72. And see *supra*, § 834; but see, as to Louisiana, State *v.* Elder, 21 La. An. 157; and compare Young *v.* Com., 12 Bush, 243. "The jail of Talladega County" implies a sufficient averment of ownership. Lockett *v.* State, 63 Ala. 5.

[4] Whart. Cr. Pl. & Pr. § 109. *Supra*, §§ 798, 836; *infra*, § 932; State *v.* Fish, 3 Dutch. 323; Marten *v.* State, 28 Ala. 71. As to corporate owners, see McGary *v.* People, 45 N. Y. 153.

[5] Com. *v.* Hamilton, 15 Gray, 480.

[6] State *v.* Lyon, 12 Conn. 487.

[7] Rickman's Case, 2 East P. C. 1034.

[8] *Supra*, § 837.

A room in a large building, separately leased by the owner of the building to a merchant, who occupied it as a store, and having no direct communication with the other parts of the building, is properly laid in an indictment for arson as the property of the lessee. State *v.* Sandy, 3 Ired. 570. See Shepherd *v.* People, 19 N. Y. 537.

On an indictment for setting fire to a barn in the night-time, whereby a dwelling-house was burned, charging the barn to be the property of G. and N., it appeared that G. was the general owner of the barn, and that part of it was in the occupancy of N., and a part of it used for the purposes of a stage company, who had hired it from G., by parol agreement, for no specified time, G. himself being a member and agent of the company, and exercising no different control over this part of the premises than he exercised over the other way stations of the company. It was held that the company, and not G., was occupant of this part of the barn, and that the allegation of the indictment that the property was N.'s and not G.'s was not supported by the proof. Com. *v.* Wade, 17 Pick. 395.

In Vermont, on an indictment for burning a public meeting-house, under a statute, it is not necessary to aver who are its owners. State *v.* Roe, 12 Vt. 93.

[9] R. *v.* Ball, 1 Mood. C. C. 30; State *v.* Toole, 29 Conn. 344; State *v.* Tonnery, 9 Iowa, 436; Shepherd *v.* People, 19 N. Y. 537.

[10] Levy *v.* People, 80 N. Y. 327.

The pleading of the name of the party defrauded has been elsewhere fully considered.[1]

Intent to defraud should be correctly stated.

§ 842. The law in respect to fraud on insurance companies is noticed in other sections.[2] A variance in this respect is fatal at common law, if the objection be taken during trial;[3] though it is no ground for *arresting judgment* that the name of the company is inaccurately stated.[4] If the owners are an unincorporated company of individuals, their names should be given.[5] Where the statute makes wilful burning by itself indictable, or where the offence is arson at common law, the intent to defraud need not be alleged.[6]

VI. BURNING HOUSES WITH INTENT TO DEFRAUD INSURERS.

Such burning has been made arson by statute.

§ 843. As we have already seen, it is not an indictable offence at common law for a person to burn his own house with intent to defraud insurers.[7] In most jurisdictions, however, statutes are in force making this an indictable offence.[8] A possibility of fraud is sufficient under the statute.[9] It is enough if the building was only partially burned.[10] The intent is to be inferred from all the circumstances of the case.[11]

[1] Whart. Prec. (389). Whart. Cr. Pl. & Pr. §§ 109 *et seq.* *Supra*, § 816.

[2] *Supra*, §§ 716, 739; *infra*, § 843.

[3] In an indictment for setting fire to a building with intent to defraud the insurers, the guilty intent to defraud the insurers must be averred; Com. *v.* Makely, 131 Mass. 421; and the names of the parties to be defrauded accurately given. Staaden *v.* People, 82 Ill. 432; aff. Wallace *v.* People, 63 Ibid. 451.

[4] People *v.* Hughes, 29 Cal. 257.

[5] People *v.* Schwartz, 32 Cal. 160.

[6] R. *v.* Heseltine, 12 Cox C. C. 404.

[7] *Supra*, § 830.

[8] See State *v.* Hurd, 51 N. H. 176; State *v.* Babcock, 51 Vt. 570; Shepherd *v.* People, 19 N. Y. 537; People *v.* Henderson, 1 Parker C. R. 560; State *v.* Thorne, 81 N. C. 555; People *v.* Schwartz, 32 Cal. 160. *Aliter* when the statutory offence is burning with intent to defraud. State *v.* Porter, 90 N. C. 719; State *v.* Phifer, Ibid. 721.

Though there are several insurers, the offence of burning with intent to defraud such insurers is but a single crime. Com. *v.* Goldstein, 114 Mass. 272. As to proving intent, see *supra*, § 831.

[9] R. *v.* Doran, 1 Esp. 127; R. *v.* Kitson, Dears. C. C. 187; State *v.* Watson, 63 Me. 128; Jhons *v.* People, 25 Mich. 500. In Illinois it is said that if the intent to defraud was malicious, it is no defence that the policy is invalid; McDonald *v.* People, 47 Ill. 533; and this is correct at least when the defect is not so absolute as to preclude a possibility of fraud. *Supra*, § 695.

[10] State *v.* Babcock, 51 Vt. 570.

[11] Whart. Crim. Ev. §§ 734 *et seq.*; State *v.* Byrne, 45 Conn. 273.

In such prosecutions it is not necessary to prove technically the charter of the insurance company when domestic. It is enough if it was doing business in the place of prosecution.[1]

VII. ATTEMPTS.

§ 844. *Attempts* to commit arson may be prosecuted when the burning is not consummated;[2] and under the New York statute it is held that such prosecutions may be maintained when one solicits another ineffectually to commit the offence.[3] That a bare solicitation is indictable when there is no overt act, may well be questioned;[4] but there can be no doubt that such solicitation is indictable when coupled with any action to communicate the fire.[5] And the better view is that there is no accessaryship before the fact in cases of solicitation unless aid be actually rendered and overt acts done towards consummation.[6]

Indictable at common law.

[1] Whart. Cr. Ev. § 164 *a*; Johnson *v.* State, 65 Ind. 204.

[2] R. *v.* Taylor, 1 F. & F. 511; R. *v.* Clayton, 1 C. & K. 128; Com. *v.* Flynn, 3 Cush. 525; State *v.* Johnson, 19 Iowa, 230. *Supra*, § 173.

[3] People *v.* Bush, 4 Hill N. Y. 133. But see *supra*, § 179.

[4] *Supra*, § 179.

[5] *Supra*, § 173.

The attempt, however, must have causal relation to the act; *supra*, § 178; and the means must be adapted to the ends; §§ 180 *et seq.* See § 187 as to abandonment of attempt.

[6] *Supra*, § 173; McDade *v.* People, 29 Mich. 50.

CHAPTER XII.

ROBBERY.

ROBBERY AT COMMON LAW.

§ 846. ROBBERY is the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or by putting him in fear.[1] The property taken must be the subject of larceny, whether common law or statutory.[2]

I. FROM THE PERSON OR IN THE PRESENCE.

§ 847. It must appear that the taking was from the person or in the presence of the prosecutor.[3] Where it appeared that with the

[1] R. *v.* Cannon, R. & R. 146; R. *v.* Hemming, 4 F. & F. 50; Clary *v.* State, 33 Ark. 561. As to statutory theft from person, see Woodard *v.* State, 9 Tex. Ap. 412; Williams *v.* State, 10 Ibid. 8.

[2] Ibid.

[3] R. *v.* Grey, 2 East P. C. 708; R. *v.* Hamilton, 8 C. & P. 49; U. S. *v.* Jones, 3 Wash. C. C. 209; Com. *v.* Snelling, 4 Binn. 379; Turner *v.* State, 1 Ohio St. 422; Kit *v.* State, 11

prosecutor was a third person, who had the prosecutor's bundle, and who, when the prosecutor was forcibly attacked by the defendant, dropped the bundle, and ran to assist the prosecutor, when the defendant took up the bundle and ran off, a learned judge is said to have doubted whether the offence was robbery.[1] But when a thief puts a man in fear, and then in his presence drives away his cattle, or takes his goods, the robbery is complete;[2] and such is the case where a man flying from a robber drops his hat, which the robber steals,[3] and where by intimidation the owner is induced to open his desk or safe.[4]

Robbery must be from the person or in the presence of the prosecutor.

II. MUST BE ANIMO FURANDI.

§ 848. The goods, also, must appear to have been taken *animo furandi*, as in cases of larceny;[5] though this is to be inferred from circumstances.[6] It has been doubted whether the offence is constituted where a man, by force or threats, compels another to give him goods he has to sell, and gives him in return money to the amount of the value of the goods,[7] although it is said by Mr. Archbold that it would be if the goods were of greater value than the money given for them.[8] As we will presently see, if a party under a *bonâ fide* impression that the property is his own obtain it by menaces, this is a trespass, but no robbery.[9]

Goods must be taken *animo furandi*.

Humph. 167; Crewë *v.* State, 3 Cold. (Tenn.) 350; Stegar *v.* State, 39 Ga. 583. See distinctions in §§ 228–230 of N. Y. Penal Code of 1882.

[1] R. *v.* Fellows, 5 C. & P. 508.

[2] 1 Hale, 583; R. *v.* Francis, 2 Stra. 1015; Turner *v.* State, 1 Ohio St. 422. *Infra*, § 851.

[3] 1 Hale, 583.

[4] U. S. *v.* Jones, 3 Wash. C. C. 209. As to proof in such cases, see State *v.* Lucas, 57 Iowa, 501.

[5] Murphy *v.* People, 3 Hun, 114; Matthews *v.* State, 4 Ohio St. 539; State *v.* Holloway, 41 Iowa, 200; State *v.* Curtis, 71 N. C. 56; Long *v.* State, 12 Ga. 293; see Ward *v.* Com., 14 Bush, 233.

[6] Ibid.

[7] 1 Hawk. P. C. c. 34, s. 14.

[8] Archbold's C. P. 245.

[9] *Infra*, § 853.

A creditor having violently assaulted his debtor, and so forced him to give him a cheque in part payment, and having then again assaulted him, in order to force him to give him money in payment of the debt, it was held, that as there was no felonious intent, he could not properly be convicted of robbery. R. *v.* Hemmings, 4 F. & F. 50. See R. *v.* Coghlan, Ibid. 316, cited *infra*, § 852. *Contra*, under Iowa statute, State *v.* Hollyway, *ut sup.* As to larceny, see *infra*, § 884.

In Virginia it is said that robbery need not be *lucri causa*. Jordan *v.* Com., 25 Grat. 943.

III. TAKING AND CARRYING AWAY.

§ 849. There must be an actual taking and carrying away.[1] If a robber cut a man's girdle, in order to get his purse, and the purse thereby fall to the ground, and the robber runs off, or is apprehended before he can take it up, this is not robbery, because the purse is never in the possession of the robber.[2] But it is immaterial whether the taking were by force or upon delivery, supposing the delivery be caused by fear; and if by delivery, it is also immaterial whether the robber compelled the prosecutor to it by a direct demand in the ordinary way, or by any colorable pretence. A carrying away must also be proved; and where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him; and the man accordingly laid down the bed, but the robber, before he could take it up to remove it from the place where it lay, was apprehended, the judges held that the robbery was not complete.[3] But where the defendant snatched out a lady's ear-ring, and succeeded in separating it from the ear, and it was afterwards found among the curls of her hair, the court held this a sufficient proof of asportation to support the indictment.[4]

Goods must be taken and carried away.

It is also held that a person travelling with the owner of goods, and charged by the owner with their custody, may be guilty of robbery in violently taking these goods from the owner's constructive possession.[5]

IV. FORCE OR FEAR.

§ 850. While there must be a felonious taking of property from the person of another, either by actual or by constructive force, consisting of the application of threatening words or gestures; yet, if force be used, fear is not an

Taking must be through force or fear.

[1] Com. *v.* Clifford, 8 Cush. 215; State *v.* Curtis, 71 N. C. 56; Jordan *v.* Com., 25 Grat. 943.

[2] 1 Hale, 533. As to proof in such cases, see Odle *v.* State, 13 Tex. Ap. 612.

[3] R. *v.* Farrell, 1 Leach, 362.

[4] R. *v.* Lapier, 1 Leach. 320. Where the defendant seized the seals and chain of the prosecutor's watch, and pulled the watch out of his fob, but the watch being secured around the neck by a chain, he could not take it until by giving two or three jerks he broke the chain, and ran off with the watch, the robbery was held complete. R. *v.* Mason, R. & R. 419; R. *v.* Davies, 2 East P. C. 709.

[5] James *v.* State, 53 Ala. 380.

essential ingredient.[1] This disjunctive way of stating the offence has been incorporated in the statutes of several of the States, where it is provided that if the goods be taken either by violence or by putting the owner in fear, it is sufficient to constitute robbery.[2]

To knock another down, and take from him his property while he is insensible or unconscious, is robbery.[3]

It is not necessary that the fear should be of robbery. Fear of bodily hurt is enough.[4]

When the indictment elects to aver fear, fear must be proved.[5] And this is sufficient without tactual force.[6] But taking by a trick is not robbery.[7]

V. NATURE OF THREATS.

§ 851. Any threat calculated to produce terror is sufficient.[8] Thus, if a man take another's child, and threaten to destroy him unless the other give him money, this is robbery.[9] And where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given; and the prosecutor thereupon gave him 5*s*., but he insisted

Threat calculated to produce terror is sufficient.

[1] State *v.* Gorham, 55 N. H. 152; Com. *v.* Humphrey, 7 Mass. 242; Com. *v.* Snelling, 4 Binn. 379; State *v.* Cowan, 7 Ired. 239; State *v.* Burke, 73 N. C. 83; Jackson *v.* State, 69 Ala. 29; Seymour *v.* State, 15 Ind. 288; Bonsall *v.* State, 35 Ibid. 460; State *v.* Howerton, 58 Mo. 581. The prisoner, when walking on the public street by night with a stranger, seized the latter's watch with violence enough to break a silk guard, and exclaimed, "Damn you, I will have your watch," and fled with it. This was held to be highway robbery, though the prosecutor could not swear that he feared anything except the loss of his watch. State *v.* McCune, 5 R. I. 60. But see Bonsall *v.* State, 35 Ind. 460, and *infra*, § 854.

In R. *v.* Gascoigne, 2 East P. C. 709; 1 Leach, 481, it was held robbery for an officer to take money from a prisoner whom he had handcuffed for this purpose.

[2] McDaniel *v.* State, 8 S. & M. 401; State *v.* Howerton, 58 Mo. 581; State *v.* Broderick, 59 Mo. 318. See Glass *v.* Com., 6 Bush, 436.

[3] Foster, 128; R. *v.* Lapier, 1 Leach, 320; Mahoney *v.* People, 3 Hun, 302; 5 Th. & C. 329; Com. *v.* Snelling, 4 Binn. 379; Brennan *v.* State, 25 Ind. 403. *Infra*, § 855.

[4] Com. *v.* Snelling, 4 Binn. 379.

[5] Glass *v.* Com., 6 Bush, 436; Dill *v.* State, 6 Tex. Ap. 113.

[6] Com. *v.* Brooks, 1 Duvall, 150; State *v.* Howerton, 58 Mo. 581.

[7] Shinn *v.* State, 64 Ind. 13.

[8] See Long *v.* State, 12 Ga. 293; R. *v.* Reane, 2 East P. C. 734.

[9] Per Eyre, C. J., in R. *v.* Reane, 2 East P. C. 734; and see R. *v.* Donnally, Ibid. 718, S. P.

on more, and the prosecutor, being terrified, gave him 5*s*. more; upon which the defendant and the mob then took bread, cheese, and cider from the prosecutor's house, without his permission, and departed; this was also held robbery.[1] But a threat to imprison by a person falsely representing himself to be a town marshal is not a threat which will sustain an indictment.[2]

VI. CHARGING WITH AN UNNATURAL CRIME.

§ 852. To extort money under threat of charging the prosecutor with an unnatural crime has in many cases been holden to be robbery;[3] even where it appeared that the prosecutor parted with his money from fear merely of losing his character or situation by such an imputation.[4] Obtaining money by such and similar means is in many States by statute made a substantive offence.[5] But to extort money, or other

Extortion by charging unnatural crime is robbery.

[1] R. *v.* Simons, 2 East P. C. 731. See R. *v.* Brown, Ibid. 731; S. P., R. *v.* Astley, Ibid. 712.

Where a mob came to the house of the prosecutor, and with the mob the prisoners, who advised the prosecutor to give them something to get rid of them and prevent mischief, by which means they obtained money from the prosecutor; Parke, J. (after consulting Vaughan, B., and Alderson, J.), admitted evidence of the acts of the mob at other places, before and after, on the same day, to show that the advice of the prisoners was not *bonâ fide*, but in reality a mere mode of robbing of the prosecutor. R. *v.* Winkworth, 4 C. & P. 444.

[2] Williams *v.* State, 12 Tex. Ap. 240; see Kimble *v.* State, Ibid. 420.

[3] R. *v.* Jones, 1 Leach, 139; 2 East P. C. 718; R. *v.* Donnally, 1 Leach, 193; 2 East P. C. 718; R. *v.* Cannon, R. & R. 146; R. *v.* Stringer, 2 Mood. C. C. 261; People *v.* McDaniels, 1 Parker C. R. 199; Long *v.* State, 12 Ga. 293; Britt *v.* State, 7 Humph. 45.

[4] Steph. D. Cr. L. art. 296; R. *v.* Hickman, 1 Leach, 278; R. *v.* Egerton, R. & R. 375. See R. *v.* Elmstead, 2 Russ. Cr. 86; R. *v.* Stringer, 2 Mood. C. C. 261; Simon's Case, 2 East P. C. 231; People *v.* McDaniels, 1 Parker C. R. 199.

[5] For threatening letters generally, see *infra*, § 1664. For cases under the English statute, see R. *v.* Carruthers, 1 Cox C. C. 138; R. *v.* Miard, Ibid. 22; R. *v.* Robertson, L. & C. 483. A person threatening A.'s father that he would accuse A. of having committed an abominable offence upon a mare, for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price, is guilty of threatening to accuse with intent to extort money, within 24 & 25 Vict. c. 96, s. 47; R. *v.* Redman, 10 Cox C. C. 159, L. R. 1 C. C. 12. Threat and intent may be inferred, even against the declaration of the prisoner at the time, and in the absence of other proof, from a letter sent, and from other inculpatory facts. R. *v.* Menage, 3 F. & F. 310; R. *v.* Coghlan, *infra*. The menace or threat must be of a character to produce in a reasonable man some degree

valuable things, by threatening a criminal prosecution for passing counterfeit money, or by any prosecution, except that for an unnatural crime, is not at common law a robbery.[1] By statutes, however, blackmailing is made a substantive offence ;[2] and to extort by threats of any prosecution is at common law an indictable misdemeanor.[3]

VII. DEFENDANT HAVING TITLE.

When goods are taken under claim of title offence is not made out.

§ 853. Where title is *bonâ fide* claimed by the defendant, the case fails.[4] Thus, in an English case, the prisoner had set wires in which game was caught. The prosecutor, a game-keeper, took them away, while the prisoner was absent. The prisoner demanded his wires and game with menaces, and, under the influence of fear, the prosecutor gave them up. The jury found that the prisoner acted under a *bonâ fide* impression that the game and wires were his property, and that he merely, by some degree of violence, gained pos-

of alarm or bodily fear, so as to interfere with that free voluntary action which constitutes consent. R. *v.* Walton, 9 Cox C. C. 268 ; L. & C. 288 ; R. *v.* Hendy, 4 Cox C. C. 243.

The guilt of the party threatened is immaterial as to the question of defendant's guilt ; R. *v.* Cracknell, 10 Cox C. C. 408—Willes ; though it is material for the purpose of determining whether the intention was to extort money or to compound a felony. R. *v.* Richards, 11 Cox C. C. 43. Therefore, although the prosecutor may be cross-examined with a view to show that he is really guilty of the offence imputed to him, yet no evidence will be allowed to be given, *aliunde*, to prove that the prosecutor is really guilty ; Ibid. ; R. *v.* Menage, 3 F. & F. 310 ; but see R. *v.* Richards, 11 Cox C. C. 43. Nor on an indictment for threatening to publish certain matter with intent to extort money, is it necessary that the matter should be libellous. R. *v.* Coghlan, 4 F. & F. 316.

The prisoner sent to the prosecutor a letter, the language of which was ambiguous : It was held, that the prosecutor might be asked what appeared to him to be the meaning of the letter. R. *v.* Hendy, 4 Cox C. C. 243. A witness may be asked whether he understood the meaning to be that which the record imputed. Ibid. As to interpretation of letter, see R. *v.* Chalmers, 16 L. T. N. S. 363.

[1] Britt *v.* State, 7 Humph. 45 ; Long *v.* State, 12 Ga. 293 ; R. *v.* Edwards, 1 M. & Rob. 257 ; 5 C. & P. 518 ; R. *v.* Henry, 2 Mood. C. C. 118.

It is not necessary, in an indictment for extortion, to set out with technical accuracy the crime charged. Com. *v.* Murphy, 12 Allen, 449.

[2] *Infra*, § 1664.

[3] R. *v.* Woodward, 11 Mod. 137 (case 195).

[4] R. *v.* Hall, 3 C. & P. 409 ; Brown *v.* State, 28 Ark. 126 ; Barnes *v.* State, 9 Tex. Ap. 128.

session of what he considered his own. It was held no robbery, there being no *animus furandi*.[1]

Such, also, is the case when property is taken under alleged belligerent rights.[2]

VIII. SNATCHING.

Snatching without struggle is not robbery.

§ 854. The snatching a thing is not considered a taking by force, but if there be a struggle to keep it, or any violence, or disruption, the taking is robbery,[3] the reason of the distinction being that, in the former case, we can infer neither fear nor the intention violently to take in face of resisting force. If putting in fear be proved, the offence is robbery.[4] And so where the thing is torn from the person, as an ear-ring from the ear.[5]

IX. AGAINST THE WILL.

Must be against the will.

§ 855. As a rule, robbery must be against the will ;[6] at the same time, as in the parallel case of rape,[7] "against the will," if there be force, is to be treated as convertible with "without consent ;" and hence where the defendant knocked the prosecutor down, and, when the latter was insensible, robbed him, it was held that the robbery was complete.[8] And so was it held, where the prosecutor was seized by the cravat and forced against the wall, and when thus pinioned his watch was taken without his knowledge.[9] But the mere taking goods from an un-

[1] R. *v.* Hall, 3 C. & P. 409. *Supra*, § 848 ; *infra*, § 883.

[2] Com. *v.* Holland, 1 Duvall, 182. See U. S. *v.* Durkee, McAllister, 196 ; Hammond *v.* State, 3 Cold. (Tenn.) 129. *Supra*, § 283.

[3] R. *v.* Macaulay, 1 Leach, 287 ; R. *v.* Baker, Ibid. 299 ; R. *v.* Steward, 2 East P. C. 702 ; R. *v.* Horner, Ibid. 703 ; R. *v.* Walls, 2 C. & K. 214 ; R. *v.* Gnosil, 1 C. & P. 304 ; Com. *v.* Ordway, 12 Cush. 270 ; McCloskey *v.* People, 5 Parker C. R. 299 ; State *v.* McCune, 5 R. I. 60 ; Shinn *v.* State, 64 Ind. 13 ; Mahoney *v.* People, 3 Hun, 202 ; State *v.* Trexler, 2 Car. L. R. 90 ; State *v.* Broderick, 59 Mo. 318. See *supra*, § 150 ; Fanning *v.* State, 66 Ga. 167 ; though see State *v.* John, 5 Jones (N. C.), 163.

[4] Moore's Case, 1 Leach, 335 ; Com. *v.* Snelling, 4 Binn. 379 ; Mahoney *v.* People, 3 Hun, 202. See *supra*, § 849.

[5] *Supra*, § 850. R. *v.* Macaulay, 1 Leach, 487 ; Shinn *v.* State, 64 Ind. 13.

[6] R. *v.* McDaniel, Foster, 121–8 ; Long *v.* State, 12 Ga. 293 ; State *v.* Johnson, Phill. (N. C.) L. 140 ; People *v.* Clough, 59 Cal. 438. See People *v.* Core, Ibid. 390.

[7] See *supra*, §§ 556, 562.

[8] R. *v.* Lapier, 1 Leach, 320 ; Foster, 128 ; R. *v.* Hawkins, 3 C. & P. 392.

[9] Com. *v.* Snelling, 4 Binn. 379.

conscious person, *without force*, or the intent to use force, is not robbery.[1]

X. CONSENT.

Consent no defence if obtained by fear.

§ 856. It makes no matter what pretences were employed to induce the owner to surrender possession, if he was put in bodily fear.[2] Thus, if a man with a sword drawn, or a pistol cocked, ask alms of me, and I give it him, through apprehension of violence, it is as much a robbery as if he had demanded money as a tribute.[3] So, where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence of payment for them, this was held to be robbery.[4] Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; and after some altercation he went with the driver, under pretence of going before a magistrate, and during their absence the mob pillaged the cart, this was also held robbery.[5] If thieves come to rob A., and finding little upon him, force him by menace to swear to bring them a greater sum, which he does accordingly, this is robbery, if, at the time he delivered the money, the fear of the menace continued to operate upon him.[6] So where the defendant, under compulsion, consents to draw a check or order;[7] and where money is given to avert a rape.[8]

But if the prosecutor consent to be robbed, simply to prosecute the robber, this is a good defence.[9]

XI. INDICTMENT.

§ 857. An indictment for the common law offence of highway robbery, which charges the offence to have been committed near the highway, is good.[10] But an indictment charging the robbery to have

[1] Brennan *v.* State, 25 Ind. 403.

[2] Dill *v.* State, 6 Tex. Ap. 113.

[3] 4 Bl. Com. 242; but see State *v.* Johnson, Phill. (N. C.) L. 186.

[4] R. *v.* Simons, 2 East P. C. 712; and see R. *v.* Spencer, Ibid. 712. *Supra*, § 146.

[5] Merriman *v.* Chippenham, 2 East P. C. 709.

[6] 1 Hale, 532. *Supra*, § 146.

[7] See R. *v.* Edwards, 6 C. & P. 521.

[8] R. *v.* Blackham, 2 East P. C. 711.

[9] R. *v.* Fuller, R. & R. 408; 1 Russ. Cr. 890. *Supra*, §§ 141 *et seq.*

[10] State *v.* Anthony, 7 Ired. 234; State *v.* Wilson, 67 N. C. 456. Under Missouri statute see State *v.* Howerton, 59 Mo. 91.

been committed in the highway is not supported by evidence of a robbery *near* the highway.[1] The *termini* of the highway need not be given.[2]

Proper technical averments must be made.

An indictment which alleges the taking of the property from the person "feloniously and violently," has been held to sufficiently allege the putting in fear.[3] But it is safer to allege that the prosecutor was put in fear, and that the act was done forcibly,[4] since in this case either of these allegations can be discharged as surplusage. "Against the will" is essential,[5] and so, at common law, is the allegation "from the person."[6]

"Feloniously" is at common law essential both to the robbery and the assault.[7]

The rules heretofore laid down for the description of personal property apply to cases of robbery.[8] Robbery of a "piece of paper" may be enough,[9] and so of whatever is the subject of statutory larceny.[10] And it is said that as force or fear is the main ingredient of the offence, the indictment need not specify value.[11]

[1] State *v.* Cowan, 7 Ired. 239.

[2] State *v.* Burke, 73 N. C. 83.

[3] Com. *v.* Humphrey, 7 Mass. 242; State *v.* Cowan, 7 Ired. 239; 2 East P. C. 783. Such is clearly the old rule. See Whart. Cr. Pl. & Pr. § 267. Under Tennessee statute, see State *v.* Swafford, 3 Lea, 162.

[4] Collins *v.* People, 39 Ill. 233; Anderson *v.* State, 28 Ind. 22; though see Glass *v.* Com., 6 Bush. 436. As to Alabama, see Chapell *v.* State, 52 Ala. 359. Under the Pennsylvania statute it is not necessary, when "rob" is used, to aver "from his body and against his will." Acker *v.* Com., 94 Penn. St. 284.

[5] Whart. Cr. Pl. & Pr. § 267. But not "assault," under Texas statute. State *v.* Brewer, 53 Iowa, 735.

[6] State *v.* Leighton, 56 Iowa, 595. See State *v.* Kegan, 62 Iowa, 106.

[7] R. *v.* Pelfryman, 2 East P. C. 783; Chappell *v.* State, 52 Ala. 359.

[8] See Whart. on Cr. Ev. § 121; and see, also, Turner *v.* State, 1 Ohio St. 422; Brennan *v.* State, 25 Ind. 403; McEntee *v.* State, 24 Wis. 43; Wesley *v.* State, 61 Ala. 282.

[9] R. *v.* Bingley, 5 C. & P. 602. *Infra*, § 880.

[10] R. *v.* Hemmings, 4 F. & F. 50; State *v.* Carro, 26 La. An. 377.

[11] State *v.* Burke, 73 N. C. 83.

An indictment for robbery, which alleges that the "defendant made an assault upon A., and put him in fear of his life, and did take, steal, and carry away feloniously, the money of said A.," is insufficient, because it does not state that the money was taken from the person of A., and against his will, which is an essential averment. Kit *v.* State, 11 Humph. 167; People *v.* Beck, 21 Cal. 385; *contra*, Terry *v.* State, 13 Ind. 70. For forms of indictment, see Whart. Prec. 410 *et seq.*

An indictment was sustained in California which charged the defendant with having feloniously, forcibly, and violently stolen from the person and control of B., and against his will,

The name of the person robbed, if known, must be stated with the same precision as in larceny.[1]

May be a conviction of larceny.

§ 858. Even at common law, if the force be not proved, the defendant while acquitted of robbery may be convicted of larceny if there be an allegation of stealing duly set forth.[2]

Attempts at robbery, and *assaults with intent to rob*, are elsewhere generally discussed.[3]

property belonging to C. It was held not necessary to aver that the property was taken against the will of C., or without his knowledge and consent; or to state that B. had a right of possession. People *v.* Shuler, 28 Cal. 490. See, as to right of possession, State *v.* Ah Loi, 5 Nev. 99.

[1] Whart. Crim. Ev. §§ 94 *et seq.*; Smedly *v.* State, 30 Texas, 214; Com. *v.* Clifford, 8 Cush. 216; Crews *v.* State, 3 Cold. 350; People *v.* Vice, 21 Cal. 344; People *v.* Jones, 53 Ibid. 58; Parker *v.* State, 9 Tex. Ap. 351. An averment in an indictment for robbery that the property was feloniously taken will not supply the want of an averment of the intent to rob or steal, under the Ohio statute. Matthews *v.* State, 4 Ohio St. 539.

[2] *Supra*, § 27; R. *v.* Birch, 1 Den. C. C. 185; Hickey *v.* State, 23 Ind. 21; State *v.* Jenkins, 36 Mo. 372; People *v.* Jones, 53 Cal. 58; U. S. *v.* Mays, 1 Idaho (N. S.), 763. See Howard *v.* State, 25 Ohio St. 399, for conviction of felonious assault under indictment for robbery.

[3] See *supra*, §§ 173 *et seq.*, 641 *et seq.*

CHAPTER XIII.

LARCENY.

§ 862. "The definitions of larceny," said Baron Parke, an eminent judge,[1] "are none of them complete; Mr. East's is the most so, but that wants some little explanation. His definition is, 'the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.' This is defective, in not stating what the definition of 'felonious' in this definition is. It may be explained to mean that there is no color of right or excuse for the act; and the 'intent' must be to deprive the owner, not temporarily, but permanently, of his property. Cases also show that a taking of goods with an intent to return them is not larceny."

Larceny is the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner without his consent.

From this definition differ those of Coke, Hawkins, and Blackstone, in the omission of two important requisites: first, the "conversion to the taker's own use;" and secondly, "without the consent of the owner." Blackstone, for instance, contents himself with declaring larceny to be "the felonious taking and carrying away of the personal goods of another." That this definition is defective in omitting "without the consent of the owner" is now universally conceded. Whether it is defective in omitting to include the *lucri*

[1] R. *v.* Holloway, 2 C. & K. 945; 1 Den. C. C. 370; T. & M. 40.

causa will be hereafter discussed.[1] But waiving this question for the present, larceny may be defined to be the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner, without his consent.

§ 862 *a*. At common law, larceny is divided into grand and petit, the latter including all stealing not exceeding twelve pence in value. In England this distinction has been cancelled by statute; and in but few of the United States does it continue to be recognized.[2]

At common law grand and petit.

I. SUBJECTS OF LARCENY.

In what way property laid in an indictment for larceny is to be described has been elsewhere considered.[3] The proof of the larceny of a single article among many laid will sustain a conviction.[4]

§ 863. Larceny cannot be committed, at common law, of a thing not the subject of determinate property, as treasure trove, waifs, etc., till seized,[5] though it would seem that the true owner, though unknown, has still a property in them before seizure by the lord, unless there be circumstances to show an intended dereliction of the property.[6] But it has been held in Massachusetts that articles of clothing, taken from a dead body ashore from a wreck, are the subjects of larceny;[7] and such is clearly the case at common law with grave-clothes,[8] and coffins in graves,[9] though

Treasure trove, human remains, waifs, and estrays cannot be the subjects of larceny; but otherwise as to grave-clothes, skins of

[1] *Infra*, § 895.

[2] That there are no accessaries in petit larceny, see *supra*, § 223. In New York, petit larceny is triable and punishable only as a misdemeanor. People *v.* Finn, 87 N. Y. 533. As to Alabama, see Borum *v.* State, 66 Ala. 468; and see State *v.* Brown, 73 Mo. 631. As to Florida, see Bell, *ex parte*, 19 Fla. 608, where it is held there is no distinction between the two grades. See, also, *supra*, § 819.

[3] Whart. Plead. & Prac. §§ 206–212; Whart. Crim. Ev. §§ 124 *et seq.*

[4] Whart. Crim. Ev. §§ 123, 132; People *v.* Wiley, 3 Hill (N. Y.), 194.

[5] 1 Hale, 510; 1 Hawk. c. 33, s. 24. See R. *v.* Hore, 3 F. & F. 315. That the act of Congress, prohibiting plundering wrecks, etc., does not apply to property abandoned by the owner, see U. S. *v.* Smiley, 6 Saw. 640.

[6] 2 East P. C. 606, 607. See R. *v.* Thurborn, T. & M. 67; 1 Den. C. C. 387.

[7] Wonson *v.* Sayward, 13 Pick. 402.

[8] Haynes's Case, 12 Co. 113; State *v.* Doepke, 68 Mo. 208. *Infra*, § 937.

[9] State *v.* Doepke, 68 Mo. 208, where it was held that the ownership might be laid in the person furnishing the coffin.

deer hung up in a camp, ice, and gas, and stored water.

it is otherwise as to dead human beings.[1] Taking deer-skins hung up in the woods at an Indian hunting-camp may be larceny, though the skins were not in the actual possession of any one at the time,[2] and so of dead animals buried by the owner.[3] Ice, when put away in an ice-house for domestic use, becomes individual property, so as to be the subject of larceny, though clearly not so when taken from the surface of an open pond or river;[4] and so gas is the subject of larceny, when severed from the general pipe before it reaches the meter.[5] Whether seaweed, left by the waves on the shore, belongs to the owner of the land has been questioned.[6] Water, when stored, may be the subject of larceny, though it is otherwise when running.[7] An estray when finally abandoned may cease to become the object of larceny.[8] But cattle running at large within certain ranges are not regarded in Texas and in other grazing Western States, as estrays.[9]

§ 864. Larceny cannot be committed of things which belong to

[1] R. *v.* Haynes, 2 East P. C. 652. See Steph. Dig. C. L. art. 292, where it is queried as to anatomical preparations.

[2] Penn. *v.* Becomb, Add. 386.

[3] R. *v.* Edwards, 36 L. T. (N. S.) 30.

[4] Ward *v.* People, 6 Hill (N. Y.), 144; 3 Ibid. 395.

[5] R. *v.* White, 3 C. & K. 363; 17 Jur. 536; 20 Eng. Law & Eq. 585; Com. *v.* Shaw, 4 Allen, 308. A person stole gas for the use of a manufactory by means of a pipe, which drew off the gas from the main without allowing it to pass through the meter. The gas from this pipe was burnt every day, and turned off at night. The pipe was never closed at its junction with the main, and consequently always remained full of gas. It was held, that as the pipe always remained full, there was, in fact, a continuous taking of the gas, and not a series of separate takings. R. *v.* Firth, L. R. 1 C. C. 172; 11 Cox C. C. 234. It was held, also, that even if the pipe had not been thus kept full, the taking would have been continuous, as it was substantially all one transaction. Ibid. See *infra*, § 931.

[6] R. *v.* Clinton, Irish R. 4 C. L. 6. See Com. *v.* Sampson, 97 Mass. 407.

[7] Steph. Dig. C. L. art. 289; Ferens *v.* O'Brien, L. R. 11 Q. B. D. 21; 15 Cox C. C. 232; Johnston *v.* State, 36 Tex. 375.

[8] *Infra*, § 908. Johnson *v.* State, 36 Tex. 375. See R. *v.* Matthews, 12 Cox C. C. 489; State *v.* Casteel, 53 Mo. 124; Debbs *v.* State, 43 Tex. 650.

[9] State *v.* Everage, 33 La. An. 120; Beatty *v.* State, 61 Miss. 18; Moore *v.* State, 8 Tex. Ap. 496. See Crockett *v.* State, 5 Ibid. 526; Deggs *v.* State, 7 Ibid. 359; Lowe *v.* State, 11 Ibid. 253. *Supra*, § 608.

Where such cattle are by statute to be branded, the omission to brand is a matter of defence. Perry *v.* State, 37 Ark. 54.

the realty,[1] though otherwise when they are severed.[2] This principle is best illustrated by the hypothetical case given by Chief Justice Gibbs, that though "if a thief severs a copper pipe, and instantly carries it off, it is no felony at common law; yet if he lets it remain after it is severed any time, then the removal of it becomes a felony if he comes back and takes it;" and so of a tree which has been some time felled; and so of a door when severed from a house.[3] And so, generally, of articles which do not adhere to the freehold, and which may be removed without injury to the freehold..[4]

Fixtures not subjects of larceny while unsevered from realty.

§ 865. Gold and other ore, when still reposing in the soil, is not the subject of larceny.[5] And this is the case with even a nugget of gold, separated from the vein by natural causes, until such period as by human care it is removed from the mass of rock.[6] It is otherwise, however, with ore when so removed.[7]

So of gold and other ore.

§ 866. Turpentine, when in the grain of a tree, is not the subject of larceny; but when it has been drawn from the tree, and is collected in troughs excavated in the tree itself, it is detached in such a way that larceny may be committed by stealing it.[8] The rule, that after severance there may be larceny, applies to maple syrup drawn from a maple-tree; to fruit; to corn, and other crops;[9] to vegetables;[10] to grass or flowers;[11] and, as has been seen, to ice formed on open water.[12]

So of turpentine, sap, grass, corn, vegetables, and flowers.

[1] 2 Russ. on Cr. 62; State *v.* Burrows, 11 Ired. 477; State *v.* Davis, 22 La. An. 77; People *v.* Williams, 35 Cal. 671.

[2] Ibid.; Jackson *v.* State, 11 Ohio St. 104. See under Texas statute Harverger *v.* State, 4 Tex. Ap. 26.

[3] Wilkie, *ex parte*, 34 Tex. 155.

[4] *Infra*, § 867; Jackson *v.* State, 11 Ohio St. 104. See State *v.* Hall, 5 Harring. 492.

In Smith *v.* Com., 14 Bush, 31, chandeliers were held not to be fixtures, and were therefore the subjects of larceny.

[5] People *v.* Williams, 35 Cal. 671.

[6] State *v.* Burt, 64 N. C. 619.

[7] State *v.* Berryman, 8 Nev. 262. In this case it was held that the allegation in an indictment for larceny that the defendant stole "six hundred and ten pounds of silver-bearing ore," sufficiently shows that the property alleged to have been stolen was personal property which could be the subject of larceny. See, also, People *v.* Freeman, 1 Idaho, N. S. 322.

[8] State *v.* Moore, 11 Ired. 70.

[9] Holly *v.* State, 54 Ala. 238; State *v.* Webb, 87 N. C. 558; Bradford *v.* State, 6 Lea, 634. As to statute in respect to cotton plants, see State *v.* Bragg, 86 N. C. 687. By statute, crops growing in fields are made subjects of larceny. See Smitherman *v.* State, 63 Ala. 24.

[10] Bell *v.* State, 4 Baxt. 522; State *v.* Foy, 82 N. C. 679.

[11] 3 Inst. 109.

[12] *Supra*, § 683.

§ 867. Fixtures, when a stationary part of the frechold, are subject to the distinction expressed above by Chief Justice Gibbs. But if they are not *fastened*, so as to be permanently attached, removing them may be larceny.[1] This is the case with the taking of keys from door locks;[2] of detachable sections of machinery in a mill;[3] of window sashes which are still unhung, and which are only temporarily and slightly connected with the house.[4] When, however, either door or window is permanently and finally attached, it becomes part of the realty, and is not the subject of larceny until it becomes detached, and is taken while in a detached state. Such is the law, as stated by the old English authorities; and however subtle and arbitrary is the distinction, it is still recognized not only in England, but in most jurisdictions in this country.[5]

But unfastened fixtures are subjects of larceny.

§ 868. We may, therefore, accept on this point the following propositions:—

(*a*) Whatever is attached to soil or freehold is not, when so attached, the subject of larceny;

(*b*) When not so attached, however, it becomes the subject of larceny;

But things attached to the soil must be first detached.

(*c*) But an article of this class, to become detached so as to have impressed upon it the character of personalty, and to be made the subject of larceny, must be first removed from its fastenings or original seat. It must be *left* in this detached state, so as to acquire these new characteristics. If taken directly by the thief from the house of which it was a fixture, or the soil in which it was imbedded, or the tree of which it was the fruit, or the field in which (as in the case of corn or vegetables) it was growing,[6] it is a chattel real,

[1] R. *v.* Nixon, 7 C. & P. 442; see State *v.* Pottmeyer, 33 Ind. 402; Wilkie, *ex parte*, 34 Tex. 155.

[2] Hoskins *v.* Tarrence, 5 Blackf. 417.

[3] Jackson *v.* State, 11 Ohio St. 104.

[4] R. *v.* Hedge, 2 East P. C. 590, n.; and see R. *v.* Wortley, 1 Den. C. C. 162.

[5] See Ward *v.* People, 6 Hill (N. Y.), 144. As maintaining that there is no difference in principle between an interval of one instant and an interval of a day, see *supra*, §§ 27, 288. To the same effect, Wilkie, *ex parte*, 34 Tex. 155; Jackson *v.* State, 11 Ohio St. 104. See, also, State *v.* Burt, 64 N. C. 619; People *v.* Williams, 35 Cal. 671, where the rule in the text is followed, though objected to as unreasonable and artificial.

[6] Holly *v.* State, 54 Ala. 238; Bell *v.* State, 4 Baxt. 522. In State *v.* Hall, 5 Harring. 492, the test was said to be *continuousness*. If the severing and removal are one continuous transaction, the taking is not larceny; it is larceny

and not the subject of larceny. If removed either by himself or another, and left (the process of removal being for the time discontinued) detached, no matter for how short a time, it becomes personalty, and taking it from such detached situation may be larceny.[1]

(*d*) The prior existence of the common law, as above stated, may be regarded as recognized by the numerous statutes adopted in England and in the United States, making the stealing of fixtures specifically indictable, which statutes, in some cases expressly, in some cases by implication, profess to correct the common law.[2] In States adopting the Roman law, however, whatever is movable is regarded as the subject of larceny.[3]

§ 869. No larceny at common law can be committed of animals in which there is no property, either absolute or qualified; as of beasts that are *ferae naturae* and unreclaimed, such as deer, rabbits, hares,[4] and conies in a

Animals *ferae naturae* not

if there be any interval between severing and taking.

In Wilkie, *ex parte*, 34 Tex. 155, while the common law as to fixtures being part of the realty, was affirmed, it was held that the very removal involved, at least where the removal required the action of several persons, a pause which made the things removed personal property. "If the appellant," said Ogden, J., "took the doors, as charged, some one must have taken them from him; and as soon as that was done, the doors became personal property, and properly the subject of theft." (p. 158.)

[1] See discussion in R. *v.* Townley, L. R. 1 C. C. 315; 12 Cox C. C. 59. And see Beall *v.* State, 68 Ga. 820.

"Sir M. Hale says (1 Pleas of Crown, 510): 'If a man come to steal trees, or the lead off a church or house, and sever it, and *after about an hour's time or so* come and fetch it away, this hath been held felony, because the act is not continuated but interpolated, and in that interval the property lodgeth in the right owner as a chattel.' The period which must elapse between the severance and the carrying away has been differently stated as 'a day;' 'an hour exactly;' 'any time;' 'afterwards.' But the question as to whether the taking be or be not larceny, does not depend upon the lapse of time. If the property be detached by the owner or by a person other than the wrong-doer, it becomes *eo instanti* the subject of larceny. If the subsequent carrying away by the wrong-doer be in pursuance of his original trespass involved in the severance, no matter what length of time may elapse between the two, then it would seem, upon principle, not to be a larceny. To hold otherwise is to attempt to avoid one 'subtle and unsatisfactory distinction,' by the engrafting upon it another as subtle and unsatisfactory." 1 Green's C. C. 340.

[2] R. *v.* Richards, R. & R. 28; R. *v.* Jones, D. & B. 555; 7 Cox C. C. 498; see R. *v.* Worrall, 7 C. & P. 516.

[3] Whart. Conf. of L. §§ 297 *et seq.*

[4] R. *v.* Read, L. R. 3 Q. B. D. 131; 37 L. T. 722. See article in London Law Times, Feb. 2, 1884, p. 249.

subjects of larceny, *e. g.*, deer, wild fowl, hares, fish, bees.

forest, chase, or warren;[1] "coons;"[2] fish in an open river or pond;[3] wild fowl, pheasants, partridges,[4] rooks, for instance,[5] at their natural liberty,[6] or turkeys; without proof, direct or inferential, that they are tame.[7] A marten caught in a trap in the woods cannot be a subject of larceny even when it is in the trap;[8] and according to Sir Thomas Wilde, C. J., not only is a wild animal itself not the subject of larceny, but it imparts its character to the cage in which it is confined.[9] Bees are *ferae naturae*, and although confined to the top of a tree by the owner of a tree, yet while they remain in the tree, and are not secured in a hive, they are not the subject of larceny,[10] though it is otherwise when they are reclaimed.[11] But where wild animals are taken by a thief and killed, and then abandoned, they may be the subjects of larceny.[12]

§ 870. Eggs partake of the character of the animal laying them. Hence an indictment for larceny, which charges that the prisoner stole "three eggs, of the value of two pence, of the goods and chattels of S. H.," is bad, for not stating the species of eggs, because it does not show that the eggs stolen might not be such as are not the subject of larceny.[13]

And so of eggs of wild animals.

[1] See R. *v.* Townley, L. R. 1 C. C. 315.

[2] Warren *v.* State, 1 Greene (Iowa), 106. "The principle is well settled," says Greene, J., "that taking from another's possession an animal *ferae naturae*, or of a base nature, in contemplation of law, will not render a person liable for larceny; though the right of the owner would be protected by a civil action. As this principle applies, by common law, to monkeys, bears, foxes, etc., it will evidently apply to coons."

[3] State *v.* Krider, 78 N. C. 481. That a dead whale may be the subject of property, see *infra*, § 874.

[4] R. *v.* Roe, 11 Cox C. C. 554; R. *v.* Head, 1 F. & F. 350.

[5] Hannam *v.* Mockett, 2 B. & C. 934; 4 D. & R. 518.

[6] 1 Hale, 511; Fost. 366; Hannam *v.* Mockett, 2 B. & C. 934; R. *v.* Townley, L. R. 1 C. C. 315; 12 Cox C. C. 59; R. *v.* Read, L. R. 3 Q. B. D. 131; Wallis *v.* Mease, 3 Binn. 546; Warren *v.* State, 1 Greene (Iowa), 106.

[7] State *v.* Turner, 66 N. C. 618; R. *v.* Mann, s. c. Hawai, 23 Alb. L. J. 445. That a parrot not tamed is not a domestic animal, see Swan *v.* Saunders, 44 L. T. N. S. 424.

[8] Norton *v.* Ladd, 5 N. H. 203.

[9] R. *v.* Powell, cited *infra*, § 876.

[10] Gillett *v.* Mason, 7 Johns. 16; Wallis *v.* Mease, 3 Binn. 546; Cock *v.* Weatherby, 5 Sm. & M. 333.

[11] Harvey *v.* Com., 23 Grat. 941; State *v.* Murphy, 8 Blackf. 498. *Infra*, § 871.

[12] Blades *v.* Higgs, 11 H. L. C. 621; R. *v.* Townley, *ut supra*.

[13] R. *v.* Cox, 1 C. & K. 494; Whart. Cr. Pl. & Pr. § 210.

§ 871. But when an animal is reclaimed or confined, and may serve for food, it is otherwise;[1] for of deer or rabbits so inclosed in a park or field, that they may be taken at pleasure, otter in a trap,[2] fish in a trunk or net, and pheasants or partridges in a mew, larceny may be committed,[3] and so of young pheasants or partridges reared by a hen, and thus reclaimed.[4] Swans, it is said, if lawfully marked, are the subject of larceny at common law, although at large in a public river;[5] or whether marked or not, if they be in a private river or pond;[6] and doves and pigeons are also the subject of larceny, when placed in the care and custody of their owners;[7] and so of tame turkeys;[8] pea-hens;[9] tame mocking-birds,[10] and bees in hives, and their honey,[11] though it is for the jury to say whether animals *ferae naturae* are tamed, so as to be the subjects of larceny.[12] But all valuable domestic animals, as

Otherwise as to animals reclaimed or confined so as to be subject to domestic use.

[1] See Hundsdon's Case, 2 East P. C. 611. In R. *v.* Petch, 38 L. T. 788; S. C., 14 Cox C. C. 116, the prisoner was employed to trap wild rabbits, and it was his duty to take them when trapped to the head keeper. Contrary to his duty he trapped from time to time rabbits, and took them to another part of the land and placed them in a bag, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence, and nicked them, and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits with the intention of appropriating them to his own use. It was held in a case reserved that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them. See R. *v.* Read, L. R. 3 Q. B. D. 131.

[2] State *v.* House, 65 N. C. 744.

[3] 1 Hale, 511; 1 Hawk. c. 33, s. 39.

[4] R. *v.* Garnham, 8 Cox C. C. 451; R. *v.* Cory, 10 Ibid. 23; R. *v.* Shickle, L. R. 1 C. C. 158; 11 Cox C. C. 189.

[5] Dalt. Just. 156.

[6] Ibid.

[7] R. *v.* Brooks, 4 C. & P. 131; R. *v.* Cheafor, 2 Den. C. B. 361; 5 Cox C. C. 367. In Stanley *v.* Birch, Law Times, May 28, 1881, this protection was extended to carrier pigeons when on short excursions for the purpose of training. When, however, pigeons are wandering at large, with nothing to designate them as reclaimed or tame, it is otherwise. Com. *v.* Chace, 9 Pick. 15. But if they bear on them the marks of having been reclaimed and tamed, then it is larceny to steal them. Stanley *v.* Birch, *supra*.

[8] State *v.* Turner, 66 N. C. 618; R. *v.* Halloway, 1 C. & P. 128. But the burden of proving tameness is on the party injured. R. *v.* Mann, *supra*, § 869.

[9] Com. *v.* Beaman, 8 Gray, 497. See other cases cited *supra*, § 869.

[10] Haywood *v.* State, 41 Ark. 479.

[11] Harvey *v.* Com., 23 Grat. 941. See State *v.* Murphy, 8 Blackf. 498.

[12] R. *v.* Cheafor, 2 Den. C. C. 361; 5 Cox C. C. 367; 8 Eng. Law & Eq. 598, Exchequer Chamber, sitting upon Crown Cases Reserved. Present: Lord

horses,[1] and all animals *domitae naturae*, which serve for food, as swine, sheep, poultry,[2] and the product of any of them, as eggs, milk from the cow while at pasture,[3] and wool pulled from the sheep's back feloniously ;[4] may be the subjects of larceny.[5]

§ 872. But as to all other animals which do not serve for food, such as dogs and ferrets, though tame and salable,[6] or other creatures kept for whim and pleasure, stealing these does not amount

Campbell, Mr. Baron Alderson, Mr. Baron Platt, Mr. Justice Talfourd, and Mr. Baron Martin. Lord Campbell said: "This case was not argued, but we are called upon to give judgment. It was tried at the Nottingham quarter sessions on the 7th of July, 1851. William Cheafor was indicted for feloniously stealing four tame pigeons, the property of John Mansell, alleged to be reclaimed. The pigeons, at the time they were taken, were in the prosecutor's dove-cote over a stable on his premises, being an ordinary dove-cote, having holes at the top, and having a door on the floor, which was kept locked. The prisoner entered the dove-cote at twelve o'clock at night, and took away the pigeons. The prisoner's counsel contended that the pigeons, being at liberty to go out at any time, were not reclaimed, and were not the subject of larceny. The chairman directed the jury that the view contended for by the prisoner's counsel was correct, and the pigeons were not the subject of larceny ; but the jury took a better view of the law than the judge, and found the prisoner guilty. Judgment was postponed till the opinion of the court had been given as to whether the direction of the chairman was right, and whether the prisoner was properly punishable. Now we think the direction of the learned chairman was wrong, because it comes to this: Is it possible there can be larceny committed of tame pigeons? because the pigeon from his nature must have egress to the open air, and unless it has a hole for that purpose it cannot get out. According to the direction of the learned chairman there can be no larceny committed of chickens, of geese, or ducks. It was a pure question of fact for the jury whether the pigeons were tame and reclaimed ; the jury seem to have come to a very proper conclusion that they were tame pigeons and reclaimed. The pigeons were the subject of larceny, although they had the opportunity of getting out and enjoying themselves. We shall direct that judgment be passed at the next quarter sessions." Conviction affirmed. See, also, R. *v.* Howell, reported 1 Ben. & H. Lead. Cases, 65 ; though see R. *v.* Brooks, 4 C. & P. 131.

[1] *Infra*, § 908. But not when abandoned by owner. Johnson *v.* State, 36 Tex. 375.

[2] Including *pea-hens*, as has been seen. Com. *v.* Beaman, 8 Gray, 497.

[3] Foster, 99.

[4] R. *v.* Martin, 1 Leach, 205.

[5] 1 Hale, 511.

[6] R. *v.* Searing, R. & R. 350 ; State *v.* Lymus, 26 Ohio St. 400 ; State *v.* Holden, 81 N. C. 527 ; Ward *v.* State, 48 Ala. 161. See, however, State *v.* Latham, 13 Ired. 33.

to larceny at common law.[1] It is otherwise, however, when they are taxed.[2]

Untaxed dogs and ferrets not subjects of larceny.

§ 873. *Oysters* have been determined to be subjects of larceny when planted and growing in a marked plot, itself the subject of ownership, generally recognized as privately planted, and not part of a bed in which oysters are growing naturally.[3]

But otherwise with oysters when planted for use.

§ 874. *Flesh* of dead animals, whether *ferae naturae* or tame, is subject of larceny ; and it has been said that the very fact of proffering it for sale reclaims it, and invests it with the character of property which the law protects.[4] What act reduces the flesh of a wild animal to the personal property of the reclaimer depends to some extent upon statutory enactments. If there are no game laws, then the flesh of animals, seized and killed upon waste lands, or on the sea, and staked or anchored in any way that may mark the ownership, is susceptible of property in the reclaimer.[5]

And so of flesh of dead animals.

§ 875. Where the question is open to doubt, the indictment, to be good, must allege the animal to be "tame."[6] So, as has been seen, "eggs" must be shown to be of an animal which is the subject of larceny.[7] When the carcase of

Indictment for stealing animals must show

[1] 1 Hale, 512 ; Findley *v.* Bear, 8 S. & R. 571. That the owner of a dog may maintain a civil action for its loss, see Hinckley *v.* Emmerson, 4 Cow. 251 ; Cummings *v.* Perham, 1 Met. 555 ; Perry *v.* Phipps, 10 Ired. 259 ; Parker *v.* Mise, 27 Ala. 480. As to malicious mischief, see *infra*, § 1076. That a dog is personal property under statute, see Mullaly *v.* People, 86 N. Y. 365 ; State *v.* Brown, 9 Rax. 81. That he is not a "domestic animal," see State *v.* Harriman, 75 Me. 562. *Cf.* 29 Alb. L. J. 205.

[2] People *v.* Maloney, 1 Parker C. R. 593 ; People *v.* Campbell, 4 Parker C. R. 386 ; Harrington *v.* Miles, 11 Kan. 480 ; Cooper, *ex parte*, 3 Tex. Ap. 489. See Washington *v.* Meigs, 1 McArthur, 53.

[3] State *v.* Taylor, 3 Dutch. 117 ; Fleet *v.* Hegeman, 14 Wend. 42. See, however, State *v.* Taylor, 13 R. I. 541. That oysters are "fish," see Caswell *v.* Johnson, 58 Me. 164.

[4] R. *v.* Gallears, 1 Den. C. C. 501 ; 2 C. & K. 981 ; T. & M. 196 ; 1 Hale, 511 ; Norton *v.* Ladd, 5 N. H. 203 ; State *v.* Jenkins, 6 Jones (N. C.), 19 ; State *v.* Doe, 79 Ind. 9. See R. *v.* Edwards, 36 L. T. (N. S.) 30 ; 13 Cox C. C. 384, where it was held larceny to steal dead pigs buried three feet under soil.

[5] See Pierson *v.* Post, 3 Caines, 175 ; Broughton *v.* Singleton, 2 N. & McC. 338. In Taber *v.* Jenny, 1 Sprague, 315, it was held that a whale caught, killed, and anchored near the shore, was the subject of larceny, though it had somewhat drifted from its moorings.

[6] R. *v.* Cheafor, *supra*, § 871 ; R. *v.* Hundsdon, 2 East P. C. 611.

[7] *Supra*, § 870.

they are the subjects of larceny.

an animal *ferae naturae* is stolen, the indictment must aver the animal to be "dead," so as to make it the subject of larceny.[1] When an animal is equally the subject of larceny whether alive or dead, it is not necessary to aver that it is "dead."[2]

"One ham" is a sufficient description, without further designation.[3]

Choses in action are not subjects of larceny.

§ 876. *Choses in action*, including bonds and notes of all classes, according to the common law, are not the subjects of larceny, being mere rights of action, having no corporeal existence;[4] though, as will presently be seen, a person may be indicted for stealing the paper on which they are written.

Deeds and mortgages are not "goods and chattels."

§ 877. Hence, deeds, mortgages, and leases are not "goods and chattels;"[5] and at common law are not the subjects of larceny.[6]

Nor are other securities at common law.

§ 878. Bonds, notes, bank notes, receipts, and bills, being mere *choses in action*, and of no intrinsic value, are not held the subjects of larceny at common law.[7] It has been

[1] R. *v.* Edwards, R. & R. 497; Com. *v.* Beaman, 8 Gray, 498; R. *v.* Gallears, *supra*; State *v.* Jenkins, *supra*; Whart. Cr. Pl. & Pr. § 209.

[2] See R. *v.* Puckering, 1 Mood. C. C. 242; State *v.* Pollard, 53 Me. 124.

[3] R. *v.* Gallears, *supra*. See Whart. Cr. Pl. & Pr. §§ 208–9.

[4] R. *v.* Green, Dears. 323; R. *v.* Johnson, 3 M. & S. 539; Com. *v.* Rand, 7 Met. 475; People *v.* Griffin, 38 How. (N. Y.) Pr. 475; State *v.* Dill, 75 N. C. 257; Whart. Cr. Pl. & Pr. § 191; Archbold's C. P. 9th ed. 165. As to distinctive Texas rule, see Sansbury *v.* State, 4 Tex. Ap. 99.

[5] Whart. Cr. Pl. & Pr. § 191.

[6] 2 East P. C. 596; R. *v.* Westbeer, 1 Leach, 12; R. *v.* Powell, 14 Eng. L. & Eq. 575; 2 Den. C. C. 403; 5 Cox C. C. 396.

[7] Archbold's C. P. 9th ed. 165; R. *v.* Watts, 24 Eng. C. L. 573; 2 Den. C. C. 14; 4 Cox C. C. 336; U. S. *v.* Bowen, 2 Cranch C. C. 133; U. S. *v.* Carnot, Ibid. 469; People *v.* Griffin, 38 How. (N. Y.) Pr. 475; Moore *v.* Com. 8 Barr, 260; State *v.* Tillery, 1 N. & McC. 9; Culp *v.* State, 1 Porter, 33. Bank notes are not excepted from this category because they are issued by an incorporated bank. R. *v.* Murtagh, 1 Crawf. & Dix, 355; R. *v.* Pearson, 1 Moody, 313; R. *v.* Morrison, 8 Cox C. C. 194; Bell C. C. 158; Thomasson *v.* State, 22 Ga. 499. But of redeemed bank notes, in the hands of the agents of the bank, larceny under the statute may be committed. Com. *v.* Rand, 7 Met. 475; see State *v.* Bonwell, 2 Harring. 529.

"The absurd conclusion," says Sir J. F. Stephen, "that a bank note cannot be stolen, rests upon no foundation except a wholly unauthorized extension made by Coke in treating of a different subject, of a case in the year-books, which was itself apparently an invention of the judges in the fifteenth century, resting, moreover, upon a principle which does not apply to documents not relating to land." 3 Steph. Hist. Cr. Law, 144.

rities at common law.

determined in England, indeed, that a railway ticket is a chattel;[1] but this has been doubted.[2] By statutes, however, generally adopted, *choses in action* are recognized as property, and the stealing of them made penal. In what way, under the statutes of the several States, bank notes are to be described, has been examined in another work.[3] The mode of proving such averments is also distinctively discussed.[4]

In order, under the statutes, to render bonds, notes, etc., the subjects of larceny, they must be, at the time of taking, legally valid and subsisting securities for the payment of money, or some specific article of value.[5]

Prosecutor's own negotiable paper may be subject of larceny.

§ 879. Must a prosecution for larceny of the prosecutor's signature to negotiable paper fail because it has no value to him? This question has received conflicting answers. No doubt the paper, while in the prosecutor's hands, is of no value. But as at the moment it is taken from his hands he is liable to be sued on it, the better opinion is that it is under the statutes subject of larceny.[6]

[1] R. *v.* Boulton, 1 Den. 508; 2 C. & K. 917.

[2] R. *v.* Kilham, L. R. 1 C. C. R. 261; Steph. Dig. C. L. art. 288.

An unstamped written agreement for building cottages, under which work has been, and is being carried on, is not capable of being stolen. R. *v.* Watts, Dear. 326.

A pawnbroker's ticket is, under statute, a warrant for delivery of goods and capable of being stolen. R. *v.* Morrison, Bell C. C. 158; Steph. Dig. art. 286, 359.

[3] Whart. Cr. Pl. & Pr. §§ 168 *et seq.*

[4] Whart. Crim. Ev. §§ 114 *et seq.* See State *v.* Wilson, 2 Rep. Const. Ct. 495; State *v.* Holbrook, 13 Johns. 90.

In cases of larceny, questions frequently arise as to the meaning of descriptive terms. These terms are considered in another volume as follows:—

"Purporting to be," Whart. Cr. Pl. & Pr. § 167; "Receipt," § 185; "Acquittance," § 186; "Bill of exchange," § 187; "Promissory note," § 188; "Bank note," § 189; "Treasury note," § 189 *a*; "Money," § 190; "Goods and chattels," § 191; "Warrant order," etc., §§ 192–4; "Deed," § 197; "Obligation," § 198; "Undertaking," § 199; "Guaranty," § 200; "Property," § 201; "Piece of paper," § 202.

[5] R. *v.* Craven, R. & R. 14; R. *v.* Phipoe, 2 Leach, 673; R. *v.* Hart, 6 C. & P. 106; R. *v.* Clark, R. & R. 181; 2 Leach, 1036; Wilson *v.* State, 1 Por. 118; Whart. Cr. Pl. & Pr. §§ 213–17.

[6] The authorities are thus accurately classified by Van Syckle, J., in State *v.* Thatcher, 35 N. J. 445:—

"This question has been discussed in cases of larceny where the thing stolen must be of some value to the

§ 880. When there is any question as to the application of a statute to a *chose in action*, a count can be introduced for stealing a piece of paper as a common law larceny.[1] In New York, how-

prosecutor. In Clark's Case (Russell & Ryan's C. C. 181) the defendant was indicted under 2 George II. c. 25, for stealing reissuable notes, the property of Large & Son, while in the course of transmission to them after they had been paid. It was held that the drawers could not have any valuable property in their own notes, and the prisoner was convicted only of the larceny of the paper and stamps on which they were written.

"In Phipoe's Case (2 East P. C. 599) some of the judges held that the prosecutor's own note could not be said to be of any value to him; others thought it was of value from the moment it was drawn, but that it never was in the possession of the prosecutor, and that it was obtained by duress, and not by larceny.

"In Walsh's Case (Russell & Ryan C. C. 215) the prisoner was charged with stealing a cheque drawn by the prosecutor, and the objection that the stolen instrument was of no value to the prosecutor, in his own hands, prevailed, and the defendant was acquitted.

"In Vyse's Case (1 Moody C. C. 218), who was convicted for receiving reissuable notes, knowing them to be stolen, the conviction was sustained. Some of the judges doubted whether the notes were valuable securities, but all agreed that if they were not, they were goods and chattels.

"In Aickle's Case (2 East P. C. 675) the conviction was for the larceny of a bill of exchange drawn by the prosecutor, and accepted by another.

"In Rex v. Metcalf (1 Mood. C. C. 433) this point was directly adjudicated. The defendant having been convicted of the larceny of a cheque drawn by the prosecutor, the judge was induced, by a reference to Walsh's case, to reserve for the opinion of the judges the question whether the cheque in the hands of the drawer was of any value to him, and could be the subject of larceny. Lord Denman, C. J., Tindal, C. J., and Justices Gaselee, Bosanquet, Alderson, Williams, and Coleridge affirmed the conviction,—Justice Littledale alone doubting. And in Heath's Case (2 Mood. C. C. 33), which was in all respects like the one last cited, the authority of Metcalf's case was acknowledged without a dissenting opinion. The Supreme Court of Alabama (Wilson v. State, 1 Porter, 118) ruled, that the prosecutor's own note was not the subject of larceny. In reaching this conclusion, Phipoe's case was relied upon by the court, no reference having been made to the later cases of Metcalf and Heath.

"In The People v. Loomis (4 Denio, 380), where the defendant was tried for the larceny of a receipt, Justice Beardsley said, 'that although a receipt was the subject of larceny under the New York statute, it must be made effective by being issued or delivered, before it can become a valuable private instrument. It must be, when stolen, an evidence of some right in action, or an instrument by which a right or title to real or personal property was in some manner affected.'" See, as to People v. Loomis, *infra*, §§ 882 *b*, 943.

[1] Thus, in an English case, A. was indicted in one count for stealing a cheque, and in another count for stealing a piece of paper. It was proved that the Great Western Railway Company drew in London a cheque on their London bankers, and sent it to one

ever, it has been held that the stealing of a letter is not indictable, as it is of no intrinsic value.[1] And in England the law now seems to be that where a *chose in action* is valid and the stealing of it is indictable by statute, the "piece of paper" is absorbed in it, and the indictment must describe the thing stolen as a *chose in action*. Where, however, the *chose in action* is a nullity, the paper itself may be described.[2] At all events, if the *chose in action* be one for stealing which no indictment lies, it is, for this purpose, a nullity, and the "piece of paper" becomes the subject of larceny.[3]

Larceny of "piece of paper" is indictable.

A piece of paper on which is a printed list of names and dates, is in like manner subject of larceny.[4] And it is hard to see why, on reasoning given in another volume, even supposing a piece of paper may be in one aspect a *chose in action*, the prosecution may not elect to consider it a piece of paper.[5] If a promise, for instance, were engraved on a gold ring, could this be a defence to an indictment for stealing the ring?

§ 881. Bank bills, complete in form, but not issued, are the property of the bank, and may be so treated in criminal proceedings for receiving them with knowledge of their having been stolen.[6] On the other hand, an incomplete

So of unissued bank bills.

of their officers at Taunton to pay a poor-rate there. He, at Taunton, gave it to the prisoner, a clerk of the company, to take to the overseer, but instead of so doing he converted it to his own use. It was held by the judges that even if the cheque was void under the 13th section of the stat. 56 Geo. III. c. 184, the prisoner might be properly convicted for stealing a piece of paper. R. v. Perry, 1 C. & K. 725; S. C., 1 Den. C. C. 69; and for other cases to same effect, see R. v. Clark, R. & R. 181; R. v. Bingley, 5 C. & P. 602; R. v. Rodway, 7 Ibid. 784; R. v. Vyse, 1 Moody C. C. 218. *Infra*, § 954; and see Whart. Cr. Pl. & Pr. § 202; Wilson v. State, 1 Port. 118. In R. v. Walker, 1 Mood. 156, stealing a roll of parchment was held indictable at common law, though it had a record engrossed on it. If it concerned realty it would be otherwise. *Supra*, § 877.

[1] Payne v. People, 6 Johns, 103. And see Moore v. Com., 8 Barr, 260. But in neither of these cases was the question of the larceny of "a piece of paper" put to the court distinctively. In Payne v. People, the indictment charged "a piece of paper *on which a certain letter*" was written; in Moore v. Com., simply a receipt.

[2] R. v. Watts, 24 Eng. Law. & Eq. 573; 2 Den. C. C. 14; 4 Cox C. C. 336; R. v. Powell, 14 Eng. Law & Eq. 575; 2 Den. C. C. 403; 5 Cox C. C. 396; R. v. Green, Dears. 323; R. v. Vyse, 1 Moody C. C. 218. *Infra*, § 951.

[3] See *infra*, § 954.

[4] State v. James, 58 N. H. 67.

[5] Whart. Cr. Pl. & Pr. § 471.

[6] People v. Wiley, 3 Hill, 194. See

engagement—*e. g.*, an unstamped and undated railroad ticket—is not the subject as such of larceny.[1]

Value may be inferentially shown.

§ 882. Some value must be shown to belong to paper alleged to be stolen;[2] but this value may be inferentially proved. Thus, in a prosecution for the larceny of a bank note it is not necessary to prove that the note is a genuine one and of some value, by any positive evidence. If the jury shall be satisfied from the evidence that the defendant feloniously stole the bank note, and afterwards passed it away as a genuine note, the defendant has, by those acts, precluded himself from calling on the prosecution for further proof of the paper being genuine and valuable.[3] But on the trial of an indictment for stealing foreign bank bills, when such passing is not proved, it is incumbent upon the prosecutor to produce at least *primâ facie* evidence of the existence of such banks and of the genuineness of the bills.[4]

Evidence that bills of the same kind have been received and passed away in the ordinary course of business, as part of the currency of the country, would be proof of value. But the fact that a witness for the prosecution, a broker, had exchanged the bills alleged to have been stolen, and given other money for them, after the larceny, he not speaking of any former knowledge of such bills, or expressing any belief as to their genuineness, has been held to be no evidence that the bills were genuine.[5]

Articles illegal or contraband may be subjects of larceny.

§ 882 *a*. Though the circulation of the bills of the banks of other States is prohibited, and they are declared by local law to be worthless, yet in the hands of a *bonâ fide* holder they are property, and may be the subject of larceny.[6] The same rule has been laid down in respect to the stealing of warehouse receipts issued without authority by a railroad company.[7]

R. *v.* Ranson, R. & R. 232; 2 Leach, 1090, 1093; R. *v.* Vyse, 1 M. C. C. 218. As to stolen goods, see *infra*, § 900 *b*.

[1] State *v.* Hill, 1 Houst. C. C. 420.

[2] See *infra*, §§ 951 *et seq.*; U. S. *v.* Nott, 1 McLean, 499.

[3] Com. *v.* Burke, 12 Allen, 182; Cummings *v.* Com., 2 Va. Cas. 128. *Infra*, § 955.

[4] People *v.* Caryl, 12 Wend. 547; but see Johnston *v.* People, 4 Denio, 364; People *v.* Jackson, 8 Barb. 637. *Infra*, § 955; and see Whart. on Ev. § 1290.

[5] Johnson *v.* People, 4 Denio, 364.

[6] Starkey *v.* State, 6 Ohio St. 266. As to parallel case of forgery see *supra*, §§ 698–9. As to papers actually valueless, see *infra*, § 882 *b*.

[7] State *v.* Loomis, 27 Minn. 521.

Money acquired by the illegal sale of intoxicating liquors may nevertheless be the subject of larceny from the possessor,[1] and so as to the liquor itself.[2]

Nor does the fact that particular articles are used for gaming purposes change the law. Thus larceny lies for stealing gaming materials.[3] So it is larceny to steal things stolen by the thief.[4]

The question whether goods and chattels include securities has been distinctively discussed.[5]

An instrument of no value not larcenous.

§ 882 *b*. If the instrument stolen be one on which a claim could under no circumstances at any time be maintained, then even under a statute designating such instrument, it is not the subject of larceny. Thus, where a debtor procured his creditor to sign a receipt for the debt, under the pretence that he was about to pay him, and then took it from him with a criminal intent, and without paying the money, it was held that he was not guilty of larceny, the receipt never having taken effect by delivery, and being therefore worthless.[6] But the mere fact that the instrument is one which by the local law cannot be sued on, or that the thing stolen is held for an illegal purpose, does not take from such paper or thing its larcenous character.[7]

[1] Com. *v.* Rourke, 10 Cush. 397; Com. *v.* Smith, 129 Mass. 104; State *v.* May, 20 Iowa, 305.

[2] Com. *v.* Coffee, 9 Gray, 139.

[3] Bales *v.* State, 3 W. Va. 685.

[4] *Infra*, § 945. That it is so as to embezzlement, see *infra*, §§ 1025, 1035, 1038.

[5] Whart. Cr. Pl. & Pr. §§ 168–191. *Supra*, § 848.

Additional English cases may be here noticed. In one of them the defendant was indicted for receiving certain country bankers' notes; and the indictment in one count charged these notes as "valuable securities," and in another, as "pieces of paper," the goods and chattels of the prosecutor, and it appeared that the notes had been paid in London, and were in the possession of a partner of the firm, who was taking them to the country to be reissued, when they were stolen. The judges held that they were properly described in the indictment as goods and chattels; but some of the judges doubted whether they were valuable securities within the meaning of the statute 8 Geo. IV. c. 29, s. 5. R. *v.* Vyse, 1 Moody C. C. 218. The halves of notes, if stolen, should be described as goods and chattels. R. *v.* Mead, 4 C. & P. 535. It seems, however, that a security which is in full force, as an uncancelled bond or note, does not in England fall under the head of "goods and chattels." R. *v.* Powell, 14 Eng. Law & Eq. 575; 2 Den. C. C. 403. See § 879.

[6] People *v.* Loomis, 4 Denio, 380, cited *supra*, § 879; *infra*, § 943, and cases there cited. See Bork *v.* People, 91 N. Y. 18; Moore *v.* Com., 8 Barr, 260.

[7] *Supra*, § 882 *a*.

II. INTENT.

§ 883. To constitute larceny, it is necessary that the goods should be taken feloniously, without the owner's consent. Hereafter we will consider what the law is when such consent is obtained by fraud.[1] Under the present head we limit ourselves to inquiring what "feloniously," or "felonious intent," in this sense means. For it should be remembered that every taking of the property of another, without his knowledge or consent, does not amount to larceny. To make it such it must be accompanied by circumstances which demonstrate a "fraudulent or felonious" intention to deprive the possessor permanently of the thing taken.[2] This "fraudulent" or "felonious" intent (and the terms are used often convertibly) is an intent, without an honest claim of right, and with the expectation of benefit to self, to take permanently from another goods which are his property. This intent must be concurrent with the taking, which must be without the owner's consent.[3]

Intent must be to deprive possessor permanently of thing taken.

[1] *Infra*, § 964. Hall's Case, 78 Va. 678.

[2] R. *v.* Holloway, 2 C. & K. 942; 1 Den. C. C. 370; T. & M. 40; R. *v.* Godfrey, 8 C. & P. 563; R. *v.* Deering, 11 Cox C. C. 298; R. *v.* McGrath, L. R. 1 C. C. 210; Adams *v.* State, 45 N. J. L. 448; Smith *v.* Shultz, 1 Scammon, 492; Hart *v.* State, 57 Ind. 102; Umphrey *v.* State, 63 Ibid. 223; Phelps *v.* People, 55 Ill. 334; Blunt *v.* Com., 4 Leigh, 689; State *v.* Fisher, 70 N. C. 78; State *v.* Watson, 7 S. C. 67; State *v.* Hawkins, 8 Porter, 461; Williams *v.* State, 44 Ala. 396; Johnson *v.* State, 73 Ibid. 525; Witt *v.* State, 9 Mo. 671; State *v.* Gresser, 79 Ibid. 247; State *v.* Rivers, 60 Iowa, 381; Hite *v.* State, 9 Yerger, 198; Fulton *v.* State, 13 Ark. 168; Johnson *v.* State, 36 Tex. 375; Landin *v.* State, 10 Tex. Ap. 63; Clayton *v.* State, 15 Ibid. 348. See State *v.* Gaither, 72 N. C. 458; Reeves *v.* State, 7 Tex. Ap. 276; Struckman *v.* State, Ibid. 582; Wolf *v.* State, 14 Ibid. 210; Wright *v.* State, 5 Yerger, 154; Long *v.* State, 11 Fla. 295. *Infra*, §§ 961, 967. That when there are no disputed facts, intent is for the court, see Johnson *v.* State, 73 Ala. 523.

In State *v.* Fenn, 41 Conn. 590, an officer of a bank with which a note of the defendant had been left for collection, called on the defendant with the note for payment. The defendant asked to be allowed to see the note, and on its being handed to him walked out of the room with it, and secreted or destroyed it. It was held that the court below properly charged the jury, that if the defendant obtained possession of the note with felonious intent, the act was theft.

[3] Ibid. and cases cited *infra*, §§ 884 *et seq.*

§ 884. The *intent* being necessary to complete the offence, if a man, under the honest impression that he has a right to the property, take it into his possession, it is not larceny,[1] if there be a colorable title.[2] If, for instance, the sheep of A. stray into the flock of B., and B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another.[3] If, under color of arrear of rent, although none be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony.[4] If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be.[5]

Taking under an honest claim of right is not larceny.

The same rule applies when a person sells property in his posses-

[1] R. *v.* Hall, 3 C. & P. 409; R. *v.* Halford, 11 Cox C. C. 88; Merry *v.* Green, 7 M. & W. 623; People *v.* Burton, 1 N. Y. Cr. R. 297; People *v.* Husband, 36 Mich. 306; State *v.* Barrackmore, 47 Iowa, 684; McDaniel *v.* State, 8 Sm. & M. 401; Witt *v.* State, 9 Mo. 671; State *v.* Homes, 17 Ibid. 379; State *v.* Conway, 18 Ibid. 321; State *v.* Deal, 64 N. C. 270; State *v.* Gaither, 72 Ibid. 458; Newton Co. *v.* White, 63 Ga. 697; Morningstar *v.* State, 55 Ala. 148; Morningstar *v.* State, 59 Ibid. 30; State *v.* Thomas, 30 La. An. 600; Herber *v.* State, 7 Tex. 69; Kay *v.* State, 40 Ibid. 29; Smith *v.* State, 42 Ibid. 444; Neeley *v.* State, 8 Tex. Ap. 64; Sisk *v.* State, 9 Ibid. 246; Vincent *v.* State, Ibid. 303; Sigler *v.* State, Ibid. 427; Baker *v.* State, 17 Fla. 406. *Infra*, § 899. See Winn *v.* State, 11 Tex. Ap. 304; Ainsworth *v.* State, Ibid. 339; Wolf *v.* State, 14 Ibid. 210; McNair *v.* State, Ibid. 78. This, however, does not apply to a claim founded on an illegal usage. Com. *v.* Doane, 1 Cush. 5; McDaniel *v.* State, 8 S. & M. 401. But a person gleaning corn, erroneously believing he has a right to do so, is not guilty of larceny. Steph. Dig. C. L. citing 2 Russ. Cr. 164–5.

B., a gamekeeper, takes snares set by A., a poacher, and a dead pheasant caught therein. A., honestly believing that the snares and pheasant were his property, and that he had a legal right to them, forces B., by threats, to return them. This is not robbery, and, if no violence were used, would not be theft. R. *v.* Hall, 3 C. & P. 409 (*supra*, § 853), cited Steph. Dig. *ut supra*.

The rule that taking under an honest though erroneous claim of right is a defence to an indictment for larceny, "if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence." 3 Steph. Hist. Cr. Law, 124.

[2] Com. *v.* Doane, 5 Cush. 5; Evans *v.* State, 15 Tex. Ap. 31.

[3] 1 Hale, 506; Hall *v.* State, 34 Ga. 208. And so if the original taking was negligent. R. *v.* Riley, 6 Cox C. C. 88; cited *infra*, § 886.

[4] 1 Hale, 509. See *infra*, § 1194.

[5] 1 Hale, 509. And see R. *v.* Hall, 3 C. & P. 409; Com. *v.* Doane, 1 Cush. 5; State *v.* Bond, 8 Iowa, 540.

sion which he believes he owns,[1] or which he believes he is authorized to sell.[2]

We may therefore conclude[3] that where property is taken under a claim of right, if this claim be *bonâ fide* and fair,[4] the court should direct an acquittal;[5] for though the reason given by Mr. East, that "it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy,"[6] does not now hold good here, so far as concerns capital punishment, there is a manifest impropriety, under a penal system, of trying in a criminal court a question of property, which it is the intention of the legislature to relieve from the incidents of imprisonment.[7] But it is no defence, as we have already seen,[8] that the party from whom the article in question was taken had no legal title to retain it.[9]

Whether there was a claim of right may be determined by the declarations of the claimant made when he was charged with the offence.[10]

That the taking was to pay debt may be no defence.

§ 884 *a*. Taking in order to force the payment of a debt may be larceny when the intention is to deprive the owner permanently of his property in case the debt is not paid.[11] It is otherwise when the taking is in pursuance of an honest claim of title.[12] Nor, when the object is not to

[1] The prisoner's wife hired a bedstead at 1*s*. per week, and within a fortnight afterwards the prisoner sold it to a broker, his wife being present at the sale. Two days after the sale the wife paid 1*s*. for a week's hire, being all that was paid. There was no evidence that the prisoner knew that the bedstead had only been hired. It was held that a conviction for larceny could not be sustained. R. *v.* Halford, 11 Cox C. C. 88.

[2] State *v.* Barrackmore, 47 Iowa, 684.

[3] *Supra*, § 883.

[4] That this condition is essential, see State *v.* Bond, 8 Iowa, 540.

[5] See Littlejohn *v.* State, 59 Miss. 273; Johnson *v.* State, 41 Tex. 608; Seymour *v.* State, 12 Tex. Ap. 391.

[6] The same reason is given in 3 Greenleaf's Ev. § 157. See Evans *v.* State, 15 Tex. Ap. 31.

[7] See, to same effect, 2 Russ. on Cr. 11; 1 Hale, 506; R. *v.* Halford, 11 Cox C. C. 88; State *v.* Barrackmore, 47 Iowa, 684; State *v.* Deal, 64 N. C. 270; Hall *v.* State, 34 Ga. 208; State *v.* Homes, 17 Mo. 379; State *v.* Conway, 18 Ibid. 321.

[8] *Supra*, § 882 *a*; *infra*, § 945.

[9] 1 Hale, 509; State *v.* May, 20 Iowa, 305. See *supra*, § 882 *a*.

[10] Whart. Cr. Ev. §§ 272, 693, 761; Childress *v.* State, 10 Tex. Ap. 698.

[11] See Com. *v.* Stebbins, 8 Gray, 402; People *v.* Smith, 5 Parker C. R. 834; Farrell *v.* People, 16 Ill. 506.

[12] *Supra*, § 884; R. *v.* Hemmings, 4 F. & F. 50. *Supra*, §§ 846, 848, 859.

defraud, but to obtain a just settlement, can there be held to be such a fraudulent intent as will sustain a conviction.[1]

Taking merely for temporary use, is not larceny.

§ 885. Taking goods, not with the intention of depriving the owner of his property in them, but with the object of temporarily using them and then returning them, is not larceny.[2] Hence where a master's horse is taken by his servant without his knowledge, and brought home again;[3] where a servant, to escape from servitude, rides off on his master's horse, and leaves it on the way, not intending to appropriate the horse;[4] where a person takes a horse, with intent to abandon it after a short use,[5] or to return it, merely to carry off more conveniently goods he has stolen;[6] where goods are taken, not with intent to steal, but simply to induce the owner, a woman, to visit, with a view to sexual intercourse, the defendant's rooms;[7] where a man takes his neighbor's plough that is left in the field, uses it upon his own land, and then returns it; where an execution debtor takes some of his goods from the sheriff, leaving enough to satisfy the execution;[8] these may be trespasses, but are not felonies, because the returning the thing taken with other facts show that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use.[9] It is true that where the original taking was wrongful, there a subsequent felonious intent makes the offence larceny in all cases in which there is concurrent with such intent, though subsequent to the taking, a fraudulent conversion or transmutation of the goods.[10] This has been held to be the case where

[1] *Infra*, § 1197.

[2] See cases cited in notes to this section, and to § 886; and see R. *v.* York, 1 Den. C. C. 335; T. & M. 20; S. C., under name of R. *v.* Yorke, 2 C. & K. 841; Keeley *v.* State, 14 Ind. 36. *Infra*, §§ 906, 909.

[3] State *v.* Self, 1 Bay, 242. See R. *v.* Crump, 1 C. & P. 658; R. *v.* McMakin, R. & R. 333 *n*.

[4] State *v.* York, 5 Harring. 493; Whart. Conf. of Laws, § 968.

[5] Dove *v.* State, 37 Ark. 261.

[6] R. *v.* Crump, 1 C. & P. 658. See R. *v.* Van Muyen, R. & R. 118; State *v.* Shermer, 55 Mo. 83.

[7] R. *v.* Dickinson, R. & R. 420.

[8] Com. *v.* Greene, 111 Mass. 392.

[9] See, also, State *v.* Ware, 62 Mo. 597. Where a party removed a valuable article, part of a wreck, from a wharf on which it had been placed, and had taken it into his own house, and had afterwards denied the possession of it; it was held, that the question for the jury was, whether at the time he originally took it he meant to steal it for his permanent use. R. *v.* Hore, 3 F. & F. 315.

[10] State *v.* Coombs, 55 Me. 477; Richards *v.* Com., 13 Grat. 803; Tanner *v.* Com., 14 Ibid. 635; Beatty *v.* Com., 61 Miss. 18; and *infra*, §§ 900, 964. For "wrongful," as in the text,

a man, driving away a flock of lambs, negligently took a lamb belonging to a third party, and then, upon subsequently finding out the fact of the true ownership, fraudulently converted the lamb to his own use, taking it from the rest of the flock.[1] But to constitute larceny from an owner who is or could be known, there must be a fraudulent intent when possession is obtained;[2] and unless this be the case, no subsequent harboring of such intent can be larceny.[3] "If," so is another phase of this rule stated, "a man takes away the goods of another openly before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of a trespass, because done openly in the presence of the owner, or of other persons who are known to the owner."[4]

And so of borrowing without fraudulent intent.

§ 886. We may therefore conclude that mere borrowing, without fraudulent intent, is not larceny.[5] "If we were to hold," said Lord Denman, "that wrongfully borrowing a thing for a time, with an intention to return it, would constitute a larceny, many very venial offences would be larcenies."[6] As a rule, to constitute larceny, it is essential that there should be an intent to deprive the owner *permanently* of his property. But if the original intent were fraudulent, then, on conversion, the larceny is complete.[7]

Sir J. F. Stephen substitutes "an actionable wrong." Dig. Art. 303.

[1] R. *v.* Riley, 14 Eng. L. & Eq. 545; 6 Cox C. C. 88; 1 Dears. C. C. 149. See *infra*, §§ 901, 958.

[2] R. *v.* Leigh, 2 East P. C. 694; R. *v.* Mucklow, 1 Mood. C. C. 160; R. *v.* Box, 9 C. & P. 126; R. *v.* Glass, 1 Den. C. C. 215; 2 C. & P. 395; Wilson *v.* People, 39 N. Y. 459; Booth *v.* Com., 4 Grat. 525; Shinn *v.* Com., 32 Ibid. 899; State *v.* Beall, 68 Ala. 820; Pinckard *v.* State, 62 Ibid. 167; State *v.* Wood, 46 Iowa, 116. See, for other cases, *infra*, § 963. That when the party taking goods is so drunk as to be incapable of a felonious intent, the offence is not larceny, see *supra*, § 53.

[3] See *infra*, § 966; R. *v.* Mucklow, 1 Mood. C. C. 160, cited *supra*, § 166; Watkins *v.* State, 60 Miss. 323; Dow *v.* State, 12 Tex. Ap. 343.

[4] 2 Russ. Cr. (9th ed.) 158, reduced from Hale P. C. 509, and approved in Johnson *v.* State, 73 Ala. 525.

[5] Steph. Dig. C. L. art. 306; 1 Hale P. C. 509; R. *v.* Phillips, 2 East P. C. 662; R. *v.* Addis, 1 Cox C. C. 78; R. *v.* Guernsey, 1 F. & F. 395; State *v.* Shermer, 55 Mo. 83.

[6] R. *v.* Holloway, 2 C. & K. 942; S. C., 1 Den. C. C. 414; T. & M. 47, per Lord Denman, C. J.; a case where it was held not to be larceny to carry some dressed skins to another part of a warehouse, and there to claim pay for work falsely pretended to have been done on them. But see R. *v.* Richards, 1 C. & K. 532. *Supra*, § 885.

[7] *Supra*, § 885; *infra*, § 963; and, also, State *v.* South, 4 Dutch. 28; Starkie *v.* Com., 7 Leigh, 752; Richards *v.* Com., 13 Grat. 803; State *v.* Bryant, 74 N. C. 124; Fields *v.* State, 6 Coldw. 524;

Returning or paying for goods does not purge guilt

§ 887. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; and such evidence may be overcome by proof of an original intent to defraud. And wherever it appears that the goods were taken with the intention of depriving the owner of them, and appropriating them to the taker's own use, his afterwards returning them will not purge the offence.[1] And although it has been held that taking with intent to pawn and return is not larceny,[2] yet if the goods were fraudulently obtained, with the intent to pawn without the means of redeeming, this is larceny.[3] Nor does paying for stolen goods constitute a defence.[4]

Buying by false pretence is not larceny; but otherwise when only *pos-*

§ 888. Suppose A. goes to B., and says, "I am C., sell me these goods," and B. delivers the goods to A., believing A. to be C., this being an essential incident of the contract; does any property pass to A.? The better view is in the negative, there being no contract between A. and B.[5] If this be correct, then it is larceny in A. to take goods on

and other cases cited *supra*, § 885. As to taking with intent to return for reward, see *infra*, § 906. As to combination of motives see *supra*, § 119.

[1] See 1 Hawk. c. 34, s. 2; R. *v.* Phetheon, 9 C. & P. 552; State *v.* Coombs, 55 Me. 477; State *v.* Bonwell, 2 Harring. 529; Eckles *v.* State, 20 Ohio St. 508; State *v.* Scott, 64 N. C. 586. *Supra*, § 862.

[2] R. *v.* Wright, 9 C. & P. 554, note; cited *infra*, § 900.

[3] R. *v.* Trebilcock, 7 Cox C. C. 408; Dears. & B. C. C. 453; R. *v.* Phetheon, 9 C. & P. 552 (in which R. *v.* Wright, *ut supra*, is criticized by the reporter; State *v.* Coombs, 55 Me. 477; Com. *v.* Coe, 115 Mass. 481; Fields *v.* State, 6 Coldw. 524. *Supra*, § 119.

In an early case, it was proved that the defendants took two horses out of the prosecutor's stables at night, without his leave, and having rode them about thirty miles left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken on the same day, at the distance of fourteen miles from the inn, walking in a direction from it; the jury found the defendants guilty, but at the same time found, specially, that the defendants meant merely to ride the horses the thirty miles, and to leave them there, without an intention to return for them, or otherwise dispose of them; and ten of the judges held that this was no felony, as there was no intention in the prisoners to change or appropriate the property. R. *v.* Phillips, 2 East P. C. 662.

[4] Trafton *v.* State, 5 Tex. 480. See *infra*, § 907.

[5] Pollock on Cont. 408; Benj. on Sales, 47, 324; Boulton *v.* Jones, 2 H. & N. 564; R. *v.* Little, 10 Cox C. C. 559; R. *v.* Gillings, 1 F. & F. 36; Com. *v.* Lawless, 103 Mass. 425; Boston Ice Co. *v.* Potter, 123 Mass. 28; State *v.* Brown, 25 Iowa, 561; State *v.* McCartney, 17 Minn. 561. *Infra*, §§ 916, 958.

session of the goods, but not the property, is obtained by the false pretence. False personation.

this false personation; though there are authorities to the effect that the case is not larceny but false pretences.[1] If the pretence be, not false personation, but false statement of means, then, as there is a contract of sale, the case is false pretences and not larceny.[2] And where A. says, "I am sent *by* C. to carry the goods to him," which is false; and thus obtains only *possession* of the goods; this is larceny, in cases in which B. intends to part only with the *possession* of the goods to A.[3] But here we encounter a subordinate distinction. Suppose A., pretending to be C., goes to B. and fraudulently obtains from B. certain goods of C., which are in B.'s hands as bailee. Is this larceny in A.? It certainly is, because B. has no intention of passing the property in the goods to A.; or to any one; he (B.) considering himself to have no property in the goods to pass.[4] This distinction has been vindicated in Massachusetts in the following case: "Sanderson had left his watch at a watchmaker's to be repaired, and the defendant went to the shop, pretending to be Sanderson, asked for the watch, paid for the repairing, and took the watch with a felonious intent." "These acts," said Chapman, J., "constitute larceny at common law. The case is like that of Rex *v.* Longstreeth, 1 Mood. C. C. 137. The defendant in that case went to a carrier's servant, and obtained from him a parcel by falsely pretending to be the person to whom it was directed. It was held to be a larceny, because the servant had no authority to

[1] R. *v.* Atkinson, 2 East P. C. 673; R. *v.* Adams, 1 Den. C. C. 38; Williams *v.* State, 49 Ind. 367. See *infra*, §§ 914–6; State *v.* Anderson, 47 Iowa, 142; Pitts *v.* State, 5 Tex. Ap. 122.

[2] R. *v.* Thompson, L. & C. 233; 9 Cox C. C. 222, and other cases cited *infra*, §§ 915, 965. See article in London Law Times, Jan. 28, 1881, p. 220.

[3] R. *v.* Gillings, 1 F. & F. 36; R. *v.* Hench, R. & R. 163; Cundy *v.* Lindsay, L. R. 3 Ap. Cas. 459; aff. Lindsay *v.* Cundy, L. R. 2 Q. B. D. 96; Hardman *v.* Booth, 1 H. & C. 803; Smith *v.* Wheatcroft, L. R. 9 Ch. D. 223; Moody *v.* Blake, 117 Mass. 23; Barker *v.* Dinsmore, 72 Penn. St. 427; State *v.* Brown, 25 Iowa, 561; State *v.* Lindenthal, 5 Rich. 237. *Infra*, §§ 966, 1142.

[4] *Infra*, § 916. R. *v.* Robins, Dears. C. C. 418; R. *v.* Wilkins, 2 East P. C. 673; R. *v.* Longstreth, 1 Mood. C. C. 137. These distinctions are swept away in New York by § 528 of the Penal Code of 1882, which includes larceny, embezzlement, and obtaining property by false pretences under one general definition with the title of larceny. How far it will be possible to work a system which includes under one definition stealing and cheating, offences which all jurisprudences have heretofore regarded as distinct, remains to be seen.

deliver it to him, so that no property passed to him, but the mere possession feloniously obtained. So in this case the watchmaker had no authority to deliver the watch to the defendant, and the latter obtained no property in it, not even the qualified property of a bailee, but a mere felonious possession, which is the essence of the crime of larceny."[1]

§ 889. To seize a weapon in supposed self-defence, is not larceny, though the person so taking, afterwards, from a fraudulent subsequent purpose, converts the weapon to his own use.[2]

Seizing weapon in self-defence is not larceny.

§ 890. The same rule applies to taking by a soldier, recognized as part of a hostile belligerent army.[3]

And so of taking by a belligerent.

§ 891. It depends upon circumstances what offence it is to force a man in the possession of goods to sell them. If the defendant take them, and throw down more than their value, this will be evidence that it was only trespass; if less were offered, it would probably be regarded as felony.[4] And consent obtained by threat is no defence.[5]

Whether forced sale is larceny depends upon circumstances.

§ 892. Taking the wrong thing and dropping it is not larceny. Thus, if a man searches the pocket of another for money and finds none, and afterwards throws the saddle from his horse to the ground, and scatters bread from his packages, he will not be guilty of larceny,[6] though he might certainly have been indicted for feloniously assaulting with an intent to steal, for that offence was complete.

Taking the wrong thing and dropping it is not larceny.

§ 893. Larceny, also, is not constituted by a taking by mere accident, or mistaking another's property for one's own.[7] The same

[1] Com. *v.* Collins, 12 Allen, 181. See, also, Com. *v.* Lawless, 103 Mass. 425. There is a statute in Massachusetts making the obtaining of goods by false personation larceny, but the first, if not the second, of these decisions is based on the common law. See, also, Com. *v.* Whitman, 121 Mass. 361; and Sir J. F. Stephen's remarks, *infra*, § 1009.

[2] R. *v.* Holloway, 5 C. & P. 524; U. S. *v.* Durkee, 1 McAllist. 196.

[3] Whart. Confl. of L. § 911; Com. *v.* Holland, 1 Duvall, 182; Hammond *v.* State, 3 Cold. 129. *Infra*, § 1799.

[4] Burrows *v.* Wright, 2 East R. 664. *Supra*, § 848; *infra*, §§ 915, 971, 976.

[5] R. *v.* Lovell, L. R. 8 Q. B. D. 185; 44 L. T. N. S. 319. *Infra*, § 915.

[6] 2 East P. C. 662. See R. *v.* Riley, 14 Eng. L. & Eq. 545; 6 Cox C. C. 88. See *infra*, § 969.

[7] Hale, 507, 509; 2 Russ. on Cr. 6th Am. ed. 8; Umphrey *v.* State, 63 Ind. 223. See R. *v.* Bailey, L. R. 1 C. C. 349; People *v.* Walker, 38 Mich. 156.

may be said of taking by way of joke.[1] Thus, in a New York case the evidence was that the defendant, with some friends, stopped at A.'s house in the daytime, and asked A.'s daughter for a drink of cider, offering to pay for it. She refused it to him, whereupon he opened the cellar-door and drew some cider in the cellar, he having been previously permitted to do this, though forbidden at this time. It was held that this, though a trespass, was not larceny.[2]

Nor is taking by accident or in joke.

§ 894. It is said that if one man take another man's corn or hay and mingle it with his own corn or hay; or take another man's cloth and embroider it with silk or gold, such other person may retake the whole heap of corn, or cock of hay, or garment and embroidery also; and this retaking is no felony, nor so much as a trespass.[3] And this has been extended to a case where a man seizes a note given by him in his creditor's hands, on the ground that no title had been made to him of the land for which the note was given.[4]

Nor is retaking one's own goods.

§ 895. We now approach a question as to which there has been a conflict of authority both ancient and modern. Can the taking of the goods of another be larceny when there is no intention on the part of the taker to reap any advantage from the taking? In other words, is it essential to constitute larceny that it should be *lucri causa?*

To larceny *lucri causa* is essential. Roman law.

In answering this question, we are at the outset met by the fact that in all jurisprudences a broad distinction is recognized between a taking with the expectation of benefit and a taking without such expectation. The first has two great elements: the deprivation of another of his property, and the gain of such property for self. This is a serious crime in any aspect, and as such should be highly punished. On the other hand, taking the goods of another, without the expectation of any benefit to self, may or may not be a high crime. It may be from mere joke, as sometimes occurs when books or clothes are hid from their owners. It may be to prevent some supposed public mischief, as when barrels of whiskey are opened and emptied in the streets, or boxes of tea cast into the sea,[5] or

[1] See Devine *v.* People, 20 Hun, 98.
[2] McCourt *v.* People, 64 N. Y. 583.
[3] 1 Hale, 513.
[4] State *v.* Deal, 64 N. C. 270. But see Farrell *v.* People, 16 Ill. 506.
[5] Even to the hard tone of English temper at the time of the Boston tea tumult, this appeared simply a riot. There was no attempt to prosecute for larceny.

arms are seized by a vigilance committee.[1] Or it may be from spite to the owner, as when animals are carried away and disfigured or killed. Grave as these offences may be, they all lack the element of expectation of gaining for one's self what is taken from another; they are simply taking from another without gaining for self. The Roman law, whose justice in this respect was appealed to by Lord Mansfield, expressly took this distinction: "*Furtum est contrectatio rei fraudulosa, lucri faciendi gratia, vel ipsius rei, vel usus ejus possessionisve.*"[2] This definition is accepted by the Code Napoleon, and will be recognized as substantially that of the old English common law. The North German Code varies but slightly. "Larceny" (Diebstahl) "is the unlawful and intentional taking (Wegnahme) of another's goods from his control, with the intent to appropriate the same to self" (in der Absicht sich dieselbe anzueignen). This definition is adopted by the codes of Saxony, Bavaria, Austria, and Wurtemburg.[3] Nor is this because these jurisprudences do not recognize malicious taking not *lucri causa* as an offence. They do so, and specifically provide for its punishment. But the punishment is lighter than that assigned to the taking *lucri causa*, and the crime regarded as of a less heinous grade, no doubt for the same reason that by the English common law malicious mischief is but a misdemeanor, while larceny, *lucri causa*, is a felony. And in this concurrence of all old if not of all the modern codes we may find the expression of a position existing in right reason, namely, that taking *from* another *for self* is an offence of a more flagrant type, and more perilous to society, than is simply taking *from* another.[4]

§ 896. That this was the English common law, as accepted originally in the American colonies, there can be no question. The qualification *lucri causa* was a part of most of the old definitions of larceny; and repeatedly was it decided that unless a taking was with the expectation of advantage to the taker it was not larceny.[5] It is true that *lucri*

And so by early English law.

[1] See U. S. *v.* Durkee, 1 McAllist. 196.
[2] L. 1. § 3. D. de furtis.
[3] See Berner, Lehrbuch des Strafrechts (1871), § 160.
[4] That such an offence is indictable as malicious mischief, see *infra*, § 1067.
[5] See R. *v.* Holloway, 1 Den. C. C. 370; 2 C. & K. 942; T. & M. 40, explained *supra*, § 886.

causa was explained in a broad sense. It was considered to be convertible with "benefit to self;" and hence it was held larceny where a woman took and burned a letter whose contents she feared would do her injury;[1] where an article was taken with the intention of giving it away, for the reason that before it was given away the taker was to have it for himself;[2] and where a post officer secreted a letter in order to escape a penalty incurred by him for its prior non-delivery.[3] But *lucri causa* was regarded in the earlier cases as in some shape a necessary constituent of larceny.[4]

Otherwise by later English cases.

§ 897. The first case in which this doctrine was invaded is the following: A., to screen his accomplice, who was indicted for horse-stealing, broke into the prosecutor's stable, and took away the horse, which he backed into a coal-pit and killed; it being objected at the trial that this was not

[1] R. *v.* Jones, 2 C. & K. 236; 1 Den. C. C. 188. (*Infra*, § 916.) "With regard to larceny," said Lord Campbell, C. J., in a remarkable case hereafter cited (R. *v.* Garrett, 22 Eng. L. & Eq. 607; 6 Cox C. C. 260; Dears. Ibid. 232; *infra*, §§ 1202–3, 6), "we must always see that in the act alleged to constitute the offence the person committing had some advantage, not necessarily a pecuniary advantage, but the gratification of some wish; otherwise it would not be larceny."

In R. *v.* Godfrey, 8 C. & P. 563, it was held that opening and keeping a letter from mere curiosity was not larceny. See cases cited *infra*, § 966.

[2] R. *v.* White, 9 C. & P. 344. Berner, in justifying this, declares that it was technically larceny even according to the Roman law, in St. Crispin, to take, as he is reported to have done, the leather of the rich to make shoes for the poor; for there was a moment, between the taking and the making, when the saint had the leather to himself.

[3] R. *v.* Wynn, 1 Den. C. C. 365; 2 C. & K. 859.

[4] Among the illustrations given by Sir J. F. Stephen (Dig. C. L. art. 206) are the following:—

A., a servant, gets B.'s letters from the post-office, and destroys one of them written to B. by C., A.'s mistress, making inquiries of B. as to A.'s character, delivering the rest. A. steals the letter. R. *v.* Jones, 1 Den. C. C. 187.

A., a puddler, throws an iron axle into his furnace in order to increase the apparent amount of iron puddled therein, on which A.'s wages depend. The axle, worth 5*s.*, is destroyed, though the iron of which it is composed, and which is much less valuable, remains for the owner. A. has stolen the axle. R. *v.* Hall, 3 C. & P. 409.

B. uses many bags in his trade, and is supplied with them by C. A., B.'s servant, takes old bags, supplied by C. to B. from B.'s house, and puts them in a place outside B.'s house, where new bags were habitually put by C. C., by consort with A., claims payment for the bags from B. as for bags newly supplied. A. is guilty of theft, and C. is an accessary before the fact. R. *v.* Manning, Dears. C. C. 21.

larceny, because the taking was not with an intention to convert the horse to the use of the taker, *animo furandi et lucri causa*, seven of the judges held that it was larceny; and six of that majority expressed their opinion that, to constitute larceny, if the taking were fraudulent, and with intent wholly to deprive the owner of the property, it was not essential that it should be *lucri causa;* but some of the majority thought that the object of the prisoner might be deemed a benefit to him, and the taking *lucri causa*.[1] Certainly, as it appeared that the defendant was to be greatly benefited by his accomplice's acquittal, the latter view is right.

The next step was on a prosecution agaist hostlers for using their master's corn to an unauthorized extent, to feed their master's horses, and incidentally to ease themselves from work. In this "easing" was claimed to be the *lucri causa*, which may explain the decision of the judges.[2]

A further advance was made in a case which came ultimately before the Court of Criminal Appeal. It was proved that the prisoners took from the floor of a barn, in the presence of the thresher, five sacks of unwinnowed oats belonging to their master, and secreted them in a loft there, for the purpose of giving them to their master's horses, they being employed as carter and carter's boy, but not being answerable at all for the condition or appearance of the horses. The jury found that they took the oats with intent to give them to their master's horses, and without any intent of applying them for their private benefit. The learned judge reserved the case for the opinion of the judges on the point whether the prisoners were guilty of larceny. The greater part of the judges (exclusive of Earle, J., and Platt, B.) appeared to think that this was larceny, because the prisoners took the oats knowingly against the will of the owner and without color of title or of authority, with intent not to take temporary possession merely and then abandon it (which would not be larceny), but to take the entire dominion over them; and that it made no difference that the taking was not *lucri causa*, or that the object of the prisoners was to apply the

[1] R. *v.* Cabbage, R. & R. 292; five of the judges held this conviction wrong. And see, to same effect, R. *v.* Jones, 1 Den. C. C. 188; 2 C. & K. 236; R. *v.* Bailey, L. R. 1 C. C. 347.

[2] R. *v.* Morfit, R. & R. 307; and see R. *v.* Gruncell, 9 C. & P. 365; R. *v.* Handley, C. & M. 547.

things stolen in a way which was against the wish of the owner, but might be beneficial to him. But all agreed that they were bound by the previous decisions to hold this to be larceny, though several of them expressed a doubt if they should have so decided, if the matter were *res integra*. Earle, J., and Platt, B., were of a different opinion; they thought that the former decision proceeded, in the opinion of some of the judges, on the supposition that the prisoners would gain by the taking, which was negatived in this case; and they were of opinion that the taking was not felonious, because, to constitute larceny, it was essential that the prisoner should intend to deprive the owner of his property in the goods, which the prisoner in this case could not, if he meant to apply it to his use.[1]

Unreasonableness of these rulings.

§ 898. If this law be good, it is larceny for a cook to take without authority from her master's stores articles to improve her master's cooking, and for a nurse to give without authority the parent's food to be eaten by the child. So far as concerns the particular question of the use of the master's corn as extra feed for horses, there are no less than three decisions reported of German courts (in Bavaria, in 1844, in Hanover, in 1846, and in Saxony in the same year), prior to the adoption of the North German Code, and at a time, therefore, when the common law which was to be construed was not affected by any statutory prescription. In all of these cases the offence was declared not to be larceny; and the decision is emphatically sustained by Mittermaier.[2] And the reasons suggested are obvious. In the first place, by rejecting the *lucri causa*, we confound larceny with malicious mischief.[3] In the second place, we give a stimulus to peculation by visiting appropriation to self with the same penalty as that assigned to mere wanton injury to another's goods. We thus not only brutalize the public mind by doing away with the distinction between the various phases of guilt, but we give a premium to desperate and remunerative criminality. "If I am to be punished all the same, I will be punished for something that

[1] R. v. Privett, 1 Den. C. C. 193; 2 Cox C. C. 40; 2 C. & K. 114. Under 26 & 27 Vict., however, the offence stated in the text is no longer larceny. Steph. Dig. C. L. art. 295.

[2] Mittermaier's ed. of Feuerbach, § 319. Note V., "Mit recht ist es nicht als Diebstahl angenommen."

[3] This objection is put by Lord Abinger, in R. v. Godfrey, 8 C. & P. 563, cited *supra*, § 896; and by Cockburn, C. J., in R. v. Bailey, L. R. 1 C. C. 347.

will pay."[1] Nor can any detriment to public justice arise from the establishment of this principle, since the particular offences which it is thus attempted to force into the line of larcenies are indictable as malicious mischiefs. The difference is that by preserving the common law distinction, we not only preserve a distinction which is reasonable and just, but we avoid the risk of asking a jury to convict of an offence which they will feel the evidence does not prove.

In the United States, qualification of *lucri causa* required.

§ 899. In the United States the qualification "*lucri causa*" has been accepted by several courts as an unquestioned part of the common law.[2] Between larceny and malicious mischief, it is argued, the line is well marked. Thus it has been frequently held to be a misdemeanor, of the nature of malicious mischief, to kill an animal belonging to another,[3] though it has never been held larceny so to kill and

[1] See this argument used by Helie, vi. p. 569.

In Fuller's Worthies of England, vol. ii. Nuttall's ed. p. 38, he says, speaking of Hertfordshire:—

"Their teams of horses (oft-times deservedly advanced from the cart to the coach) are kept in excellent equipage, much alike in color and stature, fat and fair; such is their care in dressing and well-feeding them. I could name the place and person (reader be not offended with an innocent digression) who brought his servant with a warrant before a justice of the peace for stealing his grain. The man brought his five horses tailed together along with him, alleging for himself that if he were the thief, these were the receivers, and so escaped." The reason given by Fuller is as sound as it is quaintly expressed. The appropriation of property to its owner's benefit, though it may be a civil trespass, is not larceny.

[2] As holding that *lucri causa* is essential, may be noticed:—

People v. Woodward, 2 N. Y. Cr. Rep. 32; 31 Hun, 57 (Learned, J., diss.); State v. Laws, 2 Har. (Del.) 529; State v. Hawkins, 8 Port. 461; McDaniel v. State, 8 Sm. & M. 401; Witt v. State, 9 Mo. 663; State v. Conway, 18 Ibid. 321; State v. Shermer, 55 Ibid. 83 (though see State v. Stone, 68 Ibid. 101); and see U. S. v. Durkee, 1 McAllist. 196, where it was held that seizing weapons by a vigilance committee was not larceny; Isaacs v. State, 30 Tex. 450. As holding that *lucri causa* is non-essential, see State v. Davis, 38 N. J. L. (9 Vroom) 146; State v. York, 5 Har. Del. 493; Keeley v. State, 14 Ind. 36; Williams v. State, 52 Ala. 411 (modifying State v. Hawkins, *supra*); Hamilton v. State, 35 Miss. 214; Warden v. State, 60 Ibid. 638; Juarez v. People, 28 Cal. 380; State v. Ryan, 12 Nev. 401; Dignowitty v. State, 17 Tex. 521; Johnson v. State, 36 Ibid. 375. Under § 528 of the New York Penal Code of 1882, *lucri causa* is made non-essential—29 Alb. L. J. 239.

[3] As cases in which this was ruled, see State v. Buckman, 8 N. H. 203; State v. Wheeler, 3 Vt. 344; People v. Smith, 5 Cow. 258; Loomis v. Edgerton, 19 Wend. 419; Resp. v. Teischer, 1 Dall. 335; Henderson's Case, 8 Grat. 709; State v. Scott, 2

take unless some benefit was expected by the taker. And by a series of statutes, adopted more or less extensively in all the States, malicious destructions of property are made the subjects of criminal prosecution of which the penal consequences are widely different from those attached to larceny. The legislature, by such provisions, it is maintained, says: "Injuring goods of another, without expectation of benefit to self, shall be one offence, called malicious mischief, and shall be a misdemeanor, and subject to a light punishment; while taking goods of another, in order to benefit self, shall be another offence, called larceny, which shall be a felony, and infamous, and subject to a heavy punishment." And this distinction, on the reasoning heretofore given, is both wise and humane. The severe penalties of larceny, as a system of pillage which society must put down, must be maintained in their rigor; but it will be destructive of the humanities of life to extend these penalties and infamies to every case where property is taken without the taint of selfish greed in the taker. On the other hand, it is plainly larceny, when goods are intentionally taken from the owner, the object being to deprive the owner of their use, and in any way to benefit the taker.[1]

Pawning master's goods with intent to return not larceny.

§ 900. Where a servant pawns his master's goods, if it appear that the servant only intended to raise money on his master's property for temporary purposes, and had a reasonable expectation of being able shortly to take the article out of pawn and return it, then larceny does not exist. But to justify an acquittal, there must be not only the intent but the probable ability to redeem.[2]

Dev. & Bat. 35; State *v.* Council, 1 Tenn. 305; Wright *v.* State, 30 Ga. 325. See, generally, Harding *v.* People, noticed in 29 Alb. L. J. 299; State *v.* Ware, 10 Ala. 814; Witt *v.* State, 9 Mo. 671; McDaniel *v.* State, 8 Sm. & M. 401. That "philanthropic" intent is no defence, see *supra*, § 119.

[1] See reasoning of court in Keely *v.* State, 14 Ind. 36; Hamilton *v.* State, 35 Miss. 214; Dignowitty *v.* State, 17 Tex. 521. Compare *supra*, § 896.

[2] *Supra*, § 887; R. *v.* Medland, 5 Cox C. C. 292; R. *v.* Photheon, 9 C. & P. 552; R. *v.* Trebilcock, D. & B. 453; 7 Cox, 408; 27 L. J. M. C. 103; 4 Jur. (N. S.) 123; R. *v.* Poyser, T. & M. 559; 2 Den. C. C. 233; 5 Cox. C. C. 241. *Infra*, § 968.

On the trial of a servant for larceny in stealing his master's plate, it appeared that after the plate in question was missed, but before complaint was made to a magistrate, the prisoner replaced it; and it was proved by a pawnbroker that the plate had been pawned by the prisoner, who had not redeemed it; but the pawnbroker also

Appropriating *animo furandi* lost goods with ear-marks is larceny.

§ 901. Where the personal property of one is, through inadvertence, left in the possession of another, or in a public place, and the finder, having reasonable ground to believe that its owner will appear, or may be found from ear-marks upon it, fraudulently appropriates it, he is guilty of larceny.[1] In such case the goods may be said to be *mislaid*, not *lost*. But when goods are *lost*,—*i. e.*, when the owner has no trace of them, and they show no trace of the owner,—the finder has such a special property in them that, according to the now prevalent view, as will presently be more fully seen, even though he feloniously intends to appropriate them when he finds them, it is not larceny.[2] In other words, the mere subjective side

stated that the prisoner had on previous occasions pawned plate, and afterwards redeemed it. Hallock, B. (Holroyd, J., being present), left it to the jury to say whether the prisoner took the plate with the intent to steal it, or whether he merely took it to raise money on it for a time and then return it; for that, in the latter case, it was no larceny. The jury acquitted the prisoner. R. *v.* Wright, Car. Crim. Law, 278-9; 9 C. & P. 554, n., criticized *supra*, § 887. See R. *v.* Trebilcock, 7 Cox C. C. 408; D. & B. C. C. 453.

[1] R. *v.* Moore, L. & C. 1; 8 Cox C. C. 416; R. *v.* West, Dears. 402; Com. *v.* Titus, 116 Mass. 42; People *v.* McGarren, 17 Wend. 460; Brooks *v.* State, 35 Ohio St. 46; State *v.* Levy, 23 Minn. 104; State *v.* Williams, 9 Ired. 140; State *v.* McCann, 19 Mo. 249. See R. *v.* Riley, 14 Eng. L. & Eq. 544; 1 Dears. C. C. 149; 6 Cox C. C. 88; State *v.* Farrow, Phil. (N. C.) 161. The rule in the text was applied in State *v.* Clifford, 14 Nev. 72, to a bar of bullion dropped from a stage coach.

A purchaser, by mistake, left his purse on the prisoner's market stall, without himself or the prisoner knowing it. The prisoner afterwards seeing it there, but not actually knowing whose it was, appropriated it, and subsequently denied all knowledge of it when inquiry was made by the owner. It was held that the prisoner was guilty of larceny, as the purse was not, strictly speaking, lost property, and, therefore, it was not necessary to inquire whether the prisoner had used reasonable means to find the owner. R. *v.* West, 29 Eng. L. & Eq. 525; Dears. C. C. 402; 6 Cox C. C. 415; see State *v.* Cummings, 33 Conn. 260; Lawrence *v.* State, 1 Humph. 228; and see particularly R. *v.* Moore, L. & C. 1; 8 Cox C. C. 416, cited *infra*, § 909. The question of title to lost property is discussed in an article in 1 Am. Law Journal, 270 *et seq.*

[2] Ibid.; R. *v.* Mole, 1 C. & K. 417; State *v.* Weston, 9 Conn. 527; Ransom *v.* State, 22 Ibid. 153; State *v.* Pratt, 20 Iowa, 267; People *v.* Swan, 1 Parker C. R. 9; People *v.* Cogdell, 1 Hill (N. Y.), 94; Brooks *v.* State, 35 Ohio St. 46; State *v.* Ferguson, 2 McMul. 502; State *v.* McCann, 19 Mo. 249; Neely *v.* State, 8 Tex. Ap. 64; Reed *v.* State, Ibid. 40. See 1 Hawley's Cr. Rep. 418.

is insufficient without the objective.[1] To constitute larceny there must be not only the intent to steal, but the thing taken must give on its face grounds from which it may be reasonably believed that the owner can be found.[2] If there be no indications of ownership, then the owner may be inferred to have abandoned the goods, and consequently to consent to the finder taking them. In this way we can reconcile the position now before us with the position that when felonious intent and trespass are united in taking a thing, there is larceny. There is no trespass in taking a thing abandoned.

Otherwise when there is no means of knowing at the time who the owner was.

§ 902. Hence a finder, no matter what may be his intent, of a lost article on which there is no ear-mark, even though this be a purse containing money, or a trunk containing goods without any mark, dropped on the highway, or otherwise left without ownership, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found.[3] And it may be generally held that if a man find property which has been lost, and appropriate it to himself, he is not guilty of larceny for failing to take steps to discover the owner, unless there were at the time indications which afforded the finder an immediate means of knowing who the owner

[1] See *supra*, notes to § 182.

[2] See Hamaker *v.* Blanchard, 90 Penn. St. 377.

The N. Y. Penal Code of 1882, § 539, expands the definition of the text by making it larceny when the finder, under circumstances which give him means of inquiry as to the owner, appropriates the goods without inquiry.

[3] 2 Russ. on Cr. 9th Am. ed. 169; R. *v.* Thurborn, 1 Den. C. C. 387; R. *v.* Matthews, 12 Cox C. C. 489; R. *v.* Preston, 8 Eng. L. & Eq. 589; 5 Cox C. C. 590; 2 Den. C. C. 353; R. *v.* Mole, 1 C. & K. 417; R. *v.* Shea, 7 Cox C. C. 147; R. *v.* Christopher, 8 Ibid. 91; Ransom *v.* State, 22 Conn. 153; People *v.* Anderson, 14 Johns. 294; Baker *v.* State, 29 Ohio St. 184; Bailey *v.* State, 52 Ind. 462; Wolfington *v.* State, 53 Ibid. 343; State *v.* Taylor, 25 Iowa, 273; State *v.* Dean, 49 Ibid. 73; State *v.* McCann, 19 Mo. 249; State *v.* Apel, 14 Tex. 428.

Thus the finder of money in the high road, who, at the time of the finding, had no reasonable means of knowing who the owner was, but who at that time intended to appropriate it even if the owner should afterwards become known (see *infra*, § 909), and to whom the next day the owner was made known, when he refused to give it up, is not guilty of larceny. R. *v.* Glyde, L. R. 1 C. C. 139; 11 Cox C. C. 103; R. *v.* Deaves, Ibid. 227; 3 Ir. R. C. L. 30; Tyler *v.* People, 1 Breese, 227; State *v.* Conway, 18 Mo. 321.

As unduly extending the rule in the text, see Porter *v.* State, M. & Yerg. 226; Lawrence *v.* State, 1 Humph. 228.

was at the moment when he picked it up and examined it.[1] It has always been agreed that if the defendant mean to act honestly as to the goods when found, there being no such ear-marks on the property, no subsequent felonious intent can make a conversion larceny.[2] And we must now advance a step further, and say that if, at the time of finding, he has no means of discovering the owner, he is not guilty of larceny, even though at the time of finding he intended to keep the property, no matter who the owner might be.[3]

Notice of ownership may be inferred from facts.

§ 903. Whether the finder had, or ought to have had, knowledge of the true ownership is to be inferred from the facts of the case.[4] Where a bureau was given to a carpenter to repair, and he found money secreted in it, which he converted to his own use, this was held larceny.[5] The same conclusion was reached where a bureau was bought at auction, with money secreted in it; though here the qualification was properly introduced that it was no larceny if the defendant had an

[1] R. *v.* Dixon, 36 Eng. Law & Eq. 597; Dears. C. C. 580; R. *v.* Matthews, 12 Cox C. C. 489; R. *v.* Gardner, L. & C. 243; 9 Cox C. C. 253; Brooks *v.* State, 35 Ohio St. 46.

[2] R. *v.* Preston, 8 Eng. Law & Eq. 589; 5 Cox C. C. 590; 2 Den. C. C. 353; R. *v.* Christopher, 8 Cox C. C. 91; R. *v.* Thurborn, 1 Den. C. C. 387; Ransom *v.* State, 22 Conn. 153; People *v.* Cogdell, 1 Hill, N. Y. 94; Tanner *v.* Com., 14 Grat. 635; State *v.* Ferguson, 2 McMul. 502; Porter *v.* State, Mart. & Y. 226.

[3] *Supra*, § 901; R. *v.* Thurborn, 1 Den. C. C. 387. (See for opinion of Parke, J., *infra*, § 909.) 18 L. J. M. C. 140; R. *v.* Glyde, 37 L. J. M. C. 107; L. R. 1 C. C. R. 139; 11 Cox C. C. 103, cited above. See, to same effect, Steph. Dig. C. L. art. 302.

The question as to the larcenous character of goods lost without ear-marks is analogous to that arising in the case of waifs already noticed. *Supra*, § 863. Another analogy may be found in cases where a man maliciously attempts to injure a non-existent object. A man, for instance, may inflict, with an intent to kill, a blow on a human body before him, but it turns out that the body is already dead. No amount of malice on his part would make this homicide, because there was no suitable object on which the malice could act. See discussion *supra*, § 136. In other words, we fall back upon the rule heretofore stated, that to constitute a crime there must be an offender and an object. The object must be one on which an offence can be committed.

[4] R. *v.* Knight, 12 Cox C. C. 102; R. *v.* Dixon, Dears. C. C. 580; R. *v.* Glyde, L. R. 1 C. C. 139; Com. *v.* Titus, 116 Mass. 42; State *v.* Weston, 9 Com. 527; People *v.* McGarren, 17 Wend. 460; People *v.* Cogdell, 1 Hill, 94; Tanner *v.* Com., 14 Grat. 635; State *v.* Conway, 18 Mo. 322.

[5] Cartwright *v.* Green, 8 Ves. 405; 2 Leach, 952.

honest belief that, in buying the bureau, he bought all within it.[1] Hence it has been ruled that if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is a larceny if he knew the owner, or if he took him up or set him down at any particular place where he might have inquired for him.[2] Larceny was also held to be made out in a case where the prosecutor accidentally left his purse containing money on an old saddle in a livery stable, where he had placed it while changing his clothes; and the defendant requested a small boy to take it and hand it to him, which he did, when the defendant appropriated the contents to his own use without the owner's consent.[3]

Whether the inference of an intention at the time to steal is strengthened by failure to advertise has been the subject of conflicting adjudications. On the one hand, it has been ruled that advertising may be a duty dispensing with which is suspicious.[4] On the other hand, the duty is held to be obligatory only when made so by surrounding circumstances.[5] The question depends upon local usage and opportunity. A failure to advertise, when there is nothing on the thing found, or the circumstance of finding, to show that there was an owner, does not, with articles of small value, lead to an inference of intent to steal. And even if it did, this would not be sufficient for conviction, unless there was something to indicate ownership. The inference varies with the thing itself. It is not improbable that a horse or a dog may be abandoned by the owner. It is very improbable that a bundle of bank notes should be so abandoned.[6]

§ 904. Evidence of a *bonâ fide* attempt to discover the owner, may destroy the presumption of fraudulent intent. Thus where a shawl, dropped in an exhibition room, was picked up by the defendant, placed in a conspicuous situation, and afterwards, not being claimed, was appropriated to his own use, it was held no larceny.[1] So the conscientious belief of an ignorant person that a note found by him was by law his own, may be received to disprove felonious intent.[2]

Inference of fraud may be refuted by proof of *bonâ fide* attempt to find owner.

§ 905. *Reasonable diligence, proportioned to the capacity of the party, in discovering the owner*, however, should be shown by the party finding, if there be any ear-marks or other indications of ownership.[3] Thus, on the trial of a servant who, being indicted for stealing bank notes, the property of her master, in his dwelling-house, set up as her defence that she found them in the passage, and kept them to see if they were advertised, not knowing to whom they belonged, Park, J., held that she ought to have inquired of her master whether they were his or not, and that, not having done so, but having taken them away from the house, she was guilty of stealing them.[4]

Where there are ear-marks, reasonable diligence should be shown.

§ 906. Even the finder of a chattel on the highway, as to which there are ear-marks, or reasonable grounds for the discovery of ownership, if he take it away with the intention of appropriating it to his own use, and only restore it because a reward is offered, is guilty of larceny. The only cases in which a party finding a chattel of another can be justified in appropriating it to his own use are, where it may be fairly said that the owner has abandoned it, or where there are no indications on it showing how the owner can be found.[5]

Intent to restore only for reward makes offence larceny.

§ 907. The fact that the goods were afterwards returned does not purge the original taking of its felony.[6]

Returning does not purge felony.

§ 908. It has been argued with much force that in newly settled countries, where the practice as to inclosures is not strict, the rule that larceny is not committed

Same rule as to cattle.

[1] Merry *v.* Green, 7 M. & W. 623. As to *bonâ fide* belief in title, see *supra*, §§ 87, 884; and R. *v.* Reed, C. & M. 306.

[2] R. *v.* Wynne, 2 East P. C. 664; 1 Leach, 413; R. *v.* Lamb, 2 East P. C. 665; R. *v.* Sear, 1 Leach, 415, n. See 2 Russ. on Cr. 9th Am. ed. 166.

[3] Pyland *v.* State, 4 Sneed (Tenn.), 357.

[4] That the *animus furandi* may be inferred, with other circumstances, from failure to advertise, see R. *v.* Coffin, 2 Cox C. C. 44; R. *v.* Reed, C. & M. 307; R. *v.* C——, 1 Craw. & D. 101; State *v.* Weston, 9 Conn. 527; State *v.* Jenkins, 2 Tyler, 379; State *v.* ——, Ibid. 387; State *v.* Brick, 2 Harring. 530.

[5] R. *v.* Christopher, 8 Cox C. C. 91; Bell, 27; People *v.* Cogdell, 1 Hill (N. Y.), 94; Lane *v.* People, 5 Gilman, 305.

[6] See State *v.* Dean, 49 Iowa, 73.

[1] State *v.* Roper, 3 Dev. 473.

[2] R. *v.* Reed, C. & M. 306.

[3] 2 Russ. on Cr. 12; Robinson *v.* State, 11 Tex. Ap. 403; Rhodes *v.* State, Ibid. 563.

[4] R. *v.* Kerr, 8 C. & P. 177.

[5] R. *v.* Peters, 1 C. & K. 245, per Rolfe, B.; Com. *v.* Mason, 105 Mass. 163. See Berry *v.* State, 31 Ohio St. 219; Lawrence *v.* State, 1 Humph. 228; and see, also, R. *v.* Spurgeon, 2 Cox C. C. 102. Compare R. *v.* York, 3 Ibid. 181; 1 Den. C. C. 335; R. *v.* Breen, 3 Craw. & D. 30. See *supra*, §§ 119, 885.

[6] 2 Russ. on Cr. 7; Eckels *v.* State, 20 Ohio St. 508. See State *v.* Coombs, 55 Me. 477; and *supra*, § 887; *infra*, § 909.

by one who finds goods, the owner of which he supposes cannot be ascertained, does not apply to one who finds cattle at large in a highway and converts them to his own use.[1] And it has been held to be larceny to take a horse found astray on the taker's land, with intent to conceal it until its owner shall offer a reward for its return, and then to return it, and claim the reward.[2] But it is otherwise when the intention to steal is subsequent to the finding.[3] After final abandonment, however, an astray is not the subject of larceny.[4]

Intent to steal, coupled with belief that owner may be found, constitutes larceny.

§ 909. If there be intent to steal on finding, subsequent conversion, on discovery of owner, is larceny in all cases where, at the time of finding, there were indications by which the owner could be found. We have this distinction illustrated in a case already cited, where it was held that where the defendant *subsequently* discovers the owner of lost property, he is indictable for larceny, if on first finding his intent was to appropriate, he reasonably believing the owner could be found; but that a verdict of guilty should be set aside in a case where the jury found specially "that the defendant did not know, and had not reasonable means of knowing" (at the time of finding) "who the owner was," though "*he believed at the*

[1] People *v.* Kaatz, 3 Parker C. R. 129; State *v.* Martin, 28 Mo. 530; State *v.* Williams, 19 Ibid. 389; Moore *v.* State, 8 Tex. Ap. 496; State *v.* Everage, 33 La. An. 120; and other cases cited to this point at close of *supra*, § 863.

[2] Com. *v.* Mason, 105 Mass. 163. See R. *v.* O'Donnell, 7 Cox C. C. 337. See *supra*, §§ 863, 864, 871.

[3] Starck *v.* State, 63 Ind. 285. In R. *v.* Matthews, 12 Cox C. C. 489, the prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on his, S.'s, marshes and had strayed, and a few days after that that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them a long distance away as his own property to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. It was held by the Court of Criminal Appeal that a conviction of larceny could not be sustained on a special verdict in which the jury found: (1) That at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. (2) That at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently. (3) That the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use.

[4] *Supra*, § 863.

time he picked up the note that the owner could be found."[1] But there must be an original felonious intent, general or special.[2]

But not larceny unless belief that owner may be

§ 910. The converse is also true that if there is at the time no reasonable means of discovering the owner, and no reasonable belief that the owner can be found, then even a refusal to surrender, on the owner declaring himself, does

[1] R. *v.* Moore, L. & C. 1; 8 Cox C. C. 416. See *infra*, § 969; and as to intents, see *supra*, § 119; State *v.* Jenkins, 2 Tyler, 379; State *v.* Welch, 73 Mo. 284.

"The result of the authorities is," says Parke, B., in R. *v.* Thurborn, 2 C. & K. 839; 1 Den. C. C. 387; aff. R. *v.* Matthews, 12 Cox C. C. 489, "that the rule of law on this subject seems to be, that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire domain over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But if he has taken them with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as, indeed, in the application of all fixed rules, questions of some nicety may arise; but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it; and if he did not return it to the owner the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel."

That there must be a felonious intent at time of finding, see 2 Ben. & H. Lead. Cas. 18, citing Melbourne's Case, 1 Lew. 251; R. *v.* Breen, 3 Craw. & D. C. C. 30; R. *v.* Mucklow, 1 Mood. C. C. 160; R. *v.* Steer, 1 Den. C. C. 349; R. *v.* Banks, R. & R. 441; R. *v.* Levy, 4 C. & P. 241; R. *v.* Thristle, 3 Cox C. C. 575; People *v.* Anderson, 14 Johns. 294.

That the felonious intent is not sufficient unless there was reason to believe the owner could be found, see 2 Ben. & H. Lead. Cas. 18, citing R. *v.* Pope, 6 C. & P. 346; R. *v.* Beard, 1 Jebb, 9; R. *v.* Mole, 1 C. & K. 417; R. *v.* Pierce, 6 Cox C. C. 117; R. *v.* Peters, 1 C. & K. 245; State *v.* Weston, 9 Conn. 527; State *v.* Ferguson, 2 McMul. 502; Lane *v.* People, 5 Gilman, 305; People *v.* Cogdell, 1 Hill, 94; People *v.* McGarren, 17 Wend. 460; Tyler *v.* People, 1 Breese, 227. We must, therefore, conclude that if the defendant reasonably believe at the time that the owner may be found, this is enough when there is at the time an intent to steal. Com. *v.* Titus, 116 Mass. 42. For a full discussion of the points in the text, see Roundtree *v.* State, 58 Ala. 382; Griggs *v.* State, Ibid. 425.

[2] R. *v.* Dixon, Dears. C. C. 580; 7 Cox C. C. 35; R. *v.* York, 2 C. & K. 841; 3 Cox C. C. 181.

found and felonious intent at finding concur.

not make larceny, even though there was at the finding the intention to appropriate the goods.[1]

Larceny for R. R. officers to appropriate things found in cars.

§ 911. The law with regard to the finder of lost property does not apply to the case of property of a passenger accidentally left in a railway carriage, and found there by a servant of the company; and such servant is guilty of larceny, if, instead of taking it to the station or superior officer, he appropriates it to his own use.[2]

Not larceny for person employed to find goods to appropriate them.

§ 912. Where the finder is employed by the owner to search for the article, and on finding it appropriates it, this is embezzlement, not larceny. Thus, a person having lost a carpet bag in the street employed another to find it. The bag was found, but after possession *bonâ fide* obtained, was fraudulently concealed by the finder. This was properly held to be breach of trust, but not larceny.[3]

Nor for assignee of finder to retain goods.

§ 913. The same rule has been applied to retention by assignee of finder. Thus, it has been held that if A., in expectation of a reward, withholds from the owner, whom he knows, a lost cheque *received from the finder*, B., he is not guilty of larceny.[4]

III. TAKING.

Taking must be in some way proved: need not be secret, but must be fraudulent.

§ 914. Taking, as a trespass, may be inferred from the possession of the property,[5] but must in some shape be proved.[6] Thus, if the owner's assent to a transfer of property be given, this is a defence;[7] though this want of assent must be in some way inferred from the evidence in the case.[8] But there must be some taking amounting to a trespass,

[1] R. *v.* Glyde, L. R. 1 C. C. 139; 11 Cox C. C. 103; R. *v.* Knight, 12 Ibid. 102; Tanner *v.* Com., 14 Grat. 635; State *v.* Roper, 3 Dev. 473; Randall *v.* State, 4 Sm. & M. 349, and cases heretofore cited. See *supra*, §§ 902–3–7.

[2] R. *v.* Pierce, 20 L. J. 182; 6 Cox C. C. 117.—Per Williams, J.

[3] State *v.* England, 8 Jones (N. C.), 399. See *infra*, § 967.

[4] R. *v.* Gardner, 9 Cox C. C. 253; L. & C. 243.

[5] *Infra*, § 923; Penn. *v.* Myers, Add. 320.

[6] 2 Russ. on Cr. 9th Am. ed. 145; R. *v.* Gruncell, 9 C. & P. 365; R. *v.* Walsh, 1 Mood. 14; R. *v.* Hall, 2 C. & K. 947; 1 Den. C. C. 381; Hite *v.* State, 9 Yerger, 198; People *v.* Murphy, 47 Cal. 103. As to the extent of moving requisite to taking, see *infra*, § 923.

[7] *Infra*, § 991; Zink *v.* People, 77 N. Y. 114; 6 Abb. New Cas. 413, reversing 16 Hun, 396.

[8] Spruill *v.* State, 10 Tex. App. 695.

or there is no larceny.[1] But it is not necessary that the taking should be secret, though secrecy may go to prove fraud.[2] It is essential, however, that the taking and the fraudulent intent should have been concurrent.[3]

Consent of owner to taking does not bar prosecution in cases where the consent is that defendant should have only a bare charge, or where the consent was not specific or voluntary.

§ 915. The general bearing in this connection of the maxim *Volenti non fit injuria* has been heretofore abundantly discussed.[4] It may be now generally stated that while a prosecutor cannot maintain larceny for goods taken from him with his consent,[5] and that while it is incumbent on the prosecutor to prove, at least inferentially, want of consent,[6] yet there are two important qualifications with which these positions are to be received. In the first place, his giving his goods to a servant, porter, messenger, or other agent having bare charge, does not amount to a consent on his part that such agent should dispose of such goods.[7] Secondly, his consent to a bailee taking *possession* of such goods, if such consent was obtained from him by fraud, does not avail to protect such bailee if the latter undertake to convert the *property* in the same to his own use.[8] And consent to pass property from one to another in

[1] State *v.* Copeland, 86 N. C. 691. See Dresch *v.* State, 14 Tex. Ap. 175; Krutson *v.* State, 14 Tex. Ap. 570; Deering *v.* State, Ibid. 570; McAfee *v.* State, Ibid. 668; to the effect that it is not larceny to buy goods to which the purchaser knew the vendor had no title, there being in such case no trespass.

[2] State *v.* Fenn, 41 Conn. 590; Johnson *v.* Com., 24 Grat. 555. See R. *v.* Bailey, L. R. 1 C. C. 349; McDaniel *v.* State, 8 S. & M. 401. See *infra*, § 923. It has been held in North Carolina that some clandestinity is essential. State *v.* Ledford, 67 N. C. 60; State *v.* Deal, 64 Ibid. 290. But see State *v.* Fisher, 70 Ibid. 78; State *v.* Martin, 12 Ired. 154; State *v.* Whyte, 2 Nott & McC. 174; State *v.* Rice, 83 N. C. 661.

[3] *Supra*, § 885.

[4] See *supra*, § 141.

[5] The rule in the text was applied in Moye *v.* State, 65 Ga. 754, to a case where money was taken from the pocket of a person partially intoxicated on a promise to return it. And see Love *v.* State, 15 Tex. Ap. 563.

[6] See R. *v.* Jones, C. & M. 611; Witt *v.* State, 9 Mo. 663; Long *v.* State, 11 Fla. 295; Anderson *v.* State, 14 Tex. Ap. 49; Dresch *v.* State, Ibid. 175; Wilson *v.* State, 45 Tex. 76. In Wisconsin the court has gone so far as to hold that when the owner of the goods could have been brought into court, to prove want of consent, there can be no conviction without his testimony. State *v.* Moon, 41 Wis. 684. But this cannot be sustained. See Whart. Cr. Ev. § 360. And it is no defence that the party plundered was at the time asleep. Hall *v.* People, 39 Mich. 717. See Moy *v.* State, 65 Ga. 764.

[7] *Infra*, §§ 956–61.

[8] *Infra*, § 964.

this sense must be the concurrence of two contracting minds as to the same exact act.[1] Thus A. may apply to B. for C.'s goods in B.'s possession; and B., deceived by A., may consent to give these goods to A., supposing A. to be C. Yet notwithstanding this consent, A. is indictable for larceny if he convert these goods; because B. never consented to give the *property* in them to A. His intention was to give this property to C.[2] The same rule applies when a donee or vendee intentionally takes the wrong goods.[3] There is, in the latter case, no concurrence of minds as to the identity of the thing to be transferred,[4] and there being no such concurrence, there is no transfer of property of any kind.[5] This is the case, for instance, where a creditor takes up and appropriates a hundred dollar bill handed him in mistake for a ten dollar bill.[6] An apparent consent, also, produced by threats, works no transfer.[7] But if there be a free consent (no matter how fraudulenly obtained), both as to the taker and to the thing taken, this is a defence to larceny.[8]

Consent cannot be given by unauthorized agent.

§ 916. A difficult question arises, when money or goods are feloniously taken from an agent with his consent, as to whether such agent has authority to bind his principal by such consent. It has been held that the cashier of a bank has such power committed to him by the bank, and hence that a person fraudulently receiving money from him on a forged cheque cannot be convicted of larceny.[9] But, said Blackburn, J., in the latter case, if "the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession the offence will be larceny." And so it was held larceny to fraudulently, *animo furandi*, take from a

[1] *Infra*, § 974. Hence, where the consent of a tobacconist was that matches might be taken to light cigars, this did not prevent the taking of a box of matches from being larceny. Mitchum *v.* State, 45 Ala. 29.

[2] See, as to false personation, *supra*, § 888.

[3] Peck *v.* State, 9 Tex. Ap. 70.

[4] See *infra*, § 974; Whart. on Cont. §§ 4 *et seq.*

[5] Sir J. F. Stephen gives as an illustration of this the opinion of eight judges in R. *v.* Middleton, L. R. 2 C. C. 38, that where A. gives a cabman a sovereign for a shilling, and the cabman, seeing that it is a sovereign, keeps it, this is larceny. Benj. on Sales, 2d Am. ed. 373; Pollock on Cont. 407.

[6] State *v.* Williamson, 1 Houst. C. C. 155. *Infra*, § 974.

[7] R. *v.* Lovell, L. R. 8 Q. B. D. 185; 44 L. T. N. S. 319; cited *infra*, § 971. See *supra*, § 891; *infra*, §§ 971, 976.

[8] *Supra*, § 888; *infra*, §§ 965, 971, 972, 1130. Whart. on Cont. §§ 171–211.

[9] R. *v.* Prince, L. R. 1 C. C. 150; 11 Cox C. C. 193. *Infra*, § 966.

post-office clerk money he had no authority to pay.[1] And no consent by an unauthorized agent will protect the thief from the charge of larceny.[2] Authority in such cases, however, may be inferred from an implied recognition by the principal of agency, as well as from express delegation.[3]

§ 917. It is no defence that the felony was induced by the artifice of the owner, when that artifice was exercised for the purpose of entrapping the thief.[4] Thus, in a leading case, overtures

[1] R. *v.* Middleton, 12 Cox C. C. 260; L. R. 2 C. C. 38.

"In this case" (R. *v.* Middleton), said Bovill, C. J., "the prisoner had received a warrant or authority from the postmaster-general entitling him to repayment of 10*s.* (being part of a sum of 11*s.* which he had deposited) from the post-office at Notting-hill, and a letter of advice to the same effect was sent by the postmaster-general to that post-office, authorizing the payment of the 10*s.* to the prisoner. Under these circumstances we are of opinion that neither the clerk to the postmistress, nor the postmistress personally, had any power or authority to part with the five-pound note, three sovereigns, the half-sovereign, and silver and copper, amounting to £8 16*s.* 10*d.*, which the clerk placed upon the counter, and which was taken up by the prisoner. In this view the present case appears to be undistinguishable from other cases where obtaining articles *animo furandi* from the master of a post-office, though he had intentionally delivered them over to the prisoner, has been held to be larceny, on the principle that the postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail-bags by pretending to be the mail-guard, as in Reg. *v.* Pearce (2 East P. C. 603); the obtaining a watch from the postmaster by pretending to be the person for whom it was intended, as in Reg. *v.* Kay (D. & B. 231; 7 Cox C. C. 298, where Reg. *v.* Pearce was relied upon in the judgment of the court); the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were addressed, as in Jones's Case (1 Den. 188), and in Reg. *v.* Gillings (1 F. & F. 36), were all held to be larceny. The same principle has been acted upon in other cases where the person having merely the possession of goods, without any power to part with the property in them, has delivered them to the prisoner, who has obtained them *animo furandi*; for instance, such as obtaining a parcel from a carrier's servant by pretending to be the person to whom it was directed, as in Reg. *v.* Longstreeth (1 Mood. C. C. 137), or obtaining goods through the misdelivery of them by a carman's servant, through mistake, to a wrong person, who appropriated them *animo furandi*, as in Reg. *v.* Little (10 Cox C. C. 559), were in like manner held to amount to larceny." See *supra*, § 888.

[2] R. *v.* Longstreeth, 1 Mood. C. C. 137; R. *v.* Hornby, 1 C. & K. 305; Hite *v.* State, 9 Yerg. 198.

[3] Ibid.; R. *v.* Harvey, 9 C. & P. 353; R. *v.* Sheppard, Ibid. 121; Kemp *v.* State, 11 Humph. 520.

[4] McAdam *v.* State, 8 Lea, 456; Pigg *v.* State, 43 Tex. 108. *Supra*, §§ 149, 231 *a*.

were made by a person to the servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and the former by the direction of the latter, some weeks after, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master, having previously marked some money, by his direction it was placed upon the counter by the servant, in order that it might be taken up by the party who had come for the purpose. It being so taken up, the offence was held larceny.[1] And this is the generally accepted law.[2] If the chattel is *given* to the thief, by the owner's action or consent, this is not larceny; but if the owner limits himself to putting facilities in the thief's way, and then the thief steals the chattel, the larceny is complete.[3]

No defence that goods were exposed by owner to theft.

§ 918. If a wife carry away and convert to her own use her husband's goods, it is no larceny at common law, as husband and wife are but one person.[4] And if a person merely assist a married woman who has not committed, or intended to commit, adultery, in carrying away the goods of her husband without the knowledge or consent of the latter, though with intent to deprive the latter of his property, he cannot be convicted of stealing the goods.[5]

Not larceny for wife to take away her husband's goods, or for person merely assisting her.

§ 919. It has been held, however, that it is a larceny for a man who elopes with another man's wife to take his goods, though with the consent and at the solicitation of the wife.[6] Even if no adultery has

[1] R. *v.* Williams, 1 C. & K. 195; R. *v.* Headge, 2 Leach C. C. 1033; R. & R. 160. *Supra*, § 149.

[2] 2 East P. C. 494; R. *v.* Egginton, 2 B. & P. 509; 2 Leach, 915; R. *v.* Donelly, R. & R. 310; R. *v.* Lawrence, 4 Cox C. C. 438; R. *v.* Lyons, C. & M. 217; R. *v.* Johnson, C. & M. 218; R. *v.* Bannen, 1 C. & K. 295; U. S. *v.* Foye, 1 Curt. C. C. 364.

[3] *Supra*, §§ 149, 231 *a*.

[4] 1 Hale, 514. See R. *v.* Avery, Bell, C. C. 150; R. *v.* Kenny, 13 Cox C. C. 398; Lamphier *v.* State, 70 Ind. 317. *Infra*, § 992. Under married woman's act, see *infra*, § 940.

[5] R. *v.* Avery, Bell C. C. 150; 8 Cox C. C. 184. See R. *v.* Tollett, C. & M. 112—Coleridge, J.; R. *v.* Glassie, 7 Cox C. C. 1.

[6] R. *v.* Thompson, 1 Eng. L. & Eq. 542; 2 Craw. & D. 491; R. *v.* Clark, 1 Mood. C. C. 376, n.; R. *v.* Featherstone, 26 Eng. L. & Eq. 570; 6 Cox C. C. 376; R. *v.* Berry, 8 Ibid. 117; R. *v.* Harrison, 12 Ibid. 19; R. *v.* Tollett, C. & M. 112; People *v.* Schuyler, 6 Cow. 572.

The prosecutor left his wife in the care of his house and property, and during his absence the prisoner, who had lodged for some time previously

actually been committed, but the goods of the husband are removed by the wife and the intended adulterer, with an intent that the wife should elope with him, this taking of the goods is in point of law a larceny.[1] It does not alter the case that the defendant was in the husband's employ, and acted under the wife's direction.[2] It is said, however, to be otherwise when it is the wife's wearing apparel only that is removed.[3] Where, however, the husband's goods are fraudulently taken by a third party, the wife in no way coöperating, such third party is principal in taking them and is guilty of larceny, if it appear that the taking was without the husband's consent, even though no adulterous intercourse with the wife was contemplated.[4]

But otherwise for person assisting adulterous wife.

in the house, took a great many boxes, etc., from the house, and left them at a house to which he had gone a day or two before with the prosecutor's wife, passing her for his own, and where he had hired lodgings. He soon afterwards brought her with him to the lodgings, where they lived together till he was apprehended, and the wife, who took a small basket with her, swore that all of the property she had herself taken or given to the prisoner to take, and the jury found that the prisoner stole the property jointly with the wife; it was held, on a case reserved, that this was larceny in the prisoner, for though the wife consented, it must be considered that it was done *invito domino*. R. *v.* Tolfree, 1 Mood. C. C. 243; R. *v.* Featherstone, 26 Eng. L. & Eq. 570; Dears. C. C. 369.

[1] R. *v.* Flatman, 42 L. T. N. S. 159, 14 Cox C. C. 396. See comments in London Law Times, Ap. 17, 1880, 437.

[2] R. *v.* Mutters, L. & C. 511; 10 Cox C. C. 50.

[3] R. *v.* Fitch, D. & B. C. C. 187.

So far as concerns the wife's right in such case to bind her husband, we may accept the strong expression of Lord Campbell, C. J., in R. *v.* Featherstone, Dears. C. C. 369, that when a woman becomes an adulteress, "she thereby determines her quality of wife; and her property in her husband's goods ceases." As is stated by the author of a learned note (1866), Note to Mutters's Case, L. & C. 519, the wife "thus assumes the position of a mere stranger, and can no longer invoke the protection of that quality which she has herself determined."

[4] *Supra*, § 918. Where the prisoner claims that the taking of the husband's goods was with the consent of the wife, and therefore not larcenous, it was ruled in New York, in 1871, that it is for the jury to say, from all the circumstances connected with the transaction—as the knowledge by the prisoner of the close vicinity and near return of the husband to the place of taking, and that the property was owned by the husband and not the wife—whether the prisoner received the property from the wife believing that she had any right or authority to deliver it. And it is not necessary to render such taking larcenous that the property should be appropriated to facilitate adulterous intercourse with the wife. People *v.* Cole, 43 N. Y. 508–9

But if the wife is principal in the taking and the third party merely abets her, then (at least at common law), there can be no conviction unless it be proved that the taking was in contemplation of adultery.[1]

In such case defendant must be connected with the taking.

§ 920. But an adulterer cannot be convicted of stealing the goods of the husband, brought by the wife alone to his lodgings, and placed by her in the room in which the adultery is afterwards committed, merely upon the evidence of their being found there; though it seems it would be otherwise if the goods could be traced in any way to his personal possession.[2] In such case, however, there may be a conviction for receiving stolen goods.[3]

Larceny in a man to steal his own goods from bailee to charge bailee.

§ 921. Larceny may be committed by the owner of goods feloniously taking them from the hands of a bailee, when the taking them has the effect of charging the bailee.[4] Thus where thirty bales of nux vomica, which pays no duty on exportation, but a large duty if intended for home consumption, were deposited by A. with B., who gave the usual bond to the custom-house, and were sent by B., under the care of C., to be shipped on board a foreign vessel for exportation, and A., by collusion with C., took the nux vomica from the bales, substituted cinders for it, and shipped the bales on board the vessel, this was held, by a majority of the judges, to be larceny, because the taking rendered B. chargeable to the custom-house, and liable to a suit upon his bond.[5] The rule has been still more extended in New York, where it has been said that larceny may be committed by a man stealing his own property, wherever the intent is to charge another with the value. Possession, however, in

(Grover, J.); and see R. *v.* Berry, Bell C. C. 95; 8 Cox C. C. 117. It is enough if the defendant knew that the husband did not consent to the alienation of the goods. State *v.* Jernagan, N. C. Term R. 44; Kemp *v.* State, 11 Humph. 320. *Supra*, § 149; so, also, R. *v.* Flatman, 14 Cox C. C. 396, 42 L. T. N. S. 159.

[1] R. *v.* Avery, Bell C. C. 150; 8 Cox C. C. 184.

[2] R. *v.* Rosenberg, 1 C. & K. 233; 1 Cox C. C. 21, per Lord Denman, C. J., Parke, B.; and see to same effect R. *v.* Taylor, 12 Cox C. C. 627.

[3] R. *v.* Deer, 9 Cox C. C. 225; Leigh & C. 240.

[4] 2 East P. C. 654; R. *v.* Bramley, R. & R. 478; Com. *v.* Tobin, 2 Brews. 570; Kirksey *v.* Fike, 29 Ala. 206; People *v.* Thompson, 34 Cal. 671.

[5] R. *v.* Wilkinson, R. & R. 470.

such case must be in the bailee.[1] There must, also, be in such case, in order to support a conviction, a felonious design.[2]

Joint tenant or tenant in common of chattel cannot steal chattel unless in hands of bailee.

§ 922. Where there are joint tenants or tenants in common of a personal chattel, and one of them carries away and disposes of it, this is no larceny;[3] there is, in fact, no taking, for he is already in possession; it is merely the subject of an action of account, or bill in equity. But if he were to take it out of the possession of a person in whose hands it is for safe custody, and the effect of the taking would be to charge the bailee, it would be otherwise.[4] And when joint ownership terminates, it is larceny for one ceasing to have an interest to steal from what was once the common property.[5]

Distance of moving immaterial.

§ 923. The taking of another's goods out of the place where they were put, though the taker be detected before they are actually carried away, is larceny.[6] To taking it is essential that the thing should be moved from the par-

[1] People *v.* Palmer, 10 Wend. 165; People *v.* Wiley, 3 Hill, 194; S. P., People *v.* Thompson, 34 Cal. 671.

The prisoner assigned his goods to trustees for the benefit of his creditors; but before the trustees had taken possession, and while the prisoner remained in possession of them, he removed the goods, intending to deprive his creditors of them. The jury found that the goods were not in his custody as agent of the trustees. It was held that he was not guilty of larceny. R. *v.* Pratt, 26 Eng. L. & Eq. 574; Dears. C. C. 360; 6 Cox C. C. 373.

[2] Adams *v.* State, 45 N. J. L. (16 Vroom) 448; *supra*, § 636.

[3] 1 Hale, 513; R. *v.* Burgess, Leigh & C. 299; R. *v.* Watts, 2 Den. C. C. 14; Com. *v.* Superintendent, 9 Phila. 581; State *v.* Kent, 22 Minn. 41; Carter *v.* State, 53 Ga. 326; Bell *v.* State, 7 Tex. Ap. 25.

[4] Where a member of a benefit society entered the room of the person with whom a box containing the funds of the society was deposited, and took and carried it away, this was held to be larceny, the bailee being answerable to the society for the funds. R. *v.* Bramley, R. & R. 478; People *v.* Thompson, 34 Cal. 671; Bell *v.* State, *ut supra*. See, for other cases, *infra*, § 935.

Where one got staves upon the land of another, upon contract to have half for getting them, it was held that while they remained on the land undivided the manufacturer was neither a tenant in common with the owner of the land, nor a bailee of the staves, and therefore he, or any other person with his connivance, might be guilty of larceny in taking them. State *v.* Jones, 2 Dev. & Bat. 544. See, also, State *v.* Copeland, 86 N. C. 691.

[5] Webb *v.* State, 87 N. C. 558; Bonham *v.* State, 65 Ala. 456.

[6] *Supra*, § 914; R. *v.* Walsh, 1 Moody C. C. 14; State *v.* Wilson, Coxe, 439; State *v.* Carr, 13 Vt. 571; Harrison *v.* People, 50 N. Y. 518; Eckels *v.* State, 20 Ohio St. 508; State *v.* Hen-

ticular portion of space which it occupied before the alleged taking, although the whole of it need not be moved from the whole of such space.[1] To take a thing from a *person* it is necessary that the taker should at some particular moment have adverse possession of the thing. But this independent, absolute control need endure only for an instant.[2]

derson, 66 N. C. 627; State *v.* Jones, 65 Ibid. 395; Garris *v.* State, 35 Ga. 247. But see Wolf *v.* State, 41 Ala. 412. *Cf.* Com. *v.* Luckis, 99 Mass. 431; State *v.* Jackson, 65 N. C. 305, and cases cited *supra*, § 867.

[1] R. *v.* Simpson, 6 Cox C. C. 422; Dears. 421; R. *v.* Coslet, 1 Leach, 236; Harrison *v.* People, 50 N. Y. 518; State *v.* Jones, 65 N. C. 395; State *v.* Craige, 89 Ibid. 475. In State *v.* Jones, 65 Ibid. 395, the mere upsetting, with intent to steal, of a barrel of turpentine, was held not to be larceny.

[2] State *v.* Chambers, 20 W. Va. 779. See Steph. Dig. C. L. art. 284. Sir J. F. Stephen gives the following illustrations:—

"(1) A. removes a parcel from one end of a wagon to another. This is a taking and carrying away. Coslet's Case, 1 Leach, 236."

In State *v.* Craige, 89 N. C. 475, it was held larceny to move from one garner to another (the defendant's) in a mill. See, also, Flynn *v.* State, 42 Tex. 301.

"(2) A. lifts a sword partly out of its scabbard. A. has taken and carried away the sword. R. *v.* Walsh, 2 Russ. Cr. 153 (from MS. of Bayley, J.). An odd point would arise if the sword and scabbard were merley twisted round in the place which they occupied before they were touched. I suppose this would not be an asportation.

"(3) A. causes a horse to be led out of a stable for him to mount. A. has led away the horse. R. *v.* Pitman, 2 C. & P. 423.

"(4) A., a postman, instead of delivering a letter in due course, or bringing it back in his pouch, which would be his duty if he could not deliver it, puts it in his pocket intending to steal it. This is a taking and carrying away. R. *v.* Poynton, L. & C. 247.

"(5) A. snatches a diamond earring from a lady's ear, tearing it out of the ear; it drops from his hand into her hair, and is found there by her afterwards. A. has taken and carried away the earring. Lapier's Case, 1 Leach, 320." *Supra*, §§ 849 *et seq.*

To these the following cases may be added:—

Where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket, this was considered a sufficient asportation to constitute larceny. R. *v.* Thompson, 1 Mood. C. C. 78; State *v.* Henderson, 66 N. C. 627; State *v.* Chambers, 22 W. Va. 779. And this was held to be the case where there was no positive evidence that the defendant's hand touched the pocket-book, but where the prosecutrix's pocket was torn, and the book fell to the ground. Com. *v.* Luckis, 99 Mass. 431. In another case the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through the buttonhole of the waistcoat, and kept there by a watch-

§ 924. The taking need not be by the *hand*. Thus, asportation was held to be complete when gas was subtracted from a main pipe by the fraudulent insertion of another pipe.[1] And so, no doubt, would it be held as to wine subtracted from a cask by means of a tube or pipe. In such cases the larceny, so far as concerns the continuous flow under a single impulse, is not divisible.[2]

Taking need not be by the hand

As will be hereafter seen, a taking by fraudulent legal process may be larceny.[3]

§ 925. *Animals*, merely by being killed, are not sufficiently carried away to sustain an indictment for larceny.[4] But where the defendants took away several sheep from a field, and left them, having first killed them, and skinned one of them under a tree in an adjoining field, it was held

Killing of animals not a sufficient carrying away.

key at the other end of the chain, turned so as to prevent the chain from slipping out. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain and watch-key out of the buttonhole, but the point of the key caught upon a button, and, the prisoner's hand being seized, the watch remained there suspended. It was held that the prisoner was guilty of stealing from the person, as the watch and chain were in his possession, and severed from the person of the prosecutor for the interval of time after the key was drawn out of the buttonhole, and before it caught the button. R. *v.* Simpson, 29 Eng. L. & Eq. 530; 6 Cox C. C. 422. But where the thief set a package on end, in the place where it lay, for the purpose of cutting open the side of it to get out the contents, and was detected before he had accomplished his purpose, this was held not to be larceny. R. *v.* Cherry, 2 East P. C. 556; and see State *v.* Jones, 65 N. C. 395; and the same conclusion was reached where the thief was not able to carry off the goods on account of their being attached by a string to the counter; Anon. 2 East P. C. 556; or to carry off a purse, on account of some keys attached to the strings of it being entangled in the owner's pocket. R. *v.* Wilkinson, 1 Hale, 598. See 2 Russ. on Cr. 155; Com. *v.* Luckis, 99 Mass. 431. The distinction between the latter cases and that above given, where the point of the watch-key caught in a buttonhole while the watch was being withdrawn, is, that in one case there was a moment when the goods were loose, but not so in the other. Taking, also, was held not to be proved where a man being compelled by fear to drop his goods, the thief fled before taking them up. *Supra*, § 914. The removal of a drawer containing money from a safe, leaving it outside of the safe, but taking it no further, is a sufficient asportation. State *v.* Green, 81 N. C. 560.

[1] R. *v.* White, Dears, 203; 3 C. & K. 363; Com. *v.* Shaw, 4 Allen, 308; R. *v.* Firth, cited *supra*, § 863; *infra*, § 931.

[2] *Infra*, § 931; *supra*, § 27.

[3] *Infra*, § 976.

[4] State *v.* Seagler, 1 Rich. 30; Wolf *v.* State, 41 Ala. 412; Ward *v.* State, 48 Ibid. 161; People *v.* Murphy, 47 Cal. 103.

that there was sufficient evidence of asportation,[1] though it would be otherwise if the animal were shot and skinned without being removed.[2] And any change of site enables an asportation to be presumed,[3] *e. g.*, moving and skinning the animal when dead with intent to appropriate the hide.[4]

Enticing or trapping animals not taking, etc., until seizure.

§ 926. To lead or even to entice by food an animal from its range is a "taking;"[5] but the larceny is not complete until the animal is in the thief's control;[6] nor is selling an animal larceny, unless the animal is in some way taken by the thief.[7] Nor has "trapping" been held larceny until the period when the animal trapped has been seized by the thief.[8] But the larceny is complete when the animal falls under the control of the thief.[9]

Party must be present at taking to be principal.

§ 927. In larceny a party cannot be convicted as a principal, unless he were actually or constructively present at the taking and carrying away of the goods. His previous consent to, or procurement of the caption and asportation, will not, at common law, make him a principal, nor will his subsequent reception of the thing stolen, or his aiding in concealing or disposing of it, have that effect.[10]

§ 928. When a larceny has been committed in one county, and the thief removes the stolen property into another county (*animo furandi*),[11] he is, in the eye of the law, guilty of the larceny, in

[1] State *v.* Carr, 13 Vt. 571.

[2] State *v.* Alexander, 74 N. C. 232. *Supra*, § 874.

[3] R. *v.* Williams, 1 Mood. C. C. 107; R. *v.* Clay, R. & R. 387; R. *v.* Hogan, 1 Craw. & D. 366; State *v.* Alexander, 74 N. C. 232. See R. *v.* Townley, L. R. 1 C. C. 315; Lundy *v.* State 60 Ga. 143.

That taking milk from a cow is larceny, see R. *v.* Martin, 1 Leach, 205, cited *supra*, § 871.

[4] McPhail *v.* State, 9 Tex. Ap. 164. *Supra*, § 874.

[5] State *v.* Jones, 65 N. C. 395; State *v.* Wisdom, 8 Port. 511; Money *v.* State, 8 Ala. 328; State *v.* Gazell, 30 Mo. 92. See Eckels *v.* State, 20 Ohio St. 508; Baldwin *v.* People, 2 Ill. 304.

[6] Edmonds *v.* State, 70 Ala. 8; Croom *v.* State, 71 Ibid. 14; Hite *v.* State, 9 Yerg. 198.

[7] Hardeman *v.* State, 12 Tex. Ap. 207.

[8] State *v.* Wisdom, 8 Porter, 511. See Kemp *v.* State, 11 Humph. 320; State *v.* Martin, 12 Ired. 157; Baldwin *v.* People, 2 Ill. 304.

[9] Ibid. State *v.* Whyte, 2 Nott & McC. 174; State *v.* Brown, 3 Strob. 508; State *v.* Gazell, 30 Mo. 92; People *v.* Smith, 15 Cal. 409.

[10] *Supra*, §§ 205 *et seq.*; R. *v.* Samways, 26 Eng. L. & Eq. 576; Dears. C. C. 371; State *v.* Hardin, 2 Dev. & Bat. 407.

[11] R. *v.* Simmonds, 1 Mood. C. C. 408.

every county into which the goods may thus have been carried.[1] The rule applies as well to property which is made the subject of larceny by statute, as to property which is the subject of larceny by the common law.[2]

A thief carrying goods from county to county may be convicted in either county.

The rule, however, does not apply to cases where there has been a transmutation of the property on its transit; so that an indictment describing it as it was when originally stolen would cease to describe it as it was when it arrived at the county where the trial takes place;[3] nor to cases where after a joint larceny there has been a severance before asportation;[4] nor to statutory modifications of larceny,[5] as stealing from dwelling-houses.

[1] *Supra*, § 291; R. *v.* Parkin, 1 Mood. C. C. 45; 1 Hale, 507; 1 Hawk. P. C. c. 33, s. 52; 3 Inst. 113; State *v.* Mills, 17 Me. 211; State *v.* Somerville, 21 Ibid. 14; State *v.* Underwood, 49 Ibid. 181; Com. *v.* Dewitt, 10 Mass. 154; Haskins *v.* People, 16 N. Y. 344; People *v.* Burk, 11 Wend. 129; Com. *v.* Cousins, 2 Leigh, 708; Morrissey *v.* People, 11 Mich. 329; State *v.* Margerum, 9 Bax. 362; Johnson *v.* State, 47 Miss. 671; State *v.* Brown, 8 Nev. 208; People *v.* Mellon, 40 Cal. 648. See Moore *v.* State, 55 Miss. 432; Lucas *v.* State, 62 Ala. 26.

[2] Com. *v.* Rand, 7 Met. 475; Com. *v.* Simpson, 9 Ibid. 138. As to Texas rule, see Roth *v.* State, 10 Tex. Ap. 27; Dixon *v.* State, 15 Ibid. 480.

A. took the horse, wagon, and harness of B. from his stable by a trespass, and drove to a neighboring town. While on the way, he changed the horse for another, which was in a pasture by the roadside. He then drove to another county, and there sold the second horse. It was held, that although when he took the property he intended to return it, he might nevertheless be convicted of larceny in the county where he committed the trespass. Com. *v.* White, 11 Cush. 483.

[3] R. *v.* Halloway, 1 C. & P. 127; R. *v.* Edwards, R. & R. 497. As where turkeys are stolen alive in one county and there killed and carried dead into another county. Ibid. Or where a brass furnace has been stolen in one county and there broken up and the pieces carried into another county. R. *v.* Halloway, 1 C. & P. 127. In such case the indictment must describe the chattel as it was in the county where the indictment was found. Com. *v.* Beaman, 8 Gray, 497.

[4] R. *v.* Burnett, 2 Russ. on Cr. 174. But if there be a joint larceny in one county and one of the thieves carry the goods into the other county, and they afterwards all concur in securing the goods in the latter county, they may be jointly indicted in that county. R. *v.* County, Ibid. 329.

When there is one continuing transaction, though there may be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first or intermediate act. State *v.* Trexler, 2 Car. L. R. 90; R. *v.* Firth, L. R. 1 C. C. 172. *Infra*, § 931.

[5] R. *v.* Thompson, 2 Russ. on Cr. 174; R. *v.* Millar, 7 C. & P. 665.

§ 929. One aiding or abetting in a larceny in one county, and afterward concerned in the possession and disposal of the stolen property in another county, though the goods were removed to the latter county without his agency, may be convicted of larceny in the latter county.[1] But for a conviction it is essential that he should in some way have assented to the removal.[2] And he must in some way have consented to the original taking, and have removed the property with felonious intent.[3]

All assenting to asportation are principals.

§ 930. Asportation as between independent States has been already considered.[4] It may be here added that by the Revised Statutes of New York it is provided that when larceny is committed in another State, and the stolen property brought into that State, and there converted to the taker's use, the offence may be punished to the same effect as if the original larceny had been there committed.[5]

Conflict of opinion as to whether when goods are stolen in one State the thief may be convicted in another State where the goods are brought.

Similar statutes exist in Alabama,[6] and in Texas.[7]

In New York, however, before the passage of the statute, such was not the law. Where a man stole a horse in Vermont, and afterward carried it into New York, the Supreme Court of New York held that when the original taking was out of the jurisdiction of the State the offence does not continue and accompany the thing stolen, as it does in the case where a thing is stolen in one county and the thief is found with the property in another county.[8] Such is the rule in Pennsylvania, as declared by a majority of the court after elaborate argument, it

[1] Com. v. Dewitt, 10 Mass. 154; Tippins v. State, 14 Ga. 422. See *supra*, § 291.

[2] R. v. Simmonds, 1 Mood. C. C. 408.

[3] Ibid. Welsh v. State, 3 Tex. Ap. 443; Scales v. State, 7 Ibid. 361; Cohen v. State, Ibid. 188; State v. Johnson, 38 Ark. 568.

[4] *Supra*, § 291.

[5] Rev. Stat. 694. See, as to venue, Whart. Crim. Ev. § 111. *Supra*, § 291.

[6] State v. Seay, 3 Stewart, 123; Alsey v. State, 39 Ala. 664.

[7] State v. Morales, 21 Tex. 298.

[8] People v. Gardner, 2 Johns. 477; People v. Schenck, Ibid. 479. In New York, in a case under the Revised Statutes, the principle ruled in People v. Gardner, as cited above, was reëxamined, and doubts were thrown out as to its original correctness; and Savage, C. J., stated that he had drawn the bill in People v. Gardner, and had always been convinced that the offence existed at common law. People v. Burk, 11 Wend. 129. See *supra*, § 291.

being held that in such a case the defendant must be acquitted, and be detained to wait a requisition from the State where the larceny was committed.[1] And such is the law in New Jersey, North Carolina, Georgia, Indiana, Nebraska, Nevada, and Tennessee.[2] In Massachusetts the opposite doctrine has been held, and convictions for larcenies in other States, when the property stolen has been brought within her limits, have repeatedly taken place.[3] The Connecticut Court of Errors, in an opinion which received the unanimous assent of the judges, asserted at an early period the same doctrine,[4] and in this conclusion other courts have joined.[5] That such convictions are good by statute, if not by common law, has been held in North Carolina,[6] and Maryland, though not without much argument,[7] in Mississippi,[8] in Kentucky,[9] in Ohio,[10] in Iowa,[11] in Oregon,[12] in Michigan.[13] and in SouthCarolina.[14] In some jurisdictions the courts have gone further, and, transcending the common law limits, have held that when goods were stolen in Canada and brought into one of the United States, the latter has jurisdiction.[15] But this view is strongly contested.[16]

In England, if a larceny is committed out of the kingdom, though

[1] Simmons v. Com., 5 Binn. 618.

[2] State v. Le Blanche, 2 Vroom (N. J.), 82; State v. Brown, 1 Hayw. 100; Lee v. State, 64 Ga. 203; Beal v. State, 15 Ind. 378; People v. Loughridge, 1 Neb. 11; State v. Newman, 9 Nev. 48; Simpson v. State, 4 Humph. 456. But see Lovelace v. State, 12 Lea, 721, where it was held that fraudulent conversion of a horse in one State will sustain a conviction, though the horse was stolen in another State. *Supra*, § 291.

[3] Com. v. Cullins, 1 Mass. 116; Com. v. Andrews, 2 Ibid. 14; Com. v. Uprichard, 3 Gray, 434; Com. v. White, 123 Mass. 430. See Com. v. Holder, 9 Gray, 7, where it is said that the rule applies to States "which derived their jurisprudence from the English common law." See § 296; Whart. Crim. Ev. § 111.

[4] State v. Ellis, 3 Conn. 185; S. P., State v. Cummings, 33 Conn. 260. See fully *supra*, § 291.

[5] See cases cited *supra*, § 291.

[6] State v. Brown, 1 Hayw. 100.

[7] Cummings v. State, 1 H. & J. 340. In Worthington v. State, 58 Md. 403, it was held that taking the goods into another State was a new larceny in the latter State.

[8] Watson v. State, 36 Miss. 593.

[9] Ferrill v. Com., 1 Duvall, 153.

[10] Hamilton v. State, 11 Ohio, 435.

[11] State v. Bennett, 14 Iowa, 479.

[12] State v. Johnson, 2 Oreg. 115.

[13] People v. Williams, 24 Mich. 156. See *supra*, § 291.

[14] State v. Hill, 19 S. C. 435.

[15] State v. Bartlett, 11 Vt. 650; State v. Underwood, 49 Me. 181; State v. Williams, 35 Mo. 229.

[16] Com. v. Uprichard, 3 Gray, 440; Stanley v. State, 24 Ohio St. 166.

within the king's dominions (*e. g.*, in Jersey), bringing the things stolen into England will not make it larceny.[1]

Indictments for stealing goods thus asported, when the indictment is held by the court to be based exclusively on statute, in departure from the common law, must, it is said, aver specially the facts of asportation, so as to bring the case within the statute.[2]

When several things are taken by one continuous act this is a single larceny.

§ 931. When two or more articles are taken successively, it is to be considered whether such taking is continuous, so as to form part of one transaction, to be indictable as such. And the answer is, if the transaction is set in motion by a single impulse, and operated upon by a single unintermittent force, it forms a continuous act, and hence must be treated as one larceny, not susceptible of being broken up in a series of offences, no matter how long a time the act may occupy.[3] So has it been decided in reference to gas feloniously drawn, during a long space of time, from a main pipe, by means of a fraudulent pipe;[4] and so is it where a series of articles are removed a few minutes apart, by one impulse, in execution of a general fraudulent plan.[5] And when a particular shaft of coal is fraudulently opened and quarried, in pursuance of a continuous design, by a series of innocent agents, for several years, the transaction, if there be one tapping or orifice of the vein, is single, and to be indicted as such.[6] Such is also the rule of the modern Roman law with regard to the subtraction of wine from vats by a tube fraudulently applied. No matter how long the suction lasts, or how much wine is removed, the transaction is single as long as it rests on the original attachment of the tube.

If this reasoning be correct, there can be, when there is such continuousness, but a single prosecution; and one prosecution for a

[1] R. *v.* Prowes, 1 Mood. C. C. 349; S. P., R. *v.* Madge, 9 C. & P. 29; R. *v.* Debruiel, 11 Cox C. C. 207. See generally *supra*, § 291; Whart. Crim. Ev. § 111.

[2] Alsey *v.* State, 39 Ala. 665; State *v.* Morales, 21 Tex. 298. But it is otherwise when the offence is held to be such at common law. Haskins *v.* People, 16 N. Y. 344.

[3] See on this topic Whart. Cr. Pr. & Pl. § 470, where the question is discussed in detail; and as to divisibility generally, see *supra*, § 27; State *v.* Martin, 82 N. C. 672; Record *v.* R. R. 15 Nev. 167.

[4] R. *v.* Firth, L. R. 1 C. C. 172; 11 Cox C. C. 234. *Supra*, §§ 863, 924.

[5] R. *v.* Jones, 4 C. & P. 217; R. *v.* Birdseye, Ibid. 386. *Supra*, § 27.

[6] R. *v.* Bleasdale, 2 C. & K. 765.

section or part of the things taken absorbs the offence. If the prosecutor elect to take such a section, he cannot split up the transaction into a series of cases commensurate in number with the particles of the mass taken. Such is the reasoning by which eminent German jurists have reached the conclusion that for a continuous offence there can be but a single prosecution, unless some extrinsic force necessitates the breaking of the offence into fragments.[1] The same view is practically accepted in England and the United States.[2] But if broken up, as is stated, by extrinsic action, then separate indictments are necessary.[3] This perhaps occurs when articles of different owners are taken by a continuous act;[4] and certainly when the continuous act spreads over two or more distinct jurisdictions,[5] or is arrested by the intervention of other occupations.[6]

IV. OWNERSHIP.

§ 932. To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be either the absolute or special property of the alleged owner,[7] provided that such owner be not

[1] See Bar, Priv. Int. § 557; Geyer, Holtz. Ency. *in loco*. *Supra*, § 27.

[2] R. *v.* Brettel, C. & M. 609; and see, also, R. *v.* Knight, L. & C. 378; 9 Cox C. C. 437; State *v.* Nelson, 29 Me. 329; State *v.* Cameron, 40 Vt. 555; Com. *v.* O'Connel, 12 Allen, 451; Lorton *v.* State, 7 Mo. 55; State *v.* Morphin, 37 Ibid. 373; State *v.* Williams, 10 Humph. 101; Fisher *v.* Com. 1 Bush, 211; Jackson *v.* State, 14 Ind. 327; State *v.* Johnson, 3 Hill (S. C.), 1. See, however, remarks in Com. *v.* Butterick, 100 Mass. 9, showing that in Massachusetts there may be separate prosecutions for each article—a doctrine which cannot be reconciled with the reasoning above given. Whart. Cr. Pl. & Pr. § 470; Whart. Crim. Ev. § 589.

[3] As to divisibility of offences see *supra*, § 27.

[4] See *infra*, § 948; Whart. Cr. Pl. & Pr. § 470.

[5] *Supra*, § 291. See, for authorities on this point, Whart Confl. of Laws, § 931; Moore *v.* Illinois, 14 How. 13.

[6] R. *v.* Birdseye, 4 C. & P. 386; where it was held that where there was an intermission of two minutes between the taking of two articles, this was one transaction; but that it was otherwise when there is an intermission of half an hour; and see Whart. Cr. Ev. § 589.

[7] That either absolute or special ownership will sustain indictment, but that one of the two is necessary; see 2 East P. C. 652; State *v.* Somerville, 21 Me. 14; State *v.* Pettis, 63 Ibid. 124; State *v.* Furlong, 19 Ibid. 225; Com. *v.* Morse, 14 Mass. 217; Com. *v.* Manley, 12 Pick. 173; Com. *v.* Sullivan, 104 Mass. 552; People *v.* McDonald, 43 N. Y. 61; Lyon *v.* State, 45 N. J. L. 272; State *v.* Jackson, 1 Houst. C. C. 561; State *v.* Chambers, 22 W. Va. 779; State *v.* Clapper, 59 Iowa, 279; State *v.* McIntyre, 59 Ibid. 267; State *v.*

Either absolute or special

technically the defendant.[1] If the defendant had even the right to mix his money with that fraudulently appro-

Hardison, 75 N. C. 203; State *v.* Everage, 33 La. An. 120; Langford *v.* State, 8 Tex. 115; Blackburn *v.* State, 44 Ibid. 457; Moseley *v.* State, 42 Ibid. 78; Jones *v.* Com., 17 Grat. 563, and cases cited *infra*, § 938. As to the manner of setting out the names of owners see Whart. Pl. & Pr. §§ 109 *et seq.* As to variance in names see Whart. Crim. Ev. §§ 94 *et seq.*

On the subject of ownership we have the following from Sir J. F. Stephen (Dig. C. L. art. 281):—

"A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner, to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

"A movable thing is in the possession of the husband of any woman, or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure. The word 'servant,' here includes any person acting as a servant for any particular purpose or occasion.

"The word 'custody' means such a relation towards the thing as would constitute possession if the person having custody had it on his own account.

"If a servant receives anything for his master from a third person, not being a fellow-servant, he has the possession, as distinguished from the custody of it, until he has put it into his master's possession, by putting it into a place or thing belonging to his master, or by some other act of the same sort, whether the servant himself has or has not the custody of that place or thing.

"If a servant receives anything belonging to his master from a fellow-servant who has received it from their common master, such thing continues to be in the possession of the master, unless the servant who delivered it delivered it with the intention to pass the property therein to the servant to whom it is delivered, having authority to do so from the master.

"If a servant receives anything belonging to his master from a fellow-servant who has received it on the master's account, and has done no act to put it into the master's possession, it is in the possession of the servant who so receives it, and not in his custody merely.

"*Illustrations.*—(1) A., the master of a house, gives a dinner party. The plate and other things on the table are in his possession, though from time to time they are in the custody of his guests or servants. Founded on 1 Hale P. C. 506.

"(2) A. assigns the goods in his house to trustees for the benefit of his creditors. The trustees leave him undisturbed and do not in any way interfere with the goods. A., and not the trustee, is in the possession of the goods. R. *v.* Pratt, Dears. 360.

"(3) A. produces a receipt stamp, and gets B. to write a receipt on it in A.'s presence, as for money paid by A. to B. The stamp is in A.'s not B.'s, possession. R. *v.* John Smith, 2 Den. 449.

"(4) A. buys a bureau from B. at

[1] State *v.* McCoy, 89 N. C. 466; People *v.* MacKinley, 9 Cal. 250.

priated by him, the money cannot be laid as the property of another person.[1] But it is not necessary that the alleged owner should be legally entitled to hold the property. It is enough if he in any sense have title.[2]

will sustain an indictment.

§ 932 *a*. The proper practice is to insert counts charging the ownership in as many ways as there are parties interested; but, as a general rule, it will be sufficient if either general or special ownership be alleged. Hence, when bailed goods are stolen by a stranger, the ownership may be laid either in bailor or bailee, or in principal or agent.[3]

Counts may vary property.

a sale, with money in a secret drawer, of the existence of which neither A. nor B. is aware. The money is not in B.'s possession (though the bureau which contains it is) because B. cannot be presumed to intend to act as the owner of it when he discovers it. Cartwright *v.* Green, 8 Ves. 405; Merry *v.* Green, 7 M. & W. 623.

"(5) A. is clerk to B., a banker; money is paid to A. on B.'s account; A. keeps it for a short time, and then puts it into the till. The money is in A.'s possession till it is put into the till, when it passes into B.'s possession, though A. may have the custody of it. Bazeley's Case, 2 Leach, 835. This case led to the first act against embezzlement by clerks and servants. No opinion was publicly delivered in it, but the judges seem to have considered that the act was not felony. Several similar cases are quoted in the argument." (If the taking the money by A. was not larceny, this was because it had never come into B.'s hands. *Infra*, § 943.)

"(6) B. leaves a watch with its maker to be regulated. A. writes to the maker to send the watch to B. at a certain post-office. A. then goes to the post-office, and, pretending to be B., gets the watch. As soon as the watch reaches the post-office, addressed to B., it is in B.'s possession, as the postmaster, as regards the letter and watch, is the servant of the owner. R. *v.* Kay, D. & B. 236. See Bramwell, B.'s, remarks on this case in R. *v.* Middleton, L. R. 2 C. C. R. 58.

"(7) B., being prevented by a crowd from getting near the pay-place at a railway station, hands a sovereign to A., who is close to it, to pay for her ticket, and give her the change. The sovereign is in B.'s possession, but in A.'s custody. R. *v.* Thompson, L. & C. 225." S. C., cited *infra*, §§ 956, 961, 963. Compare *infra*, § 1009.

[1] *Infra*, § 1033; *supra*, § 922.

[2] *Infra*, §§ 945, 1025, 1035, 1038.

[3] *Infra*, §§ 938, 978.

F., the cashier of a bank, as such had received a sealed package containing bank-notes. The package was in a bag in his hands. He, while on his way to his bank, went into an eating saloon, placed the bag on a hat-rack, with his hat, and then sat down at a table, a few feet from the hat-rack, and in such a direction from it as to leave the bag behind him and out of his sight and reach while sitting at the table. While there, the bag was stolen, but was not missed until F. arose from the table and went to get it, in leaving the saloon, some ten minutes after the defendant had gone from the saloon. It was held, that there was evidence for the jury to find the possession to be in

§ 933. Ownership may be inferentially proved. It is not necessary, however, to prove by the person whose property is charged to have been stolen that the property belonged to him; the testimony of other persons who know the fact is sufficient.[1] And such ownership may be inferred from the circumstances of the case.[2]

Ownership may be inferentially proved.

§ 934. The property of the stolen goods must be averred to be in the right owner, general or special, if known, or in some person or persons unknown.[3] If the owner be misnamed; if the name thus stated be not either his real name or the name by which he is usually known; or if it appear that the owner of the goods is another and different person from the person named as such in the indictment, the variance will be fatal, and the defendant, at common law, must be acquitted.[4] What is a variance at common law is fully discussed in another work.[5]

Variance in ownership is fatal.

§ 935. Joint tenants, or tenants in common, as we have seen, have not generally an ownership as against each other upon which an indictment for larceny can be sustained.[6] And the property of such owners must at common law be laid jointly, and the names of all the owners correctly given.[7] It is otherwise when one of the partners or joint

Ownership of joint tenants and tenants in common must be jointly laid.

F., so as to sustain the allegation of property in him. Com. *v.* Butts, 124 Mass. 449.

[1] 1 Archbold's C. P. 9th ed. 167; Lowrence *v.* State, 4 Yerg. 145. See State *v.* Morey, 2 Wis. 494; Stewart *v.* State, 9 Tex. Ap. 321. *Supra*, §§ 914 *et seq.*

[2] Whart. Crim. Ev. §§ 1-20; State *v.* Stanley, 48 Iowa, 221.

Where the alleged owner of goods averred to have been stolen, though he had lost such property, would not swear to it, nor that he had not sold the same to some other person than the defendant, this is not sufficient proof of ownership of the alleged stolen property. State *v.* Furlong, 19 Me. 225. See King *v.* State, 44 Ind. 285.

[3] Whart. Cr. Pl. & Pr. § 111; Whart. Crim. Ev. § 97. As to "unknown" see *infra*, § 949; Com. *v.* Morse, 14 Mass. 217; Com. *v.* Manley, 12 Pick. 173. That an averment of joint ownership will not be sustained by proof of ownership in severalty, see State *v.* Ellison, 58 N. H. 325.

[4] Whart. Crim. Ev. § 94; Lawrence *v.* State, 4 Yerg. 145.

[5] Whart. Cr. Ev. §§ 91 *et seq.*

[6] 2 Russ. on Cr. 6th Am. ed. 86. *Supra*, § 922.

[7] State *v.* McCoy, 14 N. H. 364; Com. *v.* Trimmer, 1 Mass. 476; Com. *v.* O'Brien, 12 Allen, 183; State *v.* Owens, 10 Rich. 169; Palmer *v.* State, 41 Ala. 416; Widner *v.* State, 25 Ind. 234; State *v.* Cunningham, 21 Iowa, 433; People *v.* Bogart, 36 Cal. 245; Henry *v.* State, 45 Tex. 84. In most States this is remedied by statute. See Lasure *v.* State, 19 Oh. St. 44.

owners has a special property, in which case the goods may be laid as his.[1]

§ 936. It has been already stated[2] that a man cannot be convicted of stealing his own goods, but that one having the *property* in goods may be guilty of larceny in stealing them from one to whom (*e. g.*, a bailee) he has given them in custody as special possession.[3] In such case ownership must be laid in the bailee.[4] The owner of goods, also, is guilty of larceny when he clandestinely takes them from the possession of one who has in them a lawful lien.[5] And so, on the other hand, one having special property in the goods may be guilty of larceny by converting them, and thus depriving the owner of his property.[6] But should it appear that his object was, not to deprive the bailor of his property, but to injure other parties, the indictment cannot be sustained; and hence when A., who owns personal property seized by the sheriff, carries off such property with intent to defraud the attaching creditors, it is larceny, though it would be otherwise where no vested interest is prejudiced.[7] And in any case a felonious intent must be shown.[8]

General owner may be charged with stealing from special owner.

It is settled that theft may be committed by a member of a corporation to the prejudice of that corporation of a thing which is the property of the corporation.[9]

§ 937. An indictment for stealing grave-clothes or coffins must state them to be the goods and chattels of the executor or adminis-

[1] R. *v.* Burgess, 9 Cox C. C. 302; R. *v.* Webster, Ibid. 13. See *supra*, § 922.

[2] *Supra*, § 932; R. *v.* Wilkinson, R. & R. 470.

[3] 2 East P. C. 654; State *v.* Somerville, 21 Me. 586; Adams, *v.* State, 45 N. J. L. 448; State *v.* Quick, 10 Iowa, 451; People *v.* Stone, 16 Cal. 369; and *supra*, § 921.

[4] *Supra*, § 932; Palmer *v.* People, 10 Wend. 165; State *v.* McCoy, 89 N. C. 466; People *v.* Thompson, 34 Cal. 671; and see State *v.* Dewitt, 32 Mo. 571.

In these cases it was held that a man could be indicted for stealing his own goods when in the possession of a constable who had levied on them. *Supra*, § 921; *infra*, § 942. But see State *v.* Mazyck, 3 Rich. 291. In Bruley *v.* Rose, 57 Ind. 657, it was held larceny for a pledgor to steal from a pledgee.

[5] People *v.* Long, 50 Mich. 249.

[6] *Infra*, §§ 956 *et seq.*

[7] Com. *v.* Greene, 111 Mass. 392. Surrender by the attaching officer in such case is a question of fact. Com. *v.* Brigham, 123 Mass. 248.

[8] Adams *v.* State, 45 N. J. L. (16 Vroom) 448; *supra*, § 921.

[9] Ibid., citing Roscoe's Cr. Ev. 8th ed. 652.

trator ;[1] or if there be no will or no administration, it would seem that they may be laid to be the goods of the person who defrayed the expenses of the burial, or of the ordinary, if the shroud were not purchased with the money of the deceased. So, if a coffin be stolen, it may be described in the same manner; or if from length of time it be difficult to ascertain the personal representatives of the deceased, it may be laid as the property of a person unknown; but it cannot at common law be described as the property of the church-wardens of the parish from which it was stolen.[2]

Grave-clothes and coffins to be laid as property of executor.

§ 938. Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either,[3] and "every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not divested if the special owner parts with the possession under a mistake."[4] Thus, goods left at an inn,[5] or intrusted to a person for safe keeping,[6] or for sale,[7] or to a carrier to carry ;[8] cloth to a tailor to make into clothes; linen to a laundress to wash ;[9] and goods pawned for money, may

As against strangers property may be laid in either bailor or bailee.

[1] 2 Hale, 181 ; Haynes's Case, 12 Co. 113. *Supra*, § 863. *Infra*, § 950.

[2] Anon., 2 East P. C. 652.

[3] *Supra*, § 932; R. *v.* Remnant, R. & R. 136; 4 C. & P. 391; R. *v.* Vincent, 9 Eng. L. & Eq. 548; 3 C. & K. 246; 2 Den. C. C. 467; 5 Cox C. C. 537; R. *v.* Bird, 9 C. & P. 44; State *v.* Somerville, 21 Me. 586; State *v.* Grant, 22 Me. 171; Com. *v.* O'Hara, 10 Gray, 469; Com. *v.* McLaughlin, 103 Mass. 435; Com. *v.* Whitman, 121 Mass. 361; Com. *v.* Butts, 124 Mass. 449; People *v.* Bennett, 37 N. Y. 117; People *v.* McDonald, 43 N. Y. 61; Phelps *v.* People, 72 N. Y. 334; Huling *v.* State, 17 Ohio St. 583; Yates *v.* State, 10 Yerg. 549; Owen *v.* State, 6 Humph. 330; State *v.* Mullen, 30 Iowa, 203; State *v.* Stanley, 48 Ibid. 221; Mosely *v.* State, 42 Tex. 78; Langford *v.* State, 8 Ibid. 115; Skipworth *v.* State, 8 Tex. Ap. 135. But see State *v.* Washington, 15 Rich. 39; and *infra*, §§ 944, 1009; *supra*, § 932.

[4] Steph. Dig. C. L. art. 262; citing R. *v.* Vincent, 2 Den. C. C. 464; 5 Cox C. C. 537.

[5] R. *v.* Todd, 2 East P. C. 653.

[6] R. *v.* Taylor, 1 Leach, 395; Yates *v.* State, 10 Yerg. 549.

[7] People *v.* Smith, 1 Parker C. R. 329.

[8] R. *v.* Deakin, 2 East. P. C. 653. See R. *v.* Spears, 2 Leach, 825; 2 East P. C. 568. That in such cases goods may be laid as the property of the consignee, see Walker *v.* State, 9 Tex. Ap. 38.

[9] 1 Leach, 357, n.

be laid as the property either of the owner or of the person in whose custody they were at the time.[1]

Every person who has obtained by any means possession of any movable thing is deemed to be the special owner thereof, as against any person who cannot show a better title thereto.[2]

The bailee may be laid as owner even when the thing came into his actual possession and control fortuitously or by mistake.[3]

§ 939. If the person named as owner is merely servant to the real owner without any special trust, the defendant must be acquitted ;[4] for a mere servant has not a special property in the goods, the possession of the servant being the possession of the master.[5] The same distinction applies to a child left temporarily by his father in charge of his goods.[6] But it has been held that the property of goods under care of an express company may be laid in the driver of the coach from which they are taken.[7]

Property cannot be laid in servant or child.

§ 940. Should the property be laid in a married woman, the defendant must be acquitted, because in law the wife's goods are the

[1] 1 Hawk. P. C. c. 33, s. 47; Com. *v.* O'Hara, 10 Gray, 469. *Infra*, § 944.

It seems, however, that goods let with a ready furnished lodging must be described as the lodger's goods, and not as the original owner's. 2 Russ. on Cr. 6th Am. ed. 85.

[2] Stephen's Dig. C. L. art. 283, giving the following illustrations :—

"(1) A. finds a bezoar-stone in the street and shows it to B., a jeweller, to ascertain its value. B. keeps it. A. has a right to the stone as against B. Armory *v.* Delamirie, 1 Sm. L. C. 357.

"(2) A. steals B.'s watch. C. picks A.'s pocket of the watch. C. steals from A. Founded on 1 Hale P. C. 507."

[3] See People *v.* Phelps, 72 N. Y. 334.

A person who hires a pistol from the State has such a property therein that in an indictment for the larceny of it, it may well be alleged to be his property. Jones *v.* State, 13 Ala. 153.

Where leather has been delivered to a person to be manufactured into boots, which when made are to be delivered to the employer, the boots, when in the manufacturer's possession, may be laid as his. State *v.* Ayer, 3 Foster (N. H.), 391. See R. *v.* Mucklow, 1 Mood. C. C. 160.

As we have already seen (*supra*, § 922), when a tenant labors on shares on another's farm, the property of the entire crop remains in his employer until the shares are separated; and until then, the property must be laid in the employer. State *v.* Jones, 2 Dev. & Bat. 544. See State *v.* Frame, 4 Harring. 569.

[4] 2 East P. C. 652.

[5] R. *v.* Hutchinson, R. & R. 412; 2 Russ. on Cr. 158; Heygood *v.* State, 59 Ala. 49.

[6] R. *v.* Green, 37 Eng. L. & Eq. 597; 7 Cox C. C. 186; Dears. & B. 113. But a child's necessaries may be laid as his own. *Infra*, § 947.

[7] State *v.* Nelson, 11 Nev. 334.

property of the husband;[1] even though she be living apart from her husband, upon an income arising from property vested in trustees for her separate use, because the goods cannot be the property of the trustees, and, in law, a married woman has no property.[2] Such is even the case with money given the wife for her support and that of her children, her husband having been three years absent at sea.[3] But under recent legislation, giving married women independent control of their separate property, such property may be laid as their own;[4] though the better view is that the husband, when living with the wife, has such special property that the goods may be laid as his.[5]

Nor in married woman.

§ 941. *Goods belonging to a corporation* must be laid as the property of the corporation by its corporate name, and not as the property of the individual corporators, though they be all named;[6] but where there has been no act of incorporation, the trustees or joint owners must be named

Goods of corporation must be laid as such, and so of State.

[1] 1 Hale, 513; Com. *v.* Cullins, 1 Mass. 116; Hughes *v.* Com. 17 Grat. 565; Lavender *v.* State, 60 Ala. 60.

[2] R. *v.* French, R. & R. 491. See R. *v.* Wilford, Ibid. 517; Archbold's C. P. 9th ed. p. 29.

[3] Com. *v.* Davis, 9 Cush. 283. See Davis *v.* State, 17 Ala. 415.

[4] Com. *v.* Martin, 1 Am. Law Reg. 434; Stevens *v.* State, 44 Ind. 469, *contra*.

[5] State *v.* Matthews, 76 N. C. 41; State *v.* Wincroft, Ibid. 38. See Thomas *v.* Thomas, 51 Ill. 163, to the effect that under married women's act the husband is not guilty of larceny in taking the wife's property. See *supra*, § 918.

As to wife, under recent statutes, stealing husband's goods, see R. *v.* Brittleton, 15 Cox C. C. 431.

In Louisiana, under the Roman law, the marital goods may be laid as the property either of the husband or of the wife, each having a special property therein, or as the property of the two in community. State *v.* Gaffery, 12 La. An. 265.

In Massachusetts, however, it is ruled that personal property in the possession of a married woman is to be presumed, in the absence of other evidence, to be the property of the husband, notwithstanding the statute of 1855, c. 304, enabling married women to have property in their own right, and to their own use, and to trade on their own account; and must be described as the property of the husband in an indictment for stealing it. Com. *v.* Williams, 7 Gray, 337. But an indictment charging larceny of property of a wife may be sustained under the Massachusetts Gen. Sts. c. 172, § 12, by proof of larceny of property of her husband in her possession. Com. *v.* McLaughlin, 103 Mass. 435.

Where, after indictment, a single woman marries, it is no variance that the evidence and the record in respect to her name do not correspond. Com. *v.* Brown, 2 Gray, 358.

In Ohio, under the married women's act, the goods must be laid as of the wife. Pratt *v.* State, 35 Ohio St. 514.

[6] Whar. Cr. Pl. & Pr. § 110; McGary *v.* People, 45 N. Y. 153.

seriatim.[1] Whether incorporation should be averred is elsewhere considered.[2]

A member of a corporation may be guilty of larceny in stealing the goods of the corporation.[3] When a special interest in goods is acquired by a State officer in the interest of the State, an indictment for stealing the goods may aver ownership in the State.[4]

§ 942. Where property is levied on by a constable or sheriff, he acquires a special property in it, and, if stolen, it may be charged in an indictment or complaint as his property,[5] or as that of the owner.[6] But where a bailee of a sheriff received from him personal chattels which had been attached, giving an accountable receipt, with a promise to redeliver the same on demand, it was held that the bailee had no such special property in the chattels as to support an indictment.[7] The receiptor of the goods taken by the sheriff in execution has not even a special property, and in a larceny of the goods they cannot be laid as the property of the receiptor.[8] Goods in the hands of an acting receiver, though his bonds are not yet perfected, may be laid as his.[9]

Goods levied on may be laid as property of officer or owner.

§ 943. When a servant is charged with the larceny of his master's goods, it is essential, in order to sustain an averment of property in the master, to prove that the goods at the time of the larceny were in the master's possession. The distinctions bearing on this complex topic are discussed in future sections.[10]

When servant is charged with stealing from master, master's possession must be proved.

§ 944. On the same reasoning, when it is alleged that coin is stolen, the specific coin charged in the indictment must be proved to have been stolen. It will not be enough to prove that a less amount was taken; *e. g.*, if the indictment charges the larceny of a gold dollar, it will

Specific ownership of stolen coin must be shown.

[1] 2 Russ. on Cr. 6th Am. ed. 100; Whart. Cr. Pl. & Pr. § 110. See Lithgow *v.* Com., 2 Va. Cas. 296; Smith *v.* State, 28 Ind. 321; Wallace *v.* People, 63 Ill. 451. *Supra*, § 716. *Infra*, § 979.

[2] Whart. Cr. Pl. & Pr. § 110. See Johnson *v.* State, 73 Ala. 483.

[3] *Supra*, § 936.

[4] Phelps *v.* People, 72 N. Y. 334.

[5] People *v.* Palmer, 10 Wend. 165. See cases cited *supra*, § 936; State *v.* Mazyck, 3 Rich. 291; State *v.* Dewitt, 32 Mo. 571.

[6] R. *v.* Easthall, 2 Russ. on Cr. 158; State *v.* Clapper, 59 Iowa, 279.

[7] Com. *v.* Morse, 14 Mass. 217.

[8] Norton *v.* People, 8 Cow. 137.

[9] State *v.* Rivers, 60 Iowa, 381.

[10] *Infra*, §§ 962 *et seq.*

be a fatal variance if there is proof of the larceny of only fifty cents.[1] But it cannot be objected that money alleged to be stolen as the property of A. B. had been mingled by A. B., prior to the larceny, with certain money of a third person; provided the property alleged to be stolen of A. B. is susceptible of identification.[2]

Goods stolen from thief may be laid as the property of thief.

§ 945. If the goods of A. be stolen by B., and afterwards be stolen from B. by C., an indictment against the latter may allege the title to be in either A. or B., at the election of the pleader.[3]

Things stolen from mail.

§ 946. Bank notes or other articles stolen from the mail may be laid as the property of the person forwarding them.[4]

Clothes, etc., of child may be laid as property of father or child.

§ 947. Clothes or other necessaries furnished by a father to his child may, it seems, be laid as the property either of the father or of the child, particularly if the child is of tender age;[5] but when the child is of full growth, they are more properly alleged to be his property.[6] But a saddle furnished by a father to his minor son may be laid in the indictment either as the property of the father or of the son.[7] The same liberty exists, it seems, as to money of ward stolen from guardian.[8]

Stealing simultaneously goods of different owners makes more than one offence.

§ 948. The stealing of several articles of property at the same time may be treated as one offence, and even the circumstance of several ownerships of the property, it is intimated, cannot create two offences,[9] though this conclusion has been stoutly contested.[10]

The verdict may be for a part of the articles, if duly pleaded.[11]

[1] See, on this topic fully, Whart. Crim. Ev. §§ 122–3; Whart. Cr. Pl. & Pr. § 218; *infra*, § 965.

[2] People *v.* Williams, 24 Mich. 156.

[3] R. *v.* Wilkins, 1 Leach, 522; 1 Hale, 537; 2 East P. C. 654; State *v.* Somerville, 21 Me. 14; Ward *v.* People, 3 Hill, 395. *Supra*, § 882 *a*; *infra*, § 993.

[4] U. S. *v.* Burroughs, 3 McLean, 405.

[5] R. *v.* Haynes, 12 Co. 113; 2 East P. C. 654; R. *v.* Hughes, C. & M. 593.

[6] See R. *v.* Forsgate, 1 Leach, 463, 464, n.; State *v.* Koch, 4 Harring. 570.

[7] State *v.* Williams, 2 Strobh. 229.

[8] Thomasson *v.* State, 22 Ga. 499.

[9] See *supra*, § 931; but see Com. *v.* Butterick, 100 Mass. 9.

[10] *Supra*, § 931. The authorities on either side of this vexed question will be found in Whart. Cr. Pl. & Pr. § 470.

[11] Whart. Cr. Pl. & Pr. § 134.

Owner may be laid as unknown.

§ 949. *If the owner be unknown*, the goods may be laid as "the goods of a person to the jurors unknown," for otherwise it would be impossible for felonies of this class to be punished.[1] So if in an indictment for receiving stolen goods the principal felon be unknown, he may be described in like manner; but if the name of the owner or principal felon appear in evidence before the grand jury, and his name is on the back of the bill, such an indictment cannot at common law be supported.[2]

Goods of deceased persons to be averred to be property of executor.

§ 950. *Goods of a deceased person* must be averred, until distribution, to be the property of the executor or administrator by name; though it is not necessary to insert the words "executor of A. deceased." An executor or administrator has, *per se*, such a special property as will permit the goods to be described as his individually.[3]

[1] 1 Hale, 512; Whart. Cr. Pl. & Pr. § 113. That this sufficiently negatives ownership in the defendant, see Thompson *v.* State, 9 Tex. Ap. 301.

[2] See Whart. Cr. Pl. & Pr. §§ 111–3; Whart. Cr. Ev. § 97; R. *v.* Walker, 3 Camp. 264. In R. *v.* Robinson, Holt's N. P. 595, the indictment was for plundering the wreck of a brig. In one count the property of the brig was laid in persons therein named; in the other, it was laid in persons unknown. The witness could not recollect the Christian names of some of the owners laid in the first count, and on the second count Richards, C. B., held he could not say the owners were unknown. And the prisoner was acquitted. He quoted a case at Chester, where the property being laid in a person unknown it was clear at the trial that he was known, and might easily have been ascertained. Lord Kenyon directed an acquittal.

In R. *v.* Caspar, 2 Mood. C. C. 101; S. C., 9 C. & P. 289 (*gold-dust case*), the Caspars were indicted in different counts as accessaries before the fact, in an indictment which charged "that *a certain evil-disposed person* feloniously stole certain goods, and that Caspar feloniously *incited* the said evil-disposed person to commit the said felony, and that C. D. and E. F. feloniously *received* the said goods, knowing them to be stolen." This was held bad as against the Caspars; for though in the case of receiving stolen goods (first assimilated to the offence of an accessary *after* the fact, by 3 W. & M. c. 9, s. 4, and now by 7 & 8 Geo. IV. c. 29, s. 54), the whole offence may be brought home by tracing the *goods*, without identifying the person of the thief; it is different in the case of an accessary *before* the fact, where the identity of the person to whom the accession is charged must be made out by naming and showing him to the jurors in the indictment, or stating, as an excuse for the omitting his name, that he was unknown.

But it was held good against the other persons charged as *receivers* as for a substantive felony, without stating the name of the principal felon. The 7 & 8 Geo. IV. c. 29, s. 54, confirms the old law as to *accessaries*, though it also gives another mode of proceeding for a substantive felony. See Whart. Cr. Ev. § 97; Whart. Cr. Pl. & Pr. § 111. *Infra*, § 977, 982.

[3] Cole *v.* Com., 5 Gratt. 696; State *v.* Woodley, 25 Ga. 235. *Supra*, § 937.

V. VALUE.

Some value must be attached to things stolen.

§ 951. In order to constitute the offence of larceny, or of receiving stolen goods, it is necessary at common law that the thing stolen or received be of some value, however small.[1]

Lumping valuation insufficient when the conviction is for stealing only a part.

§ 952. Where the indictment gives a lumping valuation to a series of distinct articles, of different kinds, and when either the jury convict the defendant of stealing a part, or the evidence only goes to a part of the articles charged, no judgment can be legally entered.[2] But a conviction of stealing part, upon a gross valuation of the whole collectively, will, at least in Massachusetts, be sustained, when the articles thus lumped are of the same class. Thus in an indictment for stealing "a quantity of bank notes current within this Commonwealth, amounting together to one hundred and fifty dollars, and of the value of one hundred and fifty dollars," it was held that the defendant could be convicted of stealing specific bank notes of a less value than that averred in the indictment.[3]

When there is a general verdict of guilty, it seems a value in gross is always sufficient.[4]

If value be given to some of the articles stolen and none to the remainder, the defendant should be acquitted as to the non-valued articles,[5] or judgment must be arrested as to the same.[6]

There are cases, it should be remembered, when a lumping value is necessary, from inability on the part of the pleader to attach specific and separate values, as in the case of coin or notes stolen

[1] State *v.* Fenn., 41 Conn. 590; People *v.* Wiley, 3 Hill, 194; State *v.* Wood, 46 Iowa, 116; State *v.* Allen, R. M. Charlton, 518; State *v.* Smart, 4 Rich. 355; Wilson *v.* State, 1 Porter, 118; State *v.* Krieger, 68 Mo. 98; Boyle *v.* State, 37 Tex. 359. See Whart. Crim., Ev. § 126; Whart. Cr. Pl. & Pr. §§ 213–6.

[2] R. *v.* Forsyth, R. & R. 274; Hope *v.* Com., 9 Met. 134; Com. *v.* Cahill, 12 Allen, 540. Whart. Cr. Pl. & Pr. §§ 212–216. Whart. Crim. Ev. § 127.

[3] Com. *v.* O'Connel, 12 Allen, 451; and see particularly Com. *v.* Lavery, 101 Mass. 207, cited Whart. Crim. Ev. § 127.

[4] See State *v.* Hood, 31 Me. 363; Clifton *v.* State, 5 Blackf. 224; State *v.* Murphy, 8 Blackf. 498.

[5] State *v.* Somerville, 21 Me. 20; Whart. Cr. Pl. & Pr. §§ 212–216; Whart. Crim. Ev. § 127.

[6] Com. *v.* Smith, 1 Mass. 245; People *v* Wiley, 3 Hill, 194.

in a parcel and retained by the defendant. In this case, if the indictment excuse the non-specification by want of knowledge in the grand jury, the general lumping statement will be enough.[1] And it has been held even precise enough to aver the bills stolen to be "divers bank bills, amounting in the whole to $1700, and of the value of $1700."[2]

When there is a statutory limit values must conform statute.

§ 953. When a statute (*e. g.*, as in grand and petit larceny) divides larceny into two or more classes, according to the value of the thing stolen, it is not necessary to aver the thing stolen to be "of value more" or "of value less" than the statutory test. It is enough to state the value at a specific sum; and if this be found by the jury, the court will assign such punishment as the sum according to the statute calls for.[3] And if the indictment aver the value to be *above* the statutory test, the jury, by a special finding, may assess the value *below* the statutory test, in which case only the minor punishment will be imposed.[4]

The *verdict* in this relation is distinctively considered in another volume.[5]

May be larceny of a piece of paper.

§ 954. In New York a conviction was opened where the subject of larceny was "a piece of paper, on which a certain letter of information was written, of the value of $12.50."[6] Still, however, as has already been noticed, counts have been sustained in England for the larceny of a piece of paper of the value of one penny, etc.,[7] though this seems only to be the case where the instrument is on its face invalid. When it is valid, it is said that it must be described by its technical name.[8]

[1] Com. *v.* Sawtelle, 11 Cush. 142; People *v.* Bogart, 36 Cal. 245.

[2] Com. *v.* O'Connel, *supra;* Larned *v.* Com., 12 Met. 240; Com. *v.* Sawtelle, 11 Cush. 142; State *v.* Taunt, 16 Minn. 109. *Contra*, Low *v.* People, 2 Parker C. R. 37; State *v.* Hinckley, 4 Minn. 345.

[3] Whart. Cr. Pl. & Pr. § 753. See Com. *v.* McKenney, 9 Gray, 114; People *v.* Winkler, 9 Cal. 234; see Stokes *v.* State, 58 Miss. 677.

[4] See Williams *v.* People, 24 N. Y. 405; McCorkle *v.* State, 14 Ind. 39; State *v.* Bunten, 2 N. & McC. 441.

[5] Whart. Cr. Pl. & Pr. §§ 736 *et seq.*

[6] Payne *v.* People, 6 Johns. 103. See, also, Moore *v.* Com., 8 Barr, 260. *Supra*, § 880.

[7] R. *v.* Perry, 1 C. & K. 725; S. C., 1 Den. C. C. 69; R. *v.* Clark, R. & R. 181; R. *v.* Bingley, 5 C. & P. 602. See *supra*, § 880.

[8] *Supra*, § 880; R. *v.* Green, Dears. 323.

§ 955. There need not be direct evidence of value of an article stolen. The value may be inferred generally from the facts in evidence;[1] though a satisfactory test is what the thing would bring at a well-conducted sale.[2] With current bank notes or treasury notes mere production is sufficient.[3] Thus, on the trial of an indictment for larceny in stealing "promissory notes," a witness testified that the bills stolen "were of the currency ordinarily known as greenbacks." It was held that this proof was some evidence at least of their genuineness, and that, when taken in conjunction with the further fact, to which he testified, that they were of the denomination of one hundred dollar bills of that currency, there was enough evidence, also, of the value to sustain a conviction.[4] And so is it generally as to proof of currency.

Value may be inferentially shown.

VI. BY SERVANTS AND OTHERS HAVING BARE CHARGE.

§ 956. If a servant or other agent, who has merely the care and oversight of the goods of his master,—as the butler of plate, a messenger or runner of money or goods, a hostler of horses, the shepherd of sheep, and the like,—convert such goods to his own use, without his master's consent, this is a larceny at common law;[5] because the goods, at the time they are taken, are deemed in law to be in the possession of the master—the possession of the servant in such a

Larceny for servant having bare charge to convert to his use.

[1] Whart. on Ev. § 1290; Com. v. Burke, 12 Allen, 182; State v. Fenn, 41 Conn. 590; People v. Caryl, 12 Wend. 547; Cummings v. Com., 2 Va. Cas. 128; Wolverton v. Com., 75 Va. 909; Houston v. State, 8 Eng. (Ark.) 66. Production of the article may be enough. Com. v. Burke, 12 Allen, 182; Collins v. People, 39 Ill. 233. See *supra*, § 882.

[2] State v. James, 58 N. H. 67.

[3] Collins v. People, 39 Ill. 233; Duvall v. State, 63 Ala. 12; and see Com. v. Stebbins, 8 Gray, 492; Com. v. Burke, 12 Allen, 182; State v. Smart, 4 Rich. 355, to the effect that general proof that the bills were current is enough to show value. *Supra*, § 880.

[4] Com. v. Stebbins, 8 Gray, 492; Remsen v. People, 57 Barb. 324; State v. Cassell, 2 Har. & G. 407.

[5] 1 Hale, 506; R. v. Robinson, 2 East P. C. 565; R. v. Harvey, 9 C. & P. 353; R. v. Manning, Dears. 21; R. v. Samways, Ibid. 371; R. v. Bunkall, L. & C. 371; R. v. Paradise, 2 East P. C. 565; U. S. v. Clew, 4 Wash. C. C. 700; Com. v. O'Malley, 97 Mass. 584; Com. v. Berry, 99 Ibid. 428; Com. v. Davis, 104 Ibid. 448; Com. v. Barry, 116 Ibid. 1; Phelps v. People, 72 N. Y. 334; People v. Wood, 2 Parker C. R. 22; Walker v. Com., 8 Leigh, 743; State v. Jarvis, 63 N. C. 556; People v. Belden, 37 Cal. 51; and see R. v. Harding, R. & R. 125.

case being the possession of the master.[1] The same rule is applicable to all cases in which a person to whom goods are given for a particular purpose (as the agent of another) has bare possession.[2] Thus where A., going on a journey, left his shop in the care of the defendant under the superintendence of A.'s brother, and the latter, on account of the defendant's drunkenness, dismissed him; and A., on returning, found his goods missing, and pursuing the defendant overtook him with some of them in his possession, the court sustained a conviction.[3] Where the defendant, who was carter to the prosecutor, went away with and disposed of his master's cart, the larceny was held complete;[4] and so where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them.[5] Where a person employed to drive cattle sells them, it is larceny;[6] and so where a lighterman embezzles corn he was sent to land from a vessel.[7] And on the same reasoning, if money be given by the owner to a servant or agent to carry to another,[8] or to exchange,[9] and the

[1] U. S. v. Clew, 4 Wash. C. C. 700.

[2] See State v. Brin, 30 Min. 522.

[3] State v. White, 2 Tyler, 352.

[4] R. v. Robinson, 2 East P. C. 565.

[5] R. v. Bass, 2 East P. C. 566; and see R. v. Harding, R. & R. 125.

[6] R. v. M'Namee, 1 Mood. C. C. 368; R. v. Harding, R. & R. 125.

[7] R. v. Abrahat, 2 Leach, 824; R. v. Spear, Ibid. 825; 2 East P. C. 568.

[8] R. v. Lavender, 2 Russ. on Cr. 201; 2 East P. C. 562; R. v. Reed, Dears. C. C. 257; R. v. Hayward, 1 C. & K. 518; R. v. Paradise, 2 East P. C. 565; R. v. Goode, C. & M. 582; R. v. Beaman, Ibid. 595; R. v. Cooke, L. R. 1 C. C. R. 295; State v. Ducker, 8 Oregon, 394. *Infra*, §§ 961, 963, 1140.

[9] R. v. Atkinson, 1 Leach, 302. See R. v. Brown, Dears. C. C. 616; R. v. Reed, Ibid. 257; R. v. Hayward, 1 C. & K. 518; R. v. Thompson, L. & C. 225; R. v. Paradise, 2 East P. C. 565; U. S. v. Clew, 4 Wash. C. C. 700; Com. v. O'Malley, 97 Mass. 584; Com. v. Berry, 99 Ibid. 428; Com. v. Hays, 14 Gray, 62; People v. Call, 1 Denio, 120; Justices v. People, 90 N. Y. 12; People v. Abbott, 53 Cal. 284; Murphy v. People, 104 Ill. 528.

The distinction between this position and that taken in R. v. Thomas, cited *infra*, § 965, is subtle, but may be thus stated. Where the mere custody of money is given to a servant so that he has a bare charge, and he is told to take care of it, and if he can find change for it to bring back the change, but if not, to bring back the money itself, then it is larceny for him fraudulently to appropriate it. On the other hand, if the absolute property be given to the servant, and the owner never expects to see it again except in change, then for the servant to appropriate it or its proceeds is embezzlement, not larceny; *infra*, § 965.

Sir J. F. Stephen (Dig. art. 297) gives the following:—

"Theft may be committed by converting, without the consent of the owner, anything of which the offender

servant or agent apply it to his own use, it is larceny. It is otherwise, however, when the property is passed to the servant,[1] or when the servant appropriates, not the money given to him, but the change received for it.[2]

So as to other persons having bare charge.

§ 957. The rule may be amplified by saying that where one having only the care, charge, or custody of property for the owner converts it *animo furandi*, it is larceny.[3]

Thus, where the holder of a promissory note, having received a partial payment from the maker, handed it to him to indorse the payment, and he took it away, *animo furandi*, and refused to give it up, this was held larceny.[4] And so where a guest at an inn converted plate set before him for his use,[5] and where A. appropriated a hundred dollar bill given to him by B. by mistake for a ten dollar bill.[6]

So as to person with whom goods are inadvertently left.

§ 958. Where personal property of one is, through inadvertence, left in the possession of another who conceals it, *animo furandi*, knowing the owner, he is guilty of larceny.[7] And so when, having intended, on finding it, to keep it, knowing the owner, he afterwards converts it.[8] And it is larceny to appropriate, with intent to steal, goods obtained through the inadvertence of an expressman, carrier, postmaster, or other bailee.[9] But to constitute larceny, in receiving an over-payment, the defendant must know at the time of the overpayment, and must intend to steal.[10]

has received the custody as the servant of the owner, or in order that the thing may be used by the offender for some special temporary purpose, in the presence or under the immediate control of the owner or his servant."

[1] *Infra*, §§ 960–965.

[2] *Infra*, § 965.

[3] R. *v.* Cheeseman, L. & C. 140; R. *v.* Smith, 1 C. & K. 423; People *v.* Call, 1 Denio, 120; Robinson *v.* State, 1 Cold. (Tenn.) 120; Marcus *v.* State, 26 Ind. 101; State *v.* Schingen, 20 Wis. 74. As to clerks, see *infra*, § 960.

[4] People *v.* Call, 1 Denio, 120. See Dignowitty *v.* State, 17 Tex. 551. *Supra*, § 899.

[5] 1 Hale P. C. 506.

[6] State *v.* Williamson, 1 Houst. C. C. 155. *Supra*, § 915.

[7] People *v.* McGarren, 17 Wend. 460. *Supra*, § 901.

[8] R. *v.* Riley, 14 Eng. L. & Eq. 544; 1 Dears. C. C. 149; 6 Cox C. C. 88. *Supra*, § 901.

[9] *Infra*, § 966; R. *v.* Harvey, 9 C. & P. 353; R. *v.* Webb, 5 Cox C. C. 154; R. *v.* Little, 10 Ibid. 559; Com. *v.* Lawless, 103 Mass. 425.

[10] Bailey *v.* State, 58 Ala. 414.

And so of letter-carrier stealing letters.

§ 959. *A letter-carrier* may be indicted for larceny in stealing a letter given to him for delivery.[1]

And so of clerk without discretion, stealing goods of employer.

§ 960. A clerk taking money or goods from his employer's safe, till, or shelves, is guilty of larceny, unless it appear that he is authorized to dispose of such money or goods at his discretion.[2]

The same rule is applied where the clerk is in possession, but without any discretion, under explicit directions. In such case he is a bare servant, and the possession is that of his employers, and if he steal the goods he is guilty of larceny.[3] Thus where a confidential clerk to a merchant, who had authority to get

[1] R. *v.* Poynton, L. & C. 247; 9 Cox C. C. 249. In this case a letter-carrier, whose duty it was, in case he was unable to deliver any letter, to bring it to the post-office, on his return from delivery, not having delivered a letter containing money, gave no account of it, and being asked why he had not delivered it, produced it unopened, and the coin safe within, from his trousers pocket, stating, untruly, that the house where it ought to have been delivered was closed. Upon an indictment for stealing the letter, the jury found him guilty, and that he detained it with the intention of stealing it. It was held, that so dealing with the letter amounted to larceny.

[2] R. *v.* Manning, Dears. 21; R. *v.* Hammon, R. & R. 221; Walker *v.* Com., 8 Leigh, 743; Marcus *v.* State, 26 Ind. 101; Cobletz *v.* State, 36 Tex. 353. *Infra*, § 1027. *Supra*, § 943.

Thus, where a cancelled cheque, the property of an insurance company, has passed from the hands of the messenger, who received it at the bank, to the prisoner, a clerk in the employment of the company, whose duty it was to keep it for the directors; it was held, first, that as the cheque, when it came into his custody, had arrived at its ultimate destination, it was really in the possession of the directors, who had a special property in the cheque, and, therefore, that the prisoner, who had unlawfully abstracted it, was guilty of larceny, not of embezzlement; secondly, that where the directors of a company have a special property in cheques or other articles, the interest of a shareholder in the company gives him no property in it, and that he may be indicted for stealing property from the directors. R. *v.* Watts, 1 Eng. Law & Eq. 561; S. C., 2 Den. C. C. 14; L. & C. 34.

In a case tried at Philadelphia, in 1848, and which received the benefit of the consideration of both the Federal and the State courts, the evidence was that the defendant was a clerk to the treasurer of the United States mint, but not charged or credited with public moneys, there or elsewhere, and had abstracted a considerable amount of these moneys from the closet in which they were kept, of which he had a key, though he had no charge of the key to the outer vault, of which this closet was a part. It was held by the judges of both courts that the case was not embezzlement, under the federal statutes, but larceny at common law. Com. *v.* Hutchinson, 2 Parsons, 384; U. S. *v.* Hutchinson, reported Whart. Prec. 205. *Infra*, § 1027.

[3] R. *v.* Low, 10 Cox C. C. 168.

his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange unindorsed, over which he had no authority, got it discounted, and absconded with the produce of it, the offence was held larceny.[1]

Where a person employed by a mercantile firm as a salesman in their store, having no general control over the goods in the storeroom and the money in the cash drawer, abstracted a part of the goods and money, with a fraudulent intent to convert the same to his own use, this was held larceny.[2]

In fine, wherever an agent obtains from his principal bare possession of goods for a specific object, and does not apply them to that object, but fraudulently converts them to his own use, larceny is made out.[3]

[1] R. *v.* Chipchase, 2 Leach, 805; and see R. *v.* Atkinson, 1 Leach, 302; and cases cited, §§ 956 *et seq.*

[2] Walker *v.* Com., 8 Leigh, 743. *Supra*, § 959.

So in a case above cited, a servant's duty was to give out materials to be wrought up, and pay the workmen when the work was finished; and for this purpose he received cash from his masters, and at the end of each week he accounted with them for sums so received and paid. The cash was kept by him, but he was not authorized to apply the money in any other way. He paid C. 13*s.*, and fraudulently charged his employers as having paid 14*s.* 8*d.*, and appropriated the 1*s.* 8*d.* to his own use. This was held to amount to larceny. R. *v.* Low, 10 Cox C. C. 168. The same view was taken where the defendant was foreman of a currier establishment, and as such obtained from the cashier, by fraudulent misrepresentation, a certain sum of money to be used in paying off the workmen; and the evidence was that on the pay-roll made out by the defendant, the sum of £1 10*s.* 4*d.* was set down as due one of the workmen; whereas, only £1 8*s.* was due; and the 2*s.* 4*d.* was fraudulently appropriated by him, he intending so to appropriate it at the time he received it. R. *v.* Cooke, 12 Cox C. C. 10; L. R. 1 C. C. 295.

[3] See *infra*, § 963.

Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself by certain bank notes, entering the payment in the book as being made to "a man;" this was held to be a larceny of the bank notes. R. *v.* Hammon, R. & R. 221; 2 Leach, 1083; 4 Taunt. 304. *Supra*, § 892. And so where a clerk and packer took goods from his employer's shop, he having keys by means of which, at the time in question, he entered the shop after it was closed, he not being a salesman, although the owners had occasionally allowed him to take and sell goods for them. Com. *v.* Davis, 104 Mass. 548. In this case Morton J., said: "The instructions of the court that, 'upon the undisputed evidence in the case, Brown did not sustain such a relation to the property in question as would make his felonious appropriation of it an act of embezzlement, but that his taking of the same, if the jury found the other elements necessary to constitute the offence would be larceny,' were correct. Brown was a mere servant of the owners of the property alleged to be stolen by him. We cannot see in the case any testimony which tends to show that he had even the bare custody of the goods, much less the legal possession. They were in the possession and custody of the owners, and the felonious taking and appropriation of them by Brown was clearly larceny and not embezzlement. Upon the facts in this case an indictment against him for embezzlement could not be sustained."

It is larceny for the teller of a bank to open at night a safe which he has no right to open, and to abstract money intrusted to his care during the day. Com. *v.* Barry, 116 Mass. 1.

§ 961. It is otherwise when the property in the goods has passed to the agent. Thus if, by means of false accounts, a clerk fraudulently obtain the absolute property of money from his employer, this, on the principle already so often stated, is not larceny.[1] The same rule applies to servants obtaining money from their master to settle for payments falsely represented to have been made by the servants.[2] Where, however, a clerk receives money for third parties, and swells the amount due such third parties by false accounts, and appropriates to himself the excess, this is larceny, for the owner of the money transferred to the clerk only its possession.[3]

Otherwise where *property* in goods is in clerk.

§ 962. As we have already seen, goods cannot be averred to be the master's which have never been in his possession, and which the servant, before they come into such possession, converts to his own use.[4] It is not necessary, however, to make such conversion larcenous, that the goods should come actually into the master's hands. They are held to come into his possession under the following circumstances:—

And where the master has not had possession of the goods.

§ 962 *a.* Reception in a wagon belonging to the master, even though it be driven by the servant, is reception by the master; and hence it is larceny for the servant to take them from the wagon for his own use.[5]

Reception in master's wagon is reception

[1] R. *v.* Barnes, 2 Den. C. C. 59; T. & M. 387; R. *v.* Green, Dears. C. C. 323; 6 Cox C. C. 296; R. *v.* Thompson, L. & C. 233; 9 Cox C. C. 222.

[2] R. *v.* Dartnell, 20 L. T. (N. S.) 1020. *Infra*, § 1140; *supra*, § 956.

[3] R. *v.* Low, 10 Cox C. C. 168; R. *v.* Cooke, 12 Ibid. 10, cited *supra*, § 960.

[4] *Supra*, § 943; 2 East P. C. 568; R. *v.* Bull, 2 Leach, 841; R. *v.* Whate, 1 Ibid. 3d ed. 33; R. *v.* Sullens, 1 Mood. 129; R. *v.* Walsh, R. & R. 313.

[5] R. *v.* Read, 2 C. L. R. 607; Dears. 257; 18 Jur. 67; R. *v.* Robinson, 2 East P. C. 565. See *infra*, §§ 968, 1027.

by master; and so of reception by carrier for master.

A fortiori is it larceny for the servant to take goods deposited in the hands of a common carrier to be forwarded to the master,[1] or intermediately placed by the servant in the hands of the master's agent.[2]

And so of reception in master's immediate control; but not so as to money secreted or pocketed by servant.

§ 962 *b*. It is also larceny for a servant to steal money which, after receiving for his master, he deposits in his master's till,[3] or to steal hay which he has bought for his master, and has then, before the theft, deposited at his master's stable door.[4] But it is embezzlement, not larceny, for the servant to appropriate to his own use money he draws from a bank on his master's cheque.[5] And it has hence been held not to be larceny for the servant, after depositing the money in his pocket,[6] or secreting it in some hiding place on his master's premises, but known only to himself,[7] to take it out and appropriate it to his own use; though it has been held that where the deposit is in the place where it is the duty of the servant to make it, even though on his own person, this if specifically designated by the master, makes a subsequent conversion by the servant larceny.[8] As a rule, to sustain a prosecution for larceny the master must have such a possession as would enable him to maintain trespass.[9] But wherever, by the customs of trade, the goods are, on purchase, constructively in the master's possession (as

[1] *Supra*, § 956; R. *v.* Abrahat, 2 Leach, 824; 2 East P. C. 569; Malpeca *v.* McKown, 1 La. An. 249; Penn. Nav. Co. *v.* Shand, 3 Moore, P. C. 272; Whart. Conf. of Laws, § 417; *supra*, § 961.

[2] Phelps *v.* People, 72 N. Y. 334.

[3] R. *v.* Hammon, R. & R. 221; 2 Leach, 1043; 4 Taunt. 304; R. *v.* Wright, D. & B. 431; 7 Cox, 413; Com. *v.* Brown, 4 Mass. 580; Com. *v.* Barry, 116 Mass. 1; Powell *v.* State, 34 Ark. 693; *supra*, § 960; *infra*, § 1036.

[4] R. *v.* Hayward, 1 C. & K. 518. *Infra*, §§ 968, 1027.

[5] R. *v.* Sullens, Car. C. L. 319; 1 Moody, 129; R. *v.* Walsh, R. & R. 218; Com. *v.* King, 9 Cush. 284; Kibs *v.* People, 81 Ill. 599. See *infra*, §§ 966, 968.

[6] R. *v.* Waite, 1 Leach, 28; R. *v.* Betts, Ball, 90; 8 Cox C. C. 140; R. *v.* Bazeley, 2 Leach, 835; see R. *v.* Brackett, 4 Cox, 274; Com. *v.* Barry, *ut sup.*

[7] R. *v.* Dingley, cited in 2 Leach, 4th ed. 840; 1 Show. 53. It was this decision which prompted the embezzlement statute.

[8] R. *v.* Watts, 2 Den. 14; 4 Cox, 336; L. & C. 34; cited *infra*, § 960.

[9] R. *v.* Smith, 9 Eng. L. & Eq. 532; 2 Den. 499; 5 Cox, 533; R. *v.* Frampton, 2 C. & K. 533. (*Infra*, § 996.) People *v.* Loomis, 4 Denio, 380 (cited *supra*, §§ 879, 882 *b*); Bork *v.* People, 91 N. Y. 18.

where a cargo of corn is purchased by a corn-factor), then the purchaser has such a possession as would sustain trespass.[1]

VII. BY BAILEE.[2]

To *servant's* subsequent conversion, original fraudulent intent is not necessary; otherwise as to *bailee*.

§ 963. If a mere servant appropriate money given to him on a bare charge, it is not necessary to prove an original fraudulent intent, as his possession is that of his master.[3] If, however, a bailee who has a special possession of his own, convert the money, it is necessary, in order to convict, to prove fraudulent intention on his part at the time of bailment, by which fraud he obtained such special possession.[4] Where there is such original fraudulent intent, then subsequent conversion (property remaining in the owner), is larceny.[5] And by recent statutes it is larceny to make such conversion even though there be no original fraudulent intent.[6]

[1] R. *v.* Abrahat, *ut sup.*

[2] Sir J. F. Stephen (Dig. C. L. art. 285) defines bailment as follows: "When one person delivers, or causes to be delivered, to another any movable thing, in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it, by the person to whom delivery is made, gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered, either to the person making the delivery, or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee." See fully *infra*, § 1009.

[3] See §§ 956–59; and see R. *v.* Goode, C. & M. 582; R. *v.* Beaman, Ibid. 595; R. *v.* Metcalf, 1 Mood. C. C. 433; Com. *v.* Yerkes, 12 Cox C. C. 208.

[4] *Supra*, §§ 885, 960 *et seq.*; R. *v.* Leigh, 2 East P. C. 694; R. *v.* Banks, R. & R. 441, overruling R. *v.* Tunnard, 2 East, 689; R. *v.* Brazier, R. & R. 337; R. *v.* Cornish, *infra*, § 967; R. *v.* Levy, 4 C. & P. 241; R. *v.* Warren, 10 Cox C. C. 359; R. *v.* Brennan, 1 Craw. & D. 560; R. *v.* Small, 8 C. & P. 46; R. *v.* Thompson, L. & C. 225; R. *v.* Thristle, 1 Den. C. C. 502; 2 C. & K. 842; T. & M. 264; 3 Cox C. C. 573; Com. *v.* King, 9 Cush. 284; Abrams *v.* People, 6 Hun, 491; Krause *v.* Com., 93 Penn. St. 418; State *v.* Bonwell, 5 Harring. 529; Com. *v.* Superintendent, 9 Phila. 581; Welsh *v.* People, 17 Ill. 339. See R. *v.* Waller, 10 Cox C. C. 360; Com. *v.* Lester, 129 Mass. 101. That taking without fraudulent intent is not larceny, see *supra*, § 885.

[5] 2 East P. C. 658; State *v.* Watson, 41 N. H. 534; Com. *v.* Barry, 124 Mass. 325; People *v.* McGarren, 17 Wend.

[6] *Infra*, § 1055. As to New York statute, see note to § 888.

§ 964. At common law the principle is, that where the owner retains the *property* of the goods in himself, and only parts with the *possession*, he may maintain larceny against the person who *animo furandi*, obtains from him such possession and then converts the goods.[1] Thus, it is held that hiring a horse, on pretence of taking a journey, and immediately selling it, is larceny; because there is *animus furandi* in making the contract, and the

When bare possession is fraudulently obtained, subsequent conversion is larceny.

460; Wolfstein *v.* People, 6 Hun, 121; Hildebrand *v.* People, 56 N. Y. 394; Loomis *v.* People, 67 Ibid. 322; Thomas *v.* People, Ibid. 218; State *v.* Jarvis, 63 N. C. 556; State *v.* Williams, 35 Mo. 229; People *v.* Abbott, 53 Cal. 284; State *v.* Ducker, 8 Oregon, 394; and cases cited *infra*, § 964.

"It is a fraud *per se* for a bailee to convert to his own use the property committed to his care. The conversion is *primâ facie* evidence of the fraud. Larceny at common law involves something more. It requires the *animus furandi*. There must be a felonious taking. Not so with larceny as bailee. It requires merely a fraudulent conversion" under the Pennsylvania statute. Paxson, J., Hutchison *v.* Com., 82 Penn. St. 472.

The defendant, by false pretences, induced a tradesman to send by his servant goods of the value of 2*s.* 10*d.* to a particular house, with the change for a crown piece. On the way he met the servant, and induced him to part with the goods and change a crown piece, which afterwards was found to be bad. Both the tradesman and servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, though the former admitted that he intended to sell the goods. This was held larceny. R. *v.* Small, 8 C. & P. 46. And so where the defendant obtained money from the prosecutrix on the pretence of buying with it a railway ticket for her and returning the change. R. *v.* Thompson, L. & C. 225. See, for other cases, *infra*, § 967.

[1] See cases cited *supra*, §§ 883, 963, and see R. *v.* Johnson, 2 Den. C. C. 310; 14 Eng. L. & Eq. 570; R. *v.* Hey, T. & M. 209; 1 Den. C. C. 602; U. S. *v.* Rodgers, 1 Mackey, 419; State *v.* Watson, 41 N. H. 534; Carey *v.* Hotailing, 1 Hill (N. Y.), 311; Thomas *v.* People, 67 N. Y. 218; Smith *v.* People, 53 Ibid. 111; Grunson *v.* State, 89 Ind. 583; Hite *v.* State, 9 Yerg. 198; State *v.* Williams, 35 Mo. 229; Starkie *v.* Com., 7 Leigh, 752; Vaughn *v.* Com., 10 Grat. 758; Defrese *v.* State, 3 Heisk. 53; State *v.* Thurston, 2 McMull. 382; State *v.* Gorman, 2 N. & M. 90; State *v.* Lindenthall, 5 Rich. 237; Elliott *v.* Com., 12 Bush, 176; People *v.* Smith, 23 Cal. 280.

"Where by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and the title still remains with the owner, larceny is established. . . . Where title as well as possession is absolutely parted, the crime is false pretence." Miller, J., Loomis *v.* People, 67 N. Y. 329; *Cf.* Huber *v.* State, 57 Ind. 341; R. *v.* Thomas, 9 C. & P. 741, cited *infra*, § 965. See, also, 2 Russ. on Cr. 38–9, 40, etc.; R. *v.* Cooke, 12 Cox C. C. 10; L. R. 1 C. C. 295; White *v.* State, 11 Tex. 769. *Infra*, § 973.

nature of the property has not been changed by the parting with the possession merely.[1] Even where a person hires for an indefinite period a horse or carriage, fraudulently pretending it to be a mere hiring, and converts it to his own use, he may be convicted of larceny if his original intent was felonious,[2] and to the offence even proof of a subsequent conversion is not necessary.[3] But it is essential that there should be a larcenous intent at the hiring.[4]

The same rule applies to all cases of bare possession obtained by trick or fraud.[5] Thus, in a case where a prisoner procured the mail-bags to be let down to him by a string from the window of a post-office, with intent to steal, under the pretence that he was the mail-guard, he was held guilty of larceny.[6] The same distinction exists where the defendant fraudulently obtains possession of money from the prosecutor, on the false statement that he lives near to H., to whom he is to pay it; or upon any other false device;[7] where a gun is borrowed by a guest from a landlord, on the pretence that it is to be used in shooting robins, and is then sold;[8] where a gypsy or other pretended witch obtains the possession though not the property of money on the pretence of fortune telling;[9] where goods are ob-

[1] R. *v.* Pear, 2 East P. C. 685; S. C., 1 Leach, 212; R. *v.* Kendall, 12 Cox C. C. 598; State *v.* Lindenthall, 5 Rich. 237; State *v.* Williams, 35 Mo. 229.

[2] R. *v.* Semple, 1 Leach, 420; 2 East P. C. 691; and see R. *v.* Charlewood, 1 Leach, 409; 2 East P. C. 689; People *v.* Anderson, 14 Johns. 294; State *v.* Lindenthall, 5 Rich. 237. *Supra*, § 883. See, however, as diverging from text, Felter *v.* State, 9 Yerg. 397, where it was held that hiring with fraudulent intent was not larceny.

[3] R. *v.* Janson, 4 Cox C. C. 82.

[4] R. *v.* Banks, R. & R. 441; otherwise if he steal after the horse is returned to its destination and then take *animo furandi*. *Infra*, § 969; R. *v.* Charlewood, 1 Leach, 409; R. *v.* Haigh, 7 Cox C. C. 403. *Infra*, § 1062.

[5] R. *v.* Pratt, 1 Mood. C. C. 250; R. *v.* Horner, 1 Leach, 270; R. *v.* Wilson, 8 C. & P. 111; R. *v.* Williams, 6 Ibid. 390; R. *v.* Watson, 2 Leach, 730; U. S. *v.* Rodgers, 1 Mackey, 419; State *v.* Thurston, 2 McMull. 382. *Supra*, § 962; *infra*, §§ 937, 973. As to false personation, see § 888.

[6] R. *v.* Pearce, 2 East P. C. 603.

The prisoner, in another case, was hired for the special purpose of driving sheep from one farm to another, and instead of so doing drove them, the day after he had received them, a different road, and sold them; the jury having found that at the time the prisoner received the sheep he intended to convert them to his own use, instead of driving them to the specified farm, the judges were unanimously of the opinion that he was rightly convicted of larceny. R. *v.* Stock, 1 Mood. C. C. 87.

[7] R. *v.* Brown, 36 Eng. L. & Eq. 610; Dears. C. C. 616; R. *v.* Johnson, 2 Den. C. C. 310.

[8] Richards *v.* Com., 13 Grat. 803. See *supra*, § 886.

[9] R. *v.* Bunce, 1 F. & F. 523.

tained by a common carrier, as the jury find, with an original fraudulent intent to convert, but on the pretence that they will be delivered at the place of destination, and are on the road appropriated to the carrier's use;[1] where the owner is fraudulently induced to deposit goods in the hands of a third person for sale, which are then fraudulently obtained from such third person;[2] where a watch and some money are deposited by the prosecutor with the defendant, induced by the fraud of "ring-dropping;"[3] where the goods are simply deposited, under fraudulent inducements, for the defendant's inspection, who then steals them;[4] where money is deposited, also under fraudulent inducements, as security for a pretended bet, and then stolen by the party obtaining such money;[5] and where a person falsely personates another, and obtains goods belonging to such other from a bailee.[6]

Where only possession is obtained, yet though on borrowing the intention were to return, the fact that the bailment was fraudulently obtained saturates the whole transaction with felony, and makes the subsequent conversion larceny.[7]

Otherwise when property in goods is passed.

§ 965. If, however, the property in the goods is passed, not conditionally but absolutely, then at common law (aside from the statutes to be hereafter noticed)[8] a prosecution for larceny must fail.[9] Thus, when a cheque is given to a servant by his master, to be handed to a third party,

[1] R. *v.* Hey, T. & M. 209; 1 Den. C. C. 602; R. *v.* Stock, 1 Mood. C. C. 87; State *v.* Thurston, 2 McMull. 382; People *v.* Smith, 23 Cal. 280.

[2] R. *v.* Campbell, 1 Mood. C. C. 179.

[3] *Infra*, § 973.

[4] *Infra*, § 974.

[5] Ibid.

[6] *Supra*, § 888.

In a remarkable case decided by the Philadelphia Common Pleas in 1872, and reported in England in the twelfth volume of Mr. Cox's reports, with a note stating that the case is reprinted "because of its copious and exhaustive review of the nice distinctions between larceny and false pretences," the evidence was that the defendant, an agent, authorized to purchase city bonds for the sinking fund of the city of Philadelphia, obtained through his clerk, by falsely alleging that he had purchased $33,000 of the city loan, a cheque for that amount. This cheque was obtained *animo furandi*, and was then fraudulently converted. It was held by a majority of the court, that as the owner of the cheque (the city treasurer) did not intend to part with the property of the cheque, but only its possession, the defendant was rightly convicted of larceny. Com. *v.* Yerkes, 12 Cox C. C. 208. See *supra*, § 963; *infra*, § 971.

[7] State *v.* Coombs, 55 Me. 477. See R. *v.* Wright, *supra*, § 887, as to effect of returning in purging offence.

[8] *Infra*, § 1055.

[9] *Supra*, § 961; R. *v.* Barnes, T. &

and the servant appropriates the cheque, this is larceny;[1] but if the cheque be given to the defendant absolutely, as agent for a creditor to whom it is to be handed, the property passes out of the master, and larceny cannot be maintained.[2] And where money is given to A. to have changed, the property of the money being surrendered by the owner, A. cannot be convicted of stealing the money, when no property in it was retained by the owner,[3] nor can he be convicted of stealing the change, for this the owner of the money never had.[4] If, however, the property is not passed to the party taking, he is indictable for larceny.[5] And this is the case where the property in the money is not passed to the defendant, but he obtains it by mistake of the owner.[6]

No such property passes with possession fraudulently obtained from servant or bailee as precludes prosecution for larceny.

§ 966. Where a servant or bailee has bare possession of goods, not being authorized to pass the property in the same, it is larceny fraudulently to obtain from him such possession and then convert the goods.[7] Thus larceny was held to be consummated in a case where some wheat, not the property of the prosecutors, but which had been consigned to them, was placed in one of their storehouses in the care of a servant, E., who was to deliver the wheat only to the orders of the prosecutors or their managing clerk, C., when the defendant, who was in the employ of

M. 387; 2 Den. C. C. 59; R. *v.* Davenport, Arch. Peel's Acts, 5; Lewer *v.* Com., 15 S. & R. 93; Ennis *v.* State, 3 Greene (Iowa), 67; Welsh *v.* People, 17 Ill. 339; Zschocke *v.* People, 62 Ibid. 137; Wilson *v.* State, 1 Porter, 118; Kellogg *v.* State, 26 Ohio St. 15. See R. *v.* Metcalf, 1 Mood. C. C. 433; R. *v.* Essex, D. & B. 371; 7 Cox C. C. 384.

[1] R. *v.* Metcalf, 1 Mood. C. C. 433; Smith *v.* People, 53 N. Y. 111; State *v.* Shoaf, 68 N. C. 375.

[2] *Supra*, § 962 *b*; R. *v.* Essex, *ut supra*.

[3] R. *v.* Thomas, 9 C. & P. 741; R. *v.* Reynolds, 2 Cox C. C. 170; R. *v.* Slingsby, 4 F. & F. 61; R. *v.* Jacobs, 12 Cox C. C. 151. See Wilkinson *v.* Whalley, 5 M. & G. 391. *Cf.* R. *v.* Gumble, 12 Cox C. C. 248; and see note to *supra*, § 956, as to distinctions.

[4] R. *v.* Sullens, 1 Mood. C. C. 129; R. *v.* Bird, 12 Cox C. C. 254; *Cf.* 25 Alb. L. J. 383. *Supra*, §§ 862, 962.

[5] Justices *v.* People, 90 N. Y. 12; People *v.* Abbott, 53 Cal. 284. See Hildebrand *v.* People, 56 N. Y. 394, where a customer laid down a note on the counter which the clerk seized. This was held larceny. *Supra*, § 956, and see R. *v.* McKale, L. R. 1 C. C. 32; 11 Cox C. C. 32; State *v.* Anderson, 25 Minn. 66.

[6] *Supra*, §§ 916, 957. *Infra*, § 975.

[7] *Supra*, § 956; R. *v.* Campbell, 1 Mood. C. C. 179; R. *v.* Simpson, 2 Cox C. C. 235; R. *v.* Gillings, 1 F. & F. 36; R. *v.* Harvey, 9 C. & P. 353; R. *v.* Hornby, 1 C. & K. 305; State *v.* Brown, 25 Iowa, 561.

the prosecutors, obtained the key of the storehouse from E., and was allowed to remove a quantity of the wheat, upon the fraudulent representation to E. that he had been sent by C., and was to take the wheat to the Brighton railway station;[1] and it has been held larceny for a person to take *animo furandi* from a post-office clerk a larger sum than he is entitled to, knowing the money not to be his.[2] But it is otherwise when absolute property is transferred by an authorized agent or bailee. This being the case, as the cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine orders, and to judge of their genuineness, it is not larceny but false pretence to obtain money on a forged cheque from such cashier.[3]

[1] R. *v.* Robins, 29 Eng. L. & Eq. 544; 6 Cox C. C. 420; Dears. C. C. 418. See *supra*, § 888. Compare R. *v.* Aickles, 2 East P. C. 675; S. C., 1 Leach, 294; R. *v.* Wilson, 8 C. & P. 114; State *v.* Watson, 41 N. H. 533; Cary *v.* Hotailing, 1 Hill N. Y. 311. *Supra*, § 892.

[2] R. *v.* Middleton, 12 Cox C. C. 260, cited at large *supra*, § 916; and see R. *v.* Oliver, cited 4 Taunt. 274; *Cf.* comments in London Law Times, Sept. 21, 1878, p. 347. As distinguished from text, see R. *v.* Walsh, R. & R. 215; R. *v.* Metcalf, 1 Mood. C. C. 433.

In Com. *v.* Barry, 125 Mass. 390, the evidence was that, in pursuance of a preconcerted plan with B., A. entered the baggage-room of a R. R. station, where B. had a valise checked, and presenting a check corresponding with the one on the valise, obtained permission from the baggage-master to place a package in the valise. While the attention of the baggage-master was called away by B., A. changed the checks on the valise and a trunk, which was standing underneath the valise, and immediately passed out of the room. By means of this substitution of checks, the trunk was carried to a station other than that intended by its owner. B. went on the same train with it, and on arrival at the station received it, took it with him, and appropriated its contents. It was held that A. was guilty of larceny of the trunk and its contents.

[3] R. *v.* Prince, L. R. 1 C. C. 150; 11 Cox C. C. 193. See *supra*, § 916, for other cases.

Where a letter addressed to J. M., St. Martin's Lane, Birmingham, inclosing a bill of exchange, drawn in favor of J. M., was delivered to the defendant, whose name was J. M., and who resided near St. Martin's Lane, Birmingham, but, in truth, the letter was intended for a person of the name of J. M., who resided in New Hall Street; and the prisoner who, from the contents of the letter, must have known that it was not intended for him, applied the bill of exchange to his own use; the judges held that it was no larceny, because at the time when the letter was delivered to him, the defendant had not the *animus furandi*. R. *v.* Mucklow, 1 Mood C. C. 160; R. *v.* Godfrey, 8 C. & P. 563; R. *v.* Davis, 36 Eng. L. & Eq. 607; Dears. C. C. 640. *Supra*, § 806. If, on the other hand, the original taking of the letter had been fraudulent, and with knowledge that

§ 967. When the possession by a bailee is rightfully obtained, the mere fact of the subsequent existence of the *animus furandi* does not make the offence larceny,[1] unless by some new and distinct act of taking, as by severing some part of the goods from the rest, and thereby breaking bulk, with intent to convert them to his own use, the offender determines the privity of the bailment, and so the special property thereby conferred upon him.[2] Whether the separation by a carrier of one package from

Bailee liable when bulk or package is fraudulently broken, though possession was obtained *bonâ fide*.

it was not meant for the defendant, the case is larceny. R. *v.* Gillings, 1 F. & F. 36.

[1] R. *v.* Thristle, 1 Den. C. C. 502 (cited *supra*, § 963); R. *v.* Banks, R. & R. 441; People *v.* Anderson, 14 Johns. 294; Wilson *v.* People, 39 N. Y. 459; Com. *v.* Perry, 8 Phil. Rep. 616; Com. *v.* Franz, Ibid. 612. (Cases of pawning by bailees.)

[2] 1 Hawk. c. 33, s. 1; 2 East P. C. 554; 1 Hale, 504; 2 Russ. on Cr. 6th Am. ed. 56.

Mr. Collyer, in his collection of statutes, remarks: "This latter position has been disputed, and much stress has been laid upon the unreasonableness of making a man guilty of a felony for stealing part of that of which, if he had taken it all, he would be only guilty of a misdemeanor; but a man is equally guilty of a felony in taking the whole as in taking a part, when he has done an act to determine the privity of contract. The cause of the distinction is to be found in the necessity of an accurate distinction between a breach of trust and an act of felony; and the principle is, that felony cannot be committed by a person having a legal possession of goods; as, for instance, under a contract. See R. *v.* Charlewood, 1 Leach, 409. The contract must be put an end to before felony can be committed; for during its existence the person having possession under it has, *primâ facie*, a legal possession; therefore, although by selling the goods without breaking he, in fact, destroys the privity of the contract, still that act is executed in respect of goods which are at the time in his legal possession, the termination of the contract and the act of conversion being contemporaneous; there is not, therefore, a caption and asportation of the goods of another, which is essential to the offence of larceny. And upon this principle R. *v.* Madox, R. & R. 92, was decided. The prisoner was master and owner of a ship, and stole some of the goods delivered to him to carry. It was held not larceny, because he did not take them out of their packages. But if the package of goods be first broken, the contract is determined by that act; the legal possession of the carrier is at an end; and, although the actual possession is still in him, the property revests in the owner, and any subsequent acts of conversion is strictly an act committed upon the goods of another, and the larceny is complete. It may be observed that, in the latter case, the offence is the same, whether it be committed upon the whole or upon part." Burn's Justice (29th ed.), tit. Larceny.

Where a miller having received barilla to grind, fraudulently abstracted part of it, returning a mixture of barilla and plaster of Paris, it was considered

a mass of packages, without breaking the wrapping or boxing of the package so separated, is such a breaking bulk, has been contested. The affirmative is maintained in Massachusetts and New York.[1] The negative appears to be the prevalent view in England.[2]

And so where bailment is determined by fraudulent severance.

§ 968. A bailment may be also determined by a fraudulent severance by the bailee, so as to make him guilty of larceny. Thus, in an English case that came up before all the judges, the prisoner was sent out by a tailor to sell clothes in a particular county; the price of each article was fixed, and the clothes were intrusted to the prisoner on the arrangement that he was to sell them at the price fixed, he receiving 3*s.* in the pound on the amount received for them, and

larceny. Com. *v.* James, 1 Pick. 375. See 1 Hawk. 33, s. 56; State *v.* Fairclough, 29 Conn. 47. Compare Cartwright *v.* Green, 8 Ves. 405.

Where a carrier, while his contract is in the course of completion, opens the pack and takes out part of the goods, he commits a larceny; but if he run away with the whole it is a breach of trust, and no larceny. But if, after arriving at the place where he should deliver his charge, he steal a part or the whole, it is a larceny. 1 Hale, 504; Staundf. 25.

Merely to take one article away which is not bound up in bulk with others is not, according to the English rule, breaking bulk. R. *v.* Glass, 1 Den. C. C. 215; 2 C. & K. 395. This has been applied to the case of a letter-carrier taking a bank bill out of an envelope. R. *v.* Glass, *ut sup.*; though it is otherwise if one bank note is taken out of a bundle. Ibid. So it is not larceny for a carrier to take one truss of hay from a load not bound together of several trusses. R. *v.* Pratley, 5 C. & P. 533; nor for a drover to take one sheep from a flock. R. *v.* Reilly, Jebb, 51.

Where the prosecutor sent forty bags of wheat to the prisoner, a warehouseman, for safe custody, until they should be sold by the prosecutor, and the prisoner's servant, by direction of the prisoner, emptied four of the bags, and mixed their contents with other inferior wheat, and part of the mixture was disposed of by the prisoner, and the remainder was placed in the prosecutor's bags, which had thus been emptied, and there was no severing of any part of the wheat in any other bag, and the intent was to embezzle that part only which was so severed; it was held that the prisoner was guilty of larceny in taking the wheat out of the bag. R. *v.* Brazier, R. & R. 337; and see R. *v.* Madox, Ibid. 92.

Under the special statutes, to sustain a charge of larceny by a bailee, it is necessary to prove some act of conversion inconsistent with the purpose of the bailment. R. *v.* Jackson, 9 Cox C. C. 505. See *infra*, § 1009.

[1] Com. *v.* Brown, 4 Mass. 580; Dame *v.* Baldwin, 8 Ibid. 518; Nichols *v.* People, 17 N. Y. 114, overruling People *v.* Nichols, 3 Park C. R. 579.

[2] R. *v.* Cornish, 6 Cox C. C. 432; Dears. 425; R. *v.* Madox, R. & R. 92; cited more fully *infra;* R. *v.* Jenkins, 9 C. & P. 38; R. *v.* Howell, 7 C. & R. 325; R. *v.* Pratley, 5 C. & P. 533.

being bound to bring back the remainder of the clothes which were unsold. The prisoner received from the prosecutor a parcel of clothes on these terms, but, instead of selling them, he fraudulently pawned a portion of them for his own benefit, and afterwards fraudulently misappropriated the residue to his own use. It was held, that the original bailment of the goods to the prosecutor was determined by the unlawful act of pawning part of them, and that the subsequent fraudulent misappropriation of the remainder amounted to larceny.[1]

Exception where the bailment expires of itself.

§ 969. It need scarcely be added that where a bailment has expired by its own limitations, and the property reverts to the master's possession, it is larceny for the ex-bailee to steal any article it may have included.[2] In illustration of this rule may be noticed an English case, where certain coals were delivered to the prisoner, who had been sent for them by his master, and deposited in the master's cart, their price being entered to the master's account. On the road home the prisoner disposed of a portion of the coals. It was held that this was larceny of the coals and not embezzlement, the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, and the possession from that time being in the master.[3] And determination of a bailment can be inferred from the dealings of the parties.[4]

By statute bailees open in other cases to prosecution.

§ 970. It is proper to say, that by English statutes (20 & 21 Vict. and 24 & 25 Vict.) the common law, in this respect, has been changed, and stealing by bailees is made larceny, irrespective of the limitations imposed by the common law. Similar statutes have been adopted in several of the United States.[5] These will hereafter be discussed.[6]

[1] R. *v.* Poyser, 2 Den. C. C. 233; T. & M. 559; 5 Cox C. C. 241.

[2] R. *v.* Charlewood, 1 Leach, 409; 2 East P. C. 689. See R. *v.* Stear, 1 Den. C. C. 349; R. *v.* Cornish, 33 Eng. L. & Eq. 527; Dears. 425; 6 Cox C. C. 432. See *supra*, § 892.

[3] R. *v.* Reed, Dears. C. C. 257; 18 Jur. 67. See, also, R. *v.* Hayward, 1 C. & K. 518. *Supra*, §§ 956, 962*a*. As to embezzlement in such cases see *infra*, § 1027.

[4] R. *v.* Stear, *ut sup.*

[5] As to New York statute, see note to *supra*, § 888.

[6] See *infra*, §§ 1049 *et seq.*; and see R. *v.* Aden, 12 Cox C. C. 512.

VIII. BY ASSIGNEE OR VENDEE.

§ 971. A party obtaining goods from another by sale is not liable, as we shall have frequently occasion to see, to a prosecution for larceny, no matter how fraudulent may have been the pretences by which the sale was obtained.[1] This rule, however, does not apply when the goods were obtained by force or threats of force.[2]

Sale obtained by force does not transfer property.

[1] *Supra*, §§ 914, 915, 965; R. *v.* Jones, C. & M. 611; R. *v.* Wilson, 8 C. & P. 111; Smith *v.* People, 53 N. Y. 111; Lewer *v.* Com., 15 S. & R. 93; State *v.* Shoaf, 68 N. C. 376. See notice of New York statute, *supra*, § 888, note.

[2] R. *v.* Lovell, L. R. 8 Q. B. D. 185; 44 L. T. 319; Zink *v.* People, 6 Abb. N. C. 413; 77 N. Y. 114. *Supra*, § 915.

The defendant acted as auctioneer at a mock auction, and knocked down some cloth for 26*s.* to B., who had not bid for it, as the defendant knew, and B. refused to take the cloth or pay for it; upon which the defendant refused to allow her to leave the room unless she paid. Ultimately she paid the 26*s.* to the defendant and took the cloth. She paid the 26*s.* because she was afraid. The defendant was indicted for, and convicted of, feloniously stealing these 26*s.*; and it was held by the English judges in banc that the conviction was right, because, if the force used to B. made the taking a robbery, larceny was included in that crime; if the force was not sufficient to constitute a robbery, the taking of the money nevertheless amounted to larceny, as B. paid the money to the defendant against her will, and because she was afraid. R. *v.* McGrath, L. R. 1 C. C. 205; 18 W. R. 119; 37 L. J. M. C. 7. It was held, also, that under the circumstances it was not necessary that the jury should be asked whether B. paid the money against her will, as from the evidence it was clear that there could have been no doubt in the minds of the jury that the money was so paid. See Zink *v.* People, *ut sup.* *Infra*, § 973.

In R. *v.* Lovell, *ut sup.*, the proof was that B. engaged the prisoner to grind scissors, and paid him when they were ground. B. then handed him six knives to grind. He ground them and demanded 5*s.* 6*d.* for them, the ordinary charge being 1*s.* 3*d.* B. refused to pay 5*s.* 6*d.* The prisoner then threatened B., and said he would make her pay, and ultimately, in consequence of her fears, she gave the prisoner 5*s.* 6*d.* The prisoner was indicted for larceny of the 5*s.* 6*d.*, and the chairman on the trial directed the jury, that if the money was obtained by frightening the owner, the prisoner was guilty of larceny. The jury having convicted the prisoner, the conviction was sustained by the court for crown cases reserved (1881).

In another case the prisoners, pretending that one of them was a sea captain, and a Frenchman unable to speak English, offered to the prosecutrix a dress for sale at 25*s.*, saying that if she would give that price for it, she should have another dress, which was produced, worth 12*s.*, into the bargain. The prosecutrix agreed to this, and took a sovereign and a shilling from her pocket. Whilst she was holding the money, one of the prisoners opened her hand and took it out, though not

§ 972. The sale, to bar larceny, must be complete.[1] Thus where the defendant, having bargained for goods, for which, by the custom of trade, the price should have been paid before they were taken away, took them without the consent of the owner, and at the time he bargained for them did not intend to pay for them, but meant to get them into his own possession and dispose of them for his own benefit, this was ruled to be larceny.[2] And where the defendant put goods into a cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them, his intention being from the beginning to get the goods by fraud, larceny was in like manner held to be proved.[3]

Sale must be complete.

§ 973. A transfer obtained by a fraudulent trick does not shield the taker.[4] The defendant, in the presence of the prosecutor, picked

forcibly. He then declined to take the other 4*s.*, but laid down the dress first produced, and refused to let the prosecutrix have the other. The dress proved to be of little value. It was held that the prisoners were properly convicted of larceny. R. *v.* Morgan, 29 Eng. Law & Eq. 543; Dears. C. C. 395; 6 Cox C. C. 408.

On the same reasoning the following was held to constitute larceny: The defendant went into a shop and asked to buy a chattel, and was referred by the clerk to the shopkeeper, who refused to let him have it except upon his father's order. Afterwards, without having obtained such order, and in the absence of the shopkeeper, he asked to see the chattel. When it was shown him by the clerk, he took it from the counter, told the clerk that he had made it all right with the shopkeeper, and carried it away. Com. *v.* Wilde, 5 Gray, 83. This can be sustained on the ground that there was no assent to the transfer.

[1] *Supra*, §§ 915, 959; R. *v.* Cohen, 2 Den. C. C. 249; R. *v.* Sheppard, 9 C. & P. 121; People *v.* Miller, 14 Johns. 371; State *v.* Anderson, 25 Minn. 66. See State *v.* Robinson, 35 La. An. 964.

[2] R. *v.* Gilbert, 1 Mood. C. C. 185. See Com. *v.* Wilde, as above explained.

[3] R. *v.* Pratt, 1 Mood. C. C. 250. Compare R. *v.* McKale, L. R. 1 C. C. 125; cited *infra*, § 974.

[4] *Supra*, § 964; Miller *v.* Com., 78 Ky. 15; People *v.* Tweed, 1 N. Y. Cr. R. 98; Grunson *v.* State, 89 Ind. 533. See U. S. *v.* Murphy, 1 McArth. & Mac. 375; Hall *v.* State, 6 Bax. 522.

In R. *v.* Hollis, 49 L. T., N. S., 572; L. R. 12 Q. B. D. 25; 15 Cox C. C. 345, a conviction of larceny was sustained on the following facts: The prisoner and another person went to an inn. The prisoner asked the barmaid for whiskey. He put down half a sovereign, and received 9*s.* 6*d.* in silver in change. He then asked for the half-sovereign back, saying he thought he had change. She gave it back. His companion then asked for a cigar. She served him with it. The prisoner then put down 10*s.* in silver and a half-sovereign, asking the barmaid to give him a sovereign for it, which she did.

up a purse in the street, containing a receipt of £147 for a "rich brilliant diamond ring," and also the ring itself; it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money as a security that he would return the ring as soon as his proportion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10*s.* only, and the watch and the money were never returned; it was left to the jury to say whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury being of that opinion convicted the defendant.[1] In another case, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion that this practice of ring-dropping amounted to larceny; and they distinguished it from the case of a loan; for here although the possession was parted with, the property in the goods was not.[2]

Transfer by "ring-dropping" or trick not such a sale.

§ 974. The transfer to pass such title as bars larceny, must be the consent of two minds to one thing.[3] Hence where a defendant offered to give the prosecutor gold for bank notes, and upon the prosecutor's laying down some bank notes for the purpose of having them changed, the defendant took them up and went away with them, promising to return immediately with the gold, but in fact never returned, and was indicted for stealing them: Wood, B., left it to the jury to say whether the defendant had the *animus furandi* at the time he took the notes; and said, that if they were of that opinion, the case clearly amounted to larceny.[4] To adopt the language of the same judge, "A parting with the property in goods could only be effected

Transfer must be consent of two minds to one thing.

His companion kept on engaging the barmaid's attention. The prisoner never returned the 9*s.* 6*d.* which the barmaid gave him in the first instance. The barmaid never intended to part with her master's money except for full consideration.

[1] R. *v.* Patch, 1 Leach, 273. See Defrese *v.* State, 3 Heisk. 53.

[2] R. *v.* Watson, 2 Leach, 730; S. C., 2 East P. C. 680. *Supra*, § 964.

[3] Whart. on Cont. § 4. *Supra*, § 915; Shipley *v.* People, 86 N. Y. 375; State *v.* Williamson, 1 Houst. C. C. 155; Peck *v.* State, 9 Tex. Ap. 70.

[4] R. *v.* Oliver, cited 4 Taunt. 274; 2 Russ. 122, S. C.; 2 Leach, 1072; R. & R. 215, S. C. *Supra*, § 971.

by contract, which required the assent of two minds; but in this case there was not the assent of the mind either of the prosecutor or of the prisoner, the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner never meaning to barter, but to steal."[1] And where money is

[1] See R. *v.* Rodway, 9 C. & P. 784. See *supra*, § 964.

Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodgings, out of which the defendant chose six pairs, which were laid on the back of a chair; and the defendant then sent the prosecutor back to his shop for some articles, and while he was absent absconded with the stockings; the judges held that this amounted to larceny, as the defendant clearly obtained possession of the goods *animo furandi*, and as the prosecutor did not assent to the sale. R. *v.* Sharpless, 1 Leach, 108; 2 East P. C. 675.

In another case, one of the defendants persuaded the prosecutor, by a preconcerted plan, to deposit his money with another of the defendants as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; it was left to the jury to say whether, at the time the money was taken, there was not a plan that it should be kept, under the false color of winning the bet, and the jury found that there was. The offence was held to be larceny; because, at the time the defendants obtained the money from the prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party won the wager. R. *v.* Robinson, R. & R. 413. See, also, R. *v.* Horner, 1 Leach, 325; Cald. 295. *Aliter*, if money was absolutely parted with. R. *v.* Nicholson, 2 Leach, 698. So where S., induced by the subterfuges of three fellow-passengers in a railway car, made a wager with one of them and deposited his stake with P., another of them. The opposite stake turned out to be only waste paper; but P., after detection, refused to give up S.'s money. This was held larceny in P. and his associates. Stinson *v.* People, 43 Ill. 397. See R. *v.* Robson, R. & R. 413.

Where the prisoner went into a shop and asked for change for half-a-crown, and the shopman gave him two shillings and sixpence; the prisoner held out the half-crown, and the shopman just took hold of it by the edge, but never actually got it into custody, and the prisoner ran away with the change and the half-crown: upon an indictment for stealing the two shillings and sixpence, Parke, J., held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown. R. *v.* Williams, 6 C. & P. 390. And see R. *v.* Twist, 12 Cox C. C. 509; R. *v.* Johnson, 2 Den. 310.

Another illustration is found in a crown case reserved decided in Feb. 1873. The prosecutor agreed to sell a load of onions to the defendants for cash. The defendants pretended to agree to this, and said, "You shall have your money directly the onions are unloaded." The onions were unloaded, and the prosecutor asked for his money, which the defendants would not pay, but, on receiving a bill from the prosecutor, put a cross on it, declared that they had a receipt, and hurried off with the onions. The jury

passed conditionally to another, who before the condition is performed steals it, the case, as we will presently see, is one of larceny.[1]

Conditional transfer does not bar larceny.

§ 975. Hence a transfer of property, so as to bar larceny, does not exist when there is a condition which still reserves a property in the vendor.[2] Thus, as we have just seen, if a sale be for cash, the taking of the goods without paying cash is larceny.[3]

§ 976. Where a replevin is fraudulently sued out, and by that means another man's horse is obtained and carried away, it is held

found that the defendants never intended to pay. It was ruled to be clear that there was not such an agreement between the prosecutor and the defendants to the same exact thing as made out a sale. "If, in this case," said Kelly, C. B., "it had been intended by the prosecutor to give credit for the price of the onions, even for a single hour, it would not have been larceny, but it is clear that no credit was given or ever intended to be given. *If the seller delivers first before the money is paid, and the buyer fraudulently runs off with the article, or if, on the other hand, the buyer pays first, and the seller fraudulently runs off with the money, without delivering the thing sold, it is equally larceny.*" R. *v.* Slowly, 12 Cox C. C. 269; 27 L. T. N. S. 803. See R. *v.* McGrath, 11 Cox C. C. 347; L. R. 1 C. C. 205.

[1] R. *v.* McKale, L. R. 1 C. C. 125; 11 Cox C. C. 32. *Supra*, § 972.

"In two recent cases the prisoner was charged with stealing nineteen shillings. In both the prosecutor gave the prisoner a sovereign, under the expectation that nineteen shillings change were to be given. In the first case the chairman of Quarter Sessions amended the indictment to one for stealing a sovereign, and directed the jury that if they believed that the prisoner at the moment of obtaining the sovereign intended by a trick feloniously to deprive the prosecutor of the sovereign, they were to find a verdict of guilty, and it was held that the direction was right. R. *v.* Gumble, 42 L. J. M. C. 7; L. R. 2 C. C. 1. In the second case the indictment was not amended, and therefore the prisoner could not be convicted, as she had never taken nineteen shillings at all, but the majority of the judges thought that she might have been convicted on an indictment for stealing one sovereign if the issue had been properly left to the jury. R. *v.* Bird, 12 Cox C. C. 257; C. C. R. 42 L. J., M. C. 44." Roscoe's C. P. p. 633. See distinctions taken in this respect, *supra*, §§ 956, 965.

[2] *Supra*, §§ 888, 972, 974. In R. *v.* Goode, 2 C. & P. 422, *n.*, it was held larceny in A. to fraudulently get from B. a note to deposit in bank, because B. did not intend to part with his property until the condition was fulfilled. See People *v.* Call, 1 Denio, 120; People *v.* Hildebrand, 56 N. Y. 394; Dignowitty *v.* State, 17 Tex. 521, and cases cited *supra*, §§ 956, 957.

[3] R. *v.* Cohen, 2 Den. C. C. 249; R. *v.* Campbell, 1 Mood. C. C. 179; R. *v.* Gilbert, Ibid. 185; R. *v.* Slowly, 12 Cox C. C. 269; Ross *v.* People, 5 Hill (N. Y.), 294. See R. *v.* Box, 9 C. & P. 126; cited *supra*, § 885.

No defence that goods were obtained by legal process, where such process is fraudulent.

that larceny may be maintained;[1] and so where one, having no cause of action, sues out a writ for a fictitious demand, and thus gets possession of the property of another, which he converts to his own use, and with intent to defraud the owner.[2] But it may be questioned whether such cases are not more properly extortionate abuse of process as an offence at common law. And where money is paid voluntarily to one who falsely represents himself as an officer with a warrant to arrest, the latter is not indictable for larceny.[3]

IX. INDICTMENT.

Indictment must be formally correct.

§ 977. The indictment in larceny is considered in other works, to which reference is made, as follows:—

Name and addition of defendant, Whart. Cr. Pl. & Pr. 96.

Name and addition of owner, etc., Whart. Cr. Pl. & Pr. § 109; Whart. Cr. Ev. § 94.

Description of written instrument in, Whart. Cr. Pl. & Pr. § 167.

Proof of same, Whart. Cr. Ev. § 114.

Description of articles stolen, Whart. Cr. Pl. & Pr. § 206.

Evidence of same, Whart. Cr. Ev. § 121.

Averment of value, Whart. Cr. Pl. & Pr. § 213.

Proof of, Whart. Cr. Ev. § 126.

Description of money or coin, Whart. Cr. Pl. & Pr. § 218.

Proof of same, Whart. Cr. Ev. § 122.

Joinder of articles in Whart. Cr. Pl. & Pr. §§ 243 *et seq.*

Joinder of counts in, with receiving stolen goods, Whart. Cr. Pl. & Pr. §§ 285 *et seq.*

Technical averments in, Whart. Cr. Pl. & Pr. § 266.[4]

The indictment must allege that the defendant "feloniously did steal, take, and carry away," the goods in question.[5]

[1] 1 Hale, 507; 1 Hawk, c. 33, s. 12; 3 Inst. 108; R. *v.* Farr. Kel. 43; R. *v.* Summers, 3 Salk. 194.

[2] Com. *v.* Low, Thach. C. C. 477.

[3] Perkins *v.* State, 65 Ind. 317.

[4] For Forms, see Whart. Prec. tit. "LARCENY."

[5] Whart. Cr. Pl. & Pr. § 266; Com. *v.* Pratt, 132 Mass. 246. See Yates *v.* State, 67 Ga. 770; Sovine *v.* State, 85 Ind. 137; Insall *v.* State, 14 Tex. Ap. 145.

In some jurisdictions it is necessary to aver that the taking was without the owner's assent,[1] and that the intent was to deprive the owner of his property.[2]

Various counts may be joined.

§ 978. As is elsewhere seen, counts for larceny can be joined with those for embezzlement, and receiving stolen goods.[3] In Ohio this is settled by statute.[4] Property may be stated in different ways in different counts.[5]

How far articles belonging to different owners may be grouped is elsewhere considered.[6]

Where a joint ownership is averred, it must be proved as laid.[7]

Ownership must be stated.

§ 979. Ownership must be distinctively averred, either in a specific person, or a person unknown to the grand jury.[8] "Of the goods and chattels" of the owner is a sufficient averment of ownership.[9] When required by statute, the taking must be averred either directly or inferentially to be without the owner's consent.[10] But this is not necessary at common law.[11]

It is not sufficient, at common law, to aver ownership in a partnership without giving the names of the partners.[12]

The goods may be averred to be of a person unknown,[13] and this sufficiently negatives ownership in the defendant.[14]

As we have seen, the ownership may be averred to be in either special or general owner.[15]

[1] *Supra*, § 915; Bowling *v.* State, 13 Tex. Ap. 338.

[2] Tallart *v.* State, 14 Tex. Ap. 234.

[3] Whart. Cr. Pl. & Pr. §§ 291 *et seq.* See State *v.* Lawrence, 81 N. C. 522; Brown *v.* People, 39 Mich. 37.

That there cannot be a conviction for receiving on a count for larceny, see *infra*, § 986.

[4] Code of Crim. Prac. O. L. vol. 66, 301.

[5] *Supra*, § 932 *b*.

An indictment alleging that the defendant "did unlawfully obtain from the said C. C. a cheque for the sum of £8 14*s*. 6*d*. of the moneys of the said W. W.," is a sufficient allegation of the ownership of the cheque. R. *v.* Godfrey, Dears. & B. C. C. 426; 27 L. J. M. C. 151. See Whart. Cr. Pl. & Pr. §§ 191, 218.

[6] *Supra*, §§ 931, 948; Whart. Cr. Pl. & Pr. §§ 252, 470.

[7] State *v.* Ellison, 58 N. H. 325.

[8] *Supra*, § 932; Beason *v.* State, 72 Ala. 191; Garner *v.* State, 36 Tex. 693; Maddox *v.* State, 14 Tex. Ap. 447. See Gadson *v.* State, 36 Tex. 350; Case *v.* State, 12 Tex. Ap. 228; Stone *v.* State, Ibid. 193; Whart. Cr. Pl. & Pr. § 218.

[9] State *v.* Bartlett, 55 Me. 200; Fisher *v.* State, 40 N. J. L. 169; Whart. Cr. Pl. & Pr. § 191.

[10] Com. *v.* Smith, 116 Mass. 40. See Johnson *v.* State, 39 Tex. 393.

[11] Wedge *v.* State, 7 Lea, 687.

[12] *Supra*, § 932, 935

[13] *Supra*, § 949.

[14] Thompson *v.* State, 9 Tex. Ap. 301.

[15] *Supra*, §§ 932, 936.

X. VERDICT.

§ 980. The subject of verdict, when there are lumping valuations, is elsewhere fully discussed.[1] It has been also seen that a verdict may go to a part of the articles alleged to be stolen, when each has a specific valuation.[2] Whether a valuation of the goods in the verdict is requisite is also elsewhere noticed.[3]

XI. RESTORING ARTICLES STOLEN.

By statute articles stolen are to be restored.

§ 981. The statute 21 Hen. VIII. which is part of the common law brought with them by the American colonists, declares that the person robbed, etc., "shall be restored to his money," and directs judges on conviction to award from time to time "writs of restitution for the said money, goods, and chattels." The statutes 7 & 8 Geo. IV. and 24 & 25 Vict. add provisions which will hereafter be partially noticed. Statutes on the same topic have been enacted in several of the United States.[4] The statute 21 Hen. VIII. extended only to felonious and not to fraudulent takings; and hence has been held not to include embezzlements.[5] If there be any gross neglect in prosecuting, the prosecutor is stopped from asserting his right.[6]

Goods may be followed in hands of assignees with notice.

§ 981 *a*. The statute 21 Hen. VIII. limits the restoration to "the money, goods, or chattels," robbed or stolen, and under this statute it is part of the sentence of a convicted thief that he "restore the property stolen, if not already restored." Two points of difficulty here arise. (1) The first is whether the goods can be followed into the hands of innocent assignees. The statute of 21 Hen. VIII. warranting this interpretation, the statutes of 7 & 8 Geo. IV. and 24 & 25 Vict. were passed to protect *bonâ fide* purchasers. Unless, however, a clear case of *bonâ fides* is made out, the court will order a writ to

[1] *Supra*, § 951; Whart. Cr. Pl. & Pr. §§ 736 *et seq.*

[2] Whart. Cr. Pl. & Pr. §§ 252, 470, 736 *et seq.*

[3] Whart. Cr. Pl. & Pr. § 753.

[4] See as to Massachusetts, Com. *v.* Smith, 1 Mass. 245; Com. *v.* Boudrie, 4 Gray, 418. As to New Hampshire, Locke *v.* State, 32 N. H. 106. As to Virginia, Com. *v.* Henley, 1 Va. Cas. 145.

[5] R. *v.* De Veaux, 2 Leach, 665; 2 East P. C. 789, 839. It is otherwise with the 24 & 25 Vict. See, generally, Parker *v.* Patrick, 5 T. R. 175.

[6] 1 Hale, P. C. 540; 2 Hawk. c. 23, s. 56.

issue to restore the goods wherever they may be found.[1] And the general principle is that property in a stolen chattel reverts to the owner on conviction of the thief, and he may follow the chattel wherever it may be, unless it be in the hands of *bonâ fide* innocent purchasers.[2] (2) Can the owner, by this process, obtain the *price* of the goods in case the goods have been sold by the thief? Certainly not under 21 Hen. VIII., which gives title to the stolen goods *in specie*, wherever they may be, and which, until limited by 7 & 8 Geo. IV., authorized the writ to follow the goods even in the hands of *bonâ fide* purchasers. Hence, if the goods cannot be found in the thief's possession, the court cannot assess upon the thief their price. So, indeed, has it been decided in Massachusetts.[3] And in England it has been ruled that the court has no power, either by statute or common law, to direct the disposal of chattels in the possession of a convicted felon, unless such chattels specifically belong to the prosecutor.[4]

Goods stolen from a servant may be thus recovered by the master, if the goods be laid in the indictment as the master's property.[5]

§ 981 *b*. Attempts at stealing have been already distinctively discussed.[6]

XIII. LARCENY FROM HOUSE.

Larceny from the house a statutory offence.

§ 981 *c*. By statute in several States larceny in a house is made distinctively indictable. The gist of the offence, in such case, is the fact of the larceny being committed in a house; and this includes curtilage.[7] But larceny from an alley or court adjacent to a warehouse is not larceny in a house;[8] nor is larceny from a fence or piazza-railing;[9] nor is larceny of clothes hanging on the outside wall of a house;[10] though it is otherwise when the things stolen are taken from a hook under the

[1] See R. *v.* Macklin, 5 Cox C. C. 216; and, also, R. *v.* Stanton, 7 C. & P. 431.

[2] Scattergood *v.* Sylvester, 15 Q. B. 506; R. *v.* Wollez, 8 Cox C. C. 337.

[3] Com. *v.* Bondrie, 4 Gray, 418.

[4] R. *v.* Pierce, Bell C. C. 235; 8 Cox C. C. 344. See El., Bl. & El. 509. But see Golightly *v.* Reynolds, Lofft. 88.

[5] 1 Hale P. C. 542.

[6] *Supra*, §§ 176, 178, 186.

[7] R. *v.* Norris, R. & R. 69; Stanley *v.* State, 58 Ga. 430. See Com. *v.* Smith, 111 Mass. 429; State *v.* McCann, 18 Mo. 249; Ullman *v.* State, 1 Tex. Ap. 220.

[8] Middleton *v.* State, 53 Ga. 248.

[9] Henry *v.* State, 39 Ala. 679.

[10] Martinez *v.* State, 41 Tex. 126.

eaves of the house.[1] Stealing a purse from a fellow lodger's trunk when in the house in which both lodge is larceny in a house;[2] but, so far as concerns the particular purpose, the entry must be adverse.[3] Hence the offence, so far as it involves a trespass in entering into a house, is not made out when the defendant is a married woman and the house her husband's.[4] As is the case with other forms of larceny, there must be a prior intent to steal, though it is not necessary that this intent should have been formed at the time of entrance into the house.[5]

[1] Burge *v.* State, 62 Ga. 170.

[2] Com. *v.* Smith, 111 Mass. 429.

[3] See State *v.* Chambers, 6 Ala. 855.

[4] See R. *v.* Glassie, 7 Cox C. C. 1; Com. *v.* Hartnett, 3 Gray, 450.

As to what is a "warehouse," see *supra*, § 793. As to out-houses, see *supra*, § 797.

[5] Ward *v.* Com., 14 Bush, 233; Berry *v.* State, 10 Ga. 511.

CHAPTER XIV.

RECEIVING STOLEN GOODS.

I. OFFENCE GENERALLY.

Receiving is a substantive offence.

§ 982. Receiving stolen goods knowing them to be stolen, and with intent to prevent the owner from recovering their full enjoyment, is now a substantive offence,

if not by common law, at least by statute.[1] The offence at common law is a misdemeanor;[2] though by the statute of 3 W. & M. ch. 9, it was made accessaryship after the fact to larceny and hence became felony. By the 1 Anne stat. 2, ch. 9, it was provided that where the principal was not convicted of the larceny (which then was a prerequisite to a conviction of an accessary), the receiver could be convicted of the misdemeanor of receiving. Where, however, the offence is combined with harboring and sheltering the thief, then it is accessaryship after the fact to larceny.[3] At common law this would operate as a merger; but merger is now prevented by the statutes making guilty reception of stolen goods an independent offence.[4]

Fact of stealing may be proved by testimony of thief, not by his confessions.

§ 982 *a*. The first point to be shown, in an indictment for receiving stolen goods, is that the goods were stolen,[5] and to prove this fact the thief is a competent witness.[6] His testimony, however, like that of all other accomplices,[7] is to be scrupulously weighed, and upon it, if uncorroborated, a conviction should not be permitted to rest.[8] And bare possession of the stolen property is not sufficient corroboration.[9] Unless confederacy be proved *aliunde*, and unless the confession be made during the continuance of the confederacy, the confession of the thief himself, being the principal, is not admissible against his accessaries.[10] But it is receivable when the admission of guilt is made by the thief in the receiver's presence, even though the thief was at the time in custody.[11]

[1] *Infra*, §§ 997 *et seq.*; Com. *v.* Barry, 116 Mass. 1; Com. *v.* Sullivan, 136 Ibid. 170; State *v.* Weston, 9 Conn. 527; Shriedley *v.* State, 23 Ohio St. 130; Turner *v.* State, 40 Ala. 21.

[2] 2 East P. C. 142; 1 Hale P. C. 619; 1 Chitty C. L. 950; State *v.* Hodges, 55 Md. 127.

[3] R. *v.* Smith, L. R. 1 C. C. 270. *Infra*, § 986.

[4] See People *v.* Reynolds, 2 Mich. 422; People *v.* Maxwell, 24 Cal. 14; Nourse *v.* State, 2 Tex. Ap. 304; State *v.* Coppenburg, 2 Strob. 273.

[5] R. *v.* Kenney, 13 Cox C. C. 397; 2 Q. B. D. 307; Com. *v.* White, 123 Mass. 430; Hey *v.* Com., 32 Grat. 946; O'Connell *v.* State, 55 Ga. 296. See Owen *v.* State, 52 Ind. 379. That goods taken by robbery or burglary are stolen, see R. *v.* Wardroper, Bell C. C. 249; 8 Cox C. C. 284; Shriedley *v.* State, 23 Ohio St. 130.

[6] R. *v.* Haslam, 2 Leach, 467.

[7] Whart. Crim. Ev. § 439.

[8] R. *v.* Robinson, 4 F. & F. 43; Whart. Crim. Ev. § 441.

[9] R. *v.* Pratt, 4 F. & F. 315. See Com. *v.* Savory, 10 Cush. 535; Durant *v.* People, 13 Mich. 351; Whart. Crim. Ev. § 442.

[10] R. *v.* Turner, 1 Mood. C. C. 347; Whart. Crim. Ev. § 698.

[11] R. *v.* Robinson, 4 F. & F. 43; Whart. Crim. Ev. § 679.

§ 983. Guilty knowledge, involving guilty intent, on the part of the defendant, is essential to the constitution of the offence.[1] This may be shown either by the evidence of the principal felon, supported by corroborating facts,[2] or inductively by proving that the defendant bought them very much under their value,[3] or denied their being in his possession, or the like. To show a guilty knowledge, other instances of receiving may be proved;[4] even though they be the subjects of other indictments antecedent to the receiving in question.[5] But where there is a marked difference in time and character in the receptions, one cannot be received to prove the other.[6]

Guilty knowledge is to be proved.

984. Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary

[1] See R. *v.* Densley, 6 C. & P. 399; Copperman *v.* People, 56 N. Y. 591; May *v.* People, 60 Ill. 119; Andrews *v.* People, Ibid. 254; State *v.* Caveness, 78 N. C. 484; Huggins *v.* State, 41 Ala. 393; Wilson *v.* State, 12 Tex. Ap. 481.

[2] R. *v.* White, 1 F. & F. 665; Com. *v.* Savory, 10 Cush. 535; Goldstein *v.* People, 82 N. Y. 231; Friedberg *v.* People, 102 Ill. 160.

[3] 1 Hale, 619; R. *v.* Carter, 12 Q. B. D. 522; 15 Cox C. C. 448.

In Andrews *v.* People, 60 Ill. 354, it was held that where a second-hand retailer of clothing was indicted for receiving stolen goods, and, as tending to prove guilty knowledge, evidence was introduced that he had only paid for the clothing about one-third of its value, it is error to refuse to permit the defendant to prove that, according to usage, dealers in second-hand clothing do not generally pay full prices for clothing, but purchase it at a reduction, and, from the character of the business, they are compelled to sell new clothing for the price of second-hand goods, and hence they must purchase out of season and at reduced prices. It was said by the court that such evidence would tend to rebut the inference of guilty knowledge drawn from the fact that accused had purchased the goods at very low rates.

[4] R. *v.* Dunn, 1 Mood. C. C. 146; R. *v.* Oddy, 2 Den. C. C. 264; R. *v.* Nicholls, 1 F. & F. 51; People *v.* Rando, 3 Parker C. R. 335; Shriedley *v.* State, 23 Ohio St. 130; Yarborough *v.* State, 41 Ala. 405; Devoto *v.* Com., 3 Metc. (Ky.) 417. See, on the point generally, Whart. Cr. Ev. § 44; and, as indicating limits to this, see Com. *v.* Hills, 10 Cush. 530; State *v.* Ward, 49 Conn. 429.

[5] R. *v.* Davis, 6 C. & P. 177; 2 Russ. on Cr. 251.

[6] R. *v.* Oddy, *ut supra;* Coleman *v.* People, 55 N. Y. 81; S. C., 58 Ibid. 555.

In England, by statute, prior independent receivings may be put in evidence to prove guilty knowledge; but the goods, so received, so it has been held, must have been in the defendant's possession at the time of the larceny on trial. R. *v.* Drage, 14 Cox C. C. 85; R. *v.* Carter, L. R. 12 Q. B. D. 522; 50 L. T. N. S. 432; 15 Cox C. C. 448.

that he should have heard the facts from eye-witnesses. He is required to use the circumspection usual with persons taking goods by private purchase; and this is eminently the case with dealers buying at greatly depreciated rates.[1] That which a man in the defendant's position ought to have suspected, he must be regarded as having suspected, as far as was necessary to put him on his guard and on his inquiries.[2] But it has been said that, to justify a conviction in the case of *goods found*, it is not sufficient to show that the prisoner had a general knowledge of the circumstances under which the goods were taken, unless the jury is also satisfied that he knew that the circumstances were such as constituted a larceny.[3] The proof in any case is to be inferential; and among the inferences prominent are inadequacy of price, irresponsibility of vendor or depositor, and secrecy of transaction.[4]

Such knowledge may be inferred.

§ 985. When goods, shown to have been stolen, are retained by a party in his hands, under suspicious circumstances, the burden may rest on him to explain how he came into their possession.[5] But mere possession of stolen goods will not sustain a conviction.[6]

Inference may be derived from possession.

§ 986. As an elementary principle, if larceny by the defendant be proved, though the offender appear only to be a principal in the second degree, the charge of receiving falls, because the offences are substantially distinct, and because there can be no guilty reception unless there be a prior stealing by another.[7] But this reasoning fails,

If larceny be proved defendant cannot be convicted of receiving.

[1] R. *v.* White, 1 F. & F. 665; R. *v.* Wood, Ibid. 497.—Bramwell. See State *v.* Scovel, 1 Rep. Const. Ct. (1 Mill) 274.

[2] Com. *v.* Finn, 108 Mass. 466.

[3] R. *v.* Adams, 1 F. & F. 86. See Rice *v.* State, 3 Heisk. 215.

[4] Adams *v.* State, 52 Ala. 379; Collins *v.* State, 33 Ibid. 434.

[5] R. *v.* Langmead, L. & C. 427; State *v.* Brewster, 7 Vt. 118; State *v.* Weston, 9 Conn. 527.

[6] R. *v.* Woodward, L. & C. 122; 9 Cox C. C. 95; Durant *v.* People, 13 Mich. 351; Jones *v.* State, 14 Ind. 346; State *v.* Emerson, 43 Iowa, 172. As to presumption to be derived from possession of stolen goods, see Whart. Crim. Ev. § 758.

[7] R. *v.* Perkins, 12 Eng. L. & Eq. 587; 5 Cox C. C. 554; 2 Den. C. C. 459; R. *v.* Gruncell, 9 C. & P. 365; R. *v.* Coggins, 12 Cox C. C. 517; State *v.* Ives, 13 Ired. 338; Conner *v.* State, 25 Ga. 515; Teideman *v.* State, 4 Strobh. 309; State *v.* Honig, 78 Mo. 249; State *v.* Smith, 37 Ibid. 58; State *v.* Moultrie, 33 La. An. 1146; See R. *v.* Smith, 33 Eng. L. & Eq. 531; Dears. C. C. 496; 6 Cox C. C. 554; R. *v.* Dyer, 2 East P. C. 767; R. *v.* Atwell, Ibid. 768. This applies where the defendant was prin-

when on an indictment for receiving, proof transpires to show that the defendant was also an accessary before the fact. The offences are so distinct that one cannot be said to merge in the other, nor is conviction of the one in any way incompatible with conviction of the other. Hence, in defiance of such testimony the defendant, if there be sufficient evidence of guilty receiving, may be convicted of such receiving.[1]

Claim of title a defence.

§ 987. Evidence that the thief had at one time been lawfully employed to sell such articles to the defendant will warrant an acquittal, in the absence of any evidence that the defendant knew that the authority had been withdrawn.[2] And the declarations made by the alleged vendor of the defendant at the time of the act, are admissible for the defence;[3] and so of the defendant's declarations at the time when the goods were found on him.[4]

Honest intent a defence, but need not be *lucri causa* if intent be fraudulent.

§ 988. If the intent be honest (*e. g.*, to receive goods for owner or to entrap and detect the thief), the offence is not constituted.[5] But on the other hand, it is not necessary that the offence should be *lucri causa*. It is enough if the object be to shelter or accommodate the thief,[6] or in any way to defraud the owner.[7] And, as is elsewhere seen, an intent to get by the receiving a reward is *a fortiori* sufficient to satisfy the statutes.[8]

When the statute requires an intent it must be laid.[9]

cipal in the second degree in the larceny. R. *v.* Coggins, *ut sup.*; R. *v.* Gruncell, *ut sup.* See *supra*, § 982.

[1] State *v.* Coppenburg, 2 Strobh. 273.

[2] R. *v.* Wood, 1 F. & F. 497; and see *supra*, §§ 884–85; but see Cassells *v.* State, 4 Yerg. 149; Wright *v.* State, 5 Ibid. 154.

[3] People *v.* Dowling, 84 N. Y. 478; Lander *v.* People, 104 Ill. 248; Whart. Crim. Ev. §§ 263, 691, 761. See State *v.* Daley, 53 Vt. 442.

[4] Ibid. See Whart. Cr. Ev. §§ 263, 691, 761, for cases. That the defendant's explanation may be negatived inferentially, see R. *v.* Ritson, 50 L. T. N. S. 727; 15 Cox C. C. 478.

[5] *Supra*, §§ 883 *et seq.*; Aldrich *v.* People, 101 Ill. 16.

[6] R. *v.* Richardson, 6 C. & P. 335; R. *v.* Davis, Ibid. 177; Com. *v.* Bean, 117 Mass. 141; State *v.* Hodges, 55 Md. 127; State *v.* Rushing, 69 N. C. 29; State *v.* Scovel, 1 Const. R. (S. C.) 174.

[7] People *v.* Johnson, 1 Parker C. R. 504; Rice *v.* State, 3 Heisk. 215; State *v.* St. Clair, 17 Iowa, 149.

[8] *Supra*, § 119; *infra*, §§ 991, 1416.

[9] Pelts *v.* State, 3 Blackf. 28.

If charge be joint, joint act of reception must be proved.

§ 989. If two defendants be indicted jointly for receiving, a joint act of receiving must be proved in order to convict both.[1] Proof that the goods were found in their joint possession may give an inference which will support this conclusion.[2]

But although a joint act of receiving must, under a joint indictment, be proved to sustain a joint conviction, yet, even without this, the indictment, it seems, is good under the English statute, against the one who first received.[3] Nor is it necessary that all the alleged joint receivers should have had actual possession. The possession may be constructive.[4] A master and servant may be convicted of joint reception on evidence of a receiving by the servant under the master's orders, but in the master's absence.[5]

Reception must be substantively proved.

§ 990. Reception must be substantively proved.[6] Manual possession or touch is unnecessary in order to sustain conviction; it is sufficient if there is a control by the receiver over the goods.[7] A person is said to receive goods improperly obtained as soon as he obtains control over them from the person from whom he receives them;[8] and the mere aiding in the secreting or disposal of the goods constitutes the offence.[9] When the goods were unlawfully received by a servant or wife of the party charged, it is necessary, in order to make him a receiver, that he should have done some act in the way of joining in the reception.[10]

[1] R. *v.* Messingham, 1 Mood. C. C. 257.

[2] State *v.* Brewster, 7 Vt. 118; State *v.* Weston, 9 Conn. 527. See R. *v.* Langmead, L. & C. 427.

[3] R. *v.* Dovey, 4 Cox C. C. 428; 15 Jur. 230; R. *v.* Messingham, 1 Mood. C. C. 257; Whart. Cr. Pl. & Pr. §§ 314, 755, 940. The necessity of an election is removed by Stat. 14–15 Vict., under which there can be a conviction of defendants severally.

[4] R. *v.* Rogers, 37 L. J. M. C. 83.

[5] R. *v.* Parr, 2 M. & Rob. 346.

[6] R. *v.* Wiley, 2 Den. C. C. 37; 1 Eng. L. & Eq. 567; Jones *v.* State, 14 Ind. 346; Faunce *v.* People, 51 Ill. 311.

[7] R. *v.* Miller, 6 Cox C. C. 353; R. *v.* Smith, 33 Eng. L. & Eq. 531; Dears. 496; 6 Cox. C. C. 554; State *v.* Turner, 19 Iowa, 144; State *v.* Scovel, 1 Rep. Const. Ct. (1 Mill.) 274; Huggins *v.* State, 41 Ala. 393. See R. *v.* Hill, 2 C. & K. 978; 1 Den. C. C. 453; F. & M. 150. *Supra*, § 924.

[8] Steph. Dig. C. L. art. 353; citing R. *v.* Wiley, 2 Den. 37.

[9] Shriedley *v.* State, 23 Ohio St. 120; People *v.* Stakem, 40 Cal. 509; see State *v.* St. Clair, 17 Iowa, 149.

[10] Ibid. A.'s wife, in A.'s absence, receives stolen potatoes, knowing them to be stolen. The jury find that A. "afterwards adopted his wife's receipt." This finding is not sufficient to sustain a verdict of guilty, as it is

The reception of the produce of the goods, however, is not the reception of the goods.[1]

Reception must be from thief.

§ 990 *a*. The reception must be from the thief or the thief's agent.[2] If the owner resume possession of the goods before they reach the receiver, there can be no conviction of the receiver.[3] A receiver from a receiver, also, provided there be no conspiracy,[4] is not, at common law, a receiver from the thief.[5]

Goods must be of some value.

§ 990 *b*. To constitute the offence the goods must be of some value, though this may be inferentially shown.[6]

Receiving goods with intent to receive reward is within rule.

§ 991. A party who receives stolen goods, knowing them to be stolen, for the purpose of returning them to the owner on payment of a reward, is guilty of receiving under the statute.[7]

consistent with A.'s having passively consented to what his wife had done without taking any active part in the matter. R. *v.* Dring, D. & B. 329.

A.'s wife, in A.'s absence, receives stolen goods, and pays the thief 6*d*. on account. The thief then tells A., who strikes a bargain with the thief, and pays him the balance. A. has received stolen goods, knowing them to be stolen. R. *v.* Woodward, L. & C. 122. These cases are cited from Steph. Dig. C. L. art. 353. *Infra*, § 992.

[1] U. S. *v.* Montgomery, 3 Sawy. 547.

[2] R. *v.* Dolan, *supra*; R. *v.* Wiley, 2 Den. C. C. 37; R. *v.* Wade, 1 C. & K. 739; R. *v.* White, 123 Mass. 420.

[3] R. *v.* Dolan, 29 Eng. L. & Eq. 533; Dears. 436; 6 Cox C. C. 449; S. P., R. *v.* Hancock, 38 L. J. (N. S.) 787; 14 Cox C. C. 111; qualifying R. *v.* Lyons, C. & M. 217; *Cf.* R. *v.* Schmidt, L. R. 1 C. C. 15. See London Law Times, Nov. 1878, p. 39.

A prisoner was convicted of feloniously receiving stolen goods under the following circumstances: The goods were stolen, and sent by the thief in a parcel by railway, addressed to the prisoner. A policeman belonging to the railway company, from information he had received, examined the parcel at the railway station at its place of destination, and stopped it. It was called for by one of the thieves on the day of its arrival, and refused to him. A porter of the company, the next day, by the direction of the policeman, took it to a house which the thief who had called for it designated, and it was there received by the prisoner. It was held that the conviction was wrong, as the goods had ceased to be stolen goods, within the statute, at the time of the receipt by the prisoner. R. *v.* Schmidt, 10 Cox C. C. 172; L. R. 1 C. C. 15.

[4] Com. *v.* White, 123 Mass. 430.

[5] See R. *v.* Rearden, L. R. 1 C. C. 31; 10 Cox C. C. 241; U. S. *v.* DeBare, 6 Bis. 358; State *v.* Ives, 13 Ired. 338. See Com. *v.* Finn, 108 Mass. 466, and under Nebraska Code, see Levi *v.* State, 14 Neb. 1.

[6] *Supra*, § 882. State *v.* Fenn, 41 Conn. 590; Com. *v.* Smith, 1 Mass. 245; People *v.* Wiley, 3 Hill, 194; State *v.* Krieger, 68 Mo. 98; State *v.* Smart, 4 Rich. S. C. 355. As to averment of value, see *infra*, § 1003.

[7] People *v.* Wiley, 3 Hill (N. Y.) 194; State *v.* Pardee, 37 Ohio St. 63. *Supra*, § 119; *infra*, § 1416.

Wife cannot be convicted of receiving goods stolen by husband; but husband is responsible for conniving at his wife's guilty reception.

§ 992. A wife cannot be convicted of feloniously receiving goods stolen by her husband.[1] Nor can she, in England, be convicted jointly with her husband of receiving.[2]

A husband is responsible for his wife's guilty reception, he knowing and afterwards adopting the same.[3] But it is otherwise when the reception is without his knowledge and apart from him.[4] This, of course, does not in any way impinge on the principle that a husband may be convicted of feloniously receiving property which his wife has *stolen* voluntarily and without any constraint on his part, if he received it knowing that she had stolen it.[5]

Reception against will of thief is not within rule.

§ 993. When a second thief takes goods from a first thief without the latter's will, this is larceny.[6] But if the reception is with the first thief's assent, this is receiving stolen goods.[7]

Conflict as to whether indictment lies in one State for receiving goods stolen in another.

§ 994. A person receiving in the State of A. goods stolen in the State of B. is indictable in the State of A. for receiving such goods, if bringing the goods in such State is there held to be larceny.[8]

In England, the practice is different. Thus, where a person had stolen goods in Guernsey and brought them to England, where he was taken and committed for trial, it was held, that Guernsey not being a part of the United Kingdom, he could not be convicted of larceny for having them in his possession in England, nor of receiving in England the goods so stolen in Guernsey.[9]

Place of reception to be inferentially proved.

§ 995. The place of reception, like the place of stealing, is to be inferred from all the circumstances in the case.[10]

[1] R. *v.* Brooks, Dears. C. C. 184; 6 Cox C. C. 148; R. *v.* Kenny, L. R. 2 Q. B. D. 307; 36 L. J. (N. S.) 36; S. C., 13 Cox C. C. 398. See R. *v.* Wardroper, Bell C. C. 249; 8 Cox C. C. 284. *Supra*, § 83.

[2] R. *v.* Mathews, 1 Den. C. C. 596; 1 Eng. L. & Eq. 549.

[3] R. *v.* Woodward, L. & C. C. C. 122; 9 Cox C. C. 95. *Supra*, § 990.

[4] R. *v.* Dring, Dears. & B. C. C. 329; 7 Cox. C. C. 382. *Supra*, § 83.

[5] R. *v.* McAthey, L. & C. 250; 9 Cox C. C. 251. *Supra*, § 83.

[6] See *supra*, § 945.

[7] R. *v.* Wade, 1 C. & K. 739.

[8] Com. *v.* Andrews, 2 Mass. 14; Com. *v.* White, 123 Ibid. 430. See *supra*, §§ 279, 287, 291, 930, for a full discussion of this topic.

[9] R. *v.* Debruiel, 11 Cox C. C. 207 —Byles. See *supra*, § 291.

[10] Wills *v.* People, 3 Parker C. R. 473; Whart. Cr. Ev. § 108.

Reception after statutory larcenies indictable.

§ 996. When a taking is by statute made larceny, receiving goods so taken is indictable under the statutes against receiving. By the same reasoning it is indictable to receive goods embezzled when such embezzlement is indictable, and even where this is not so by statute, it would be so at common law.[1]

II. INDICTMENT.[2]

Name of thief need not be given.

§ 997. The indictment need not set forth the name of any person from whom the goods were received,[3] nor, according to the preponderance of authority, that they were received from some person or persons unknown.[4] When, however, the principal felon is named, a variance is fatal.[5] It is not fatal to the averment of "unknown" that the grand jury have found an indictment against a named person for stealing the same goods.[6]

Not necessary to aver conviction of thief.

§ 998. It is not essential, in any case, to aver that the principal felon or thief has been convicted.[7]

Scienter and unlawfulness necessary.

§ 999. It is fatal to omit the *scienter*, which in some shape must be averred.[8] The reception, also, must be averred or implied to be unlawful.[9]

[1] R. *v.* Frampton, Dears. & B. 585.

[2] See, for indictments, Whart. Prec. 450 *et seq.*

[3] R. *v.* Wheeler, 7 C. & P. 170; R. *v.* Pulham, 9 Ibid. 280; R. *v.* Thomas, 2 East P. C. 781; Com. *v.* State, 11 Gray, 60; State *v.* Hazard, 2 R. I. 474; People *v.* Caswell, 21 Wend. 86; Schriedley *v.* State, 23 Ohio St. 130; State *v.* Coppenberg, 2 Strobh. 273; State *v.* Murphy, 6 Ala. 845; State *v.* Smith, 37 Mo. 58; State *v.* Moultrie, 34 La. An. 489.

[4] In some jurisdictions, however, it is necessary to aver the name of the thief; State *v.* Beatty, Phil. (N. C.) L. 52; State *v.* Ives, 13 Ired. 338; and hence it is safer to give this, or state the thief to be unknown. Compare R. *v.* Jervis, 6 C. & P. 156; Com. *v.* King, 9 Cush. 284; Swaggerty *v.* State, 9 Yerg. 338.

[5] R. *v.* Woolford, 1 M. & Rob. 384; U. S. *v.* De Bare, 6 Biss. 358; Com. *v.* King, 9 Cush. 284; though see State *v.* Coppenberg, 2 Strobh. 273.

[6] Com. *v.* Hill, 11 Cush. 137. As to this point, see Whart. Cr. Ev. § 97.

[7] Com. *v.* King, 9 Cush. 284; R. *v.* Woolford, 1 M. & Rob. 384.

[8] Whart. Cr. Ev. § 164; R. *v.* Larkin, 26 Eng. L. & Eq. 572; Dears. 365; 6 Cox C. C. 377. As to averring *scienter*, see Huggins *v.* State, 41 Ala. 393; and see Com. *v.* Cohen, 120 Mass. 198; Pelts *v.* State, 3 Blackf. 28. *Supra*, § 164. The reception must be averred to have been felonious or fraudulent. People *v.* Johnson, 1 Parker C. R. 564.

In Tennessee, an indictment for receiving stolen goods must charge the defendant with receiving them with intent to deprive the true owner thereof. Hurell *v.* State, 5 Humph. 68.

[9] State *v.* Hodges, 55 Md. 127.

Time and place need not be stated.

§ 1000. *The time and place* when and where the goods were stolen need not be stated in the indictment.[1]

An indictment, which avers that the defendant received on a specified day goods "before then" stolen, may be sustained by proof of his receiving after the theft goods stolen on a later day.[2]

"Taking" or "stealing" must be averred.

§ 1001. When it is charged that the goods were "feloniously stolen," it is not necessary on an indictment against the receiver by himself, to add the words "taken and carried away."[3] But merely "carry" without being followed by "away," is defective when receiver and thief are charged together.[4]

Goods must be accurately described.

§ 1002. The indictment should describe the goods with accuracy, and a variance in this particular will be fatal.[5] If, however, as in larceny, the crime be established in respect to only a single article, though the indictment describe several, the defendant may be convicted.[6] But articles belonging to several persons cannot be at common law joined.[7]

It is not necessary to allege that the goods were received upon any consideration passing between the thief and the receiver.[8]

Value must be averred.

§ 1003. The rule of value laid down as to larceny applies equally to receiving stolen goods.[9] It may here be specially observed that no judgment can be pronounced in either offence, except for specific articles, as charged in the indictment.[10]

[1] 2 East P. C. 780; 1 Leach, 109, 477; Starke C. P. 169; Com. *v.* Sullivan, 136 Mass. 170; State *v.* Holford, 2 Blackf. 103; State *v.* Murphy, 6 Ala. 845.

[2] Com. *v.* Campbell, 103 Mass. 436. See Com. *v.* Cohen, 120 Ibid. 198.

[3] Com. *v.* Lakeman, 5 Gray, 82.

[4] Com. *v.* Adams, 7 Gray, 43.

[5] People *v.* Wiley, 3 Hill (N. Y.), 194. As to how goods are to be set out, see Whart. Cr. Pl. & Pr. § 206; Whart. Crim. Ev. § 121; and as to the designation of written instruments, Whart. Cr. Pl. & Pr. § 167; Whart. Crim. Ev. § 114.

[6] People *v.* Wiley, *ut supra;* Whart. Cr. Pl. & Pr. §§ 250, 470, 736.

[7] Kilrow *v.* Com., 89 Penn. St. 480; Whart. Cr. Pl. & Pr. §§ 90, 252, 470.

[8] Hopkins *v.* People, 12 Wend. 76.

[9] See *supra*, § 952; and see, also, State *v.* Watson, 3 R. I. 114. As to value being necessary, see *supra*, § 990 *b*.

[10] Where an indictment charges a defendant with receiving various articles of stolen property, knowing them to be stolen, and specifically describes each article, and avers the value thereof, and he pleads that he is "guilty of receiving fifty dollars' worth of said

§ 1004. Separate counts may be introduced averring separate owners. It has been held that there may be as many counts, under the statute, for receiving as there are counts for stealing, and that the prosecutor ought not to be put to elect.[1] Ownership, when known, must in some way be averred.[2]

Counts may vary with ownership.

§ 1005. Larceny and receiving stolen goods may be joined ;[3] and a count for receiving may be tacked to one for stealing, so as to be dependent on the latter for its sense, and yet to stand independently in case of an acquittal on the stealing. This is the uniform practice in Pennsylvania. In England, this practice was sustained on an indictment in which the first count charged the prisoner with larceny, on which the jury found a verdict of not guilty ; in a subsequent count, the prisoner was charged with having received the article, "so as aforesaid feloniously stolen," on which the jury found a verdict of guilty. It was held that there was no repugnancy ; for that, although the word "aforesaid" in a subsequent count virtually incorporates in that count all the previous averments as to time and place, the words "so as aforesaid feloniously stolen" did not necessarily mean that the article had been stolen by the person named in the first count, but only that it had before then been feloniously stolen by *some person*.[4]

Counts for larceny and for receiving may be joined.

A thief and a receiver of stolen goods may be jointly indicted.[5]

§ 1006. A conviction and sentence for having received the goods of A. B., knowing them to be stolen, is no bar to a further indictment for having received the goods of C. D.,

Simultaneous reception of goods of different owners not one offence.

property, in manner and form as set forth in the indictment," no valid judgment can be rendered against him on such plea. O'Connell *v.* Com., 7 Met. 460.

[1] R. *v.* Beeton, 2 C. & K. 960 ; S. C., 1 Den. C. C, 414. See Com. *v.* Cohen, 120 Mass. 198 ; Whart. Cr. Pl. & Pr. § 293.

[2] State *v.* McAloon, 40 Me. 133 ; Whart. Crim. Ev. § 97. *Supra*, § 932.

[3] Whart. Cr. Pl. & Pr. § 291. *Supra*, § 978. See Johnson *v.* State, 61 Ga. 212.

[4] R. *v.* Craddock, 2 Den. C. C. 31 ; T. & M. 361 ; 1 Eng. L. & Eq. 563.

[5] Com. *v.* Adams, 7 Gray, 43.

In Massachusetts, when a defendant is convicted on an indictment which charges him with receiving and aiding in the concealment of stolen goods, he is convicted of only one offence, and if the indictment properly charges the defendant with aiding in the concealment of the goods, he may be legally sentenced, although the charge of receiving the goods is insufficiently made. Stevens *v.* Com., 6 Met. 241.

at the same time and place, knowing them to have been stolen, though the acts of receiving were one and the same.[1] Whether the prosecution can waive this, and include such double receiving in one count, is elsewhere discussed.[2]

[1] Com. *v.* Andrews, 2 Mass. 409. See *supra*, § 948 ; Whart. Cr. Pl. & Pr. § 471.

[2] *Supra*, § 948.

CHAPTER XV.

EMBEZZLEMENT.

I. AGAINST SERVANTS AND OTHERS APPROPRIATING GOODS NOT YET COME TO THEIR MASTER.

Statutes not designed to overlap the common law. Larceny at common law cannot be embezzlement by statute.

§ 1009. Embezzlement is an intentional and fraudulent appropriation of the goods of another by a person intrusted with the property of the same.[1] In the common law definition of larceny, we must remember, there are two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps is caused by the position that to maintain larceny it is necessary that the stolen goods should have been at some time in the prosecutor's possession.[2] The second results from the

[1] See U. S. *v.* Conant, U. S. Dist. Ct. Bost. 1879, 9 Cent. L. J. 129, per Lowell, J.; State *v.* Wolff, 34 La. An. 1153; 13 Cent. Law J. 462.

[2] See *supra*, § 943. Cartwright *v.* Green, 8 Ves. 405, and criticism of Sir J. F. Stephen, in note xvii. to his Digest of Criminal Law. This criticism closes as follows:—

"The point upon which the most

assumption that when possession of goods is acquired *bonâ fide* by a bailee, no subsequent fraudulent conversion (unless there be breaking of bulk or some other rupture of the conditions of bailment) can be larceny while the bailment lasts.[1] To cure

subtle questions as to possession arise is the distinction between theft and embezzlement,—a perfectly useless distinction, no doubt, and one which the legislature has, on two separate occasions, vainly tried to abolish. So long, however, as it is allowed to exist, it is necessary to understand it.

"I have already explained how a man may retain the possession of a thing of which he gives his servant the custody. He retains a power over the thing which is not the less real or effective because he has to exercise it through the will of another person, who has undertaken to be the instrument of his will. Suppose, however, that instead of the master's having given his horse to his groom, or his plate to his butler, a horse-dealer has delivered the horse to the groom, or a silversmith has delivered plate to the butler for his master; I should have thought that there was no real difference between these cases; that, inasmuch as the servant in each case was acting for the master, in the discharge of a duty towards him, and under an agreement to execute his orders, the master would come into possession of the horse or the plate as soon as his servant received it from the dealer or the silversmith, just as he remains in possession of the horse or the plate when he gives the custody of it to his groom or his butler. I should also have thought that the servant who appropriated his master's property to his own use, after receiving it from another on his master's account, was, for all purposes, in precisely the same position as the servant who did the same thing after receiving it from his master. The courts, however, decided otherwise. They have held on many occasions that, though the master's possession continues when he gives the custody of a thing to his servant, it does not begin when the servant receives anything on account of his master; on the contrary, the servant has the possession, as distinguished from the custody, until he does some act which vests the possession in his master, though it may leave the custody in himself. If, during that interval, he appropriates the thing, he commits embezzlement. If afterwards, theft. The most pointed illustration of this singular doctrine which can be given occurs in the case of R. *v.* Reid, Dears. 257. B. sent A., his servant, with a cart to fetch coals. A. put the coals into the cart, and, on the way home, sold some of them and kept the money. A. was convicted of larceny, and the question was whether he ought to have been convicted of embezzlement. It was held that the conviction was right, because, though A. had the custody of the cart all along, yet the possession of it and its contents was in B., and though A. had the possession of the coals whilst he was carrying them to the cart, that possession was reduced to a mere custody when they were deposited in the cart, so that A.'s offence was larceny, and not embezzlement, which it would have been if he had misappropriated the coals before they were put into the cart." See also *infra*, § 1050.

[1] *Supra*, § 971.

these defects were passed the embezzlement statutes of England and of most of the United States.[1] These statutes were intended simply to make penal two phases of theft not previously penal. If a servant (and this is the first of the two) steal his master's goods *before they have come into his master's possession*, this is to be indictable as embezzlement. And the second is, that it shall be also embezzlement for a trustee or bailee to fraudulently convert to his own use his master's goods he may have *bonâ fide* received. Now, as neither of these cases is larceny at common law, the statutes of embezzlement in no way overlap the old domain of larceny. They were passed solely and exclusively to provide for cases which larceny at common law did not include. Hence, nothing that is larceny at common law is indictable under the English embezzlement statutes, and those of a similar type; and nothing that is indictable under these statutes is larceny at common law.[2] And by applying this test we will find that the embezzlement statutes fall into two distinct and widely different classes: first, those meeting the case of servants and clerks appropriating their master's property before it reaches his possession; and secondly, those meeting the case of trustees and bailees appropriating goods of which they obtained possession *bonâ fide*.[3] It should at the same time be kept in mind

[1] See State *v.* Lanier, 89 N. C. 517; State *v.* Shiver, 20 S. C. 392; State *v.* Wolff, 34 La. An. 1153.

[2] *Infra*, §§ 1027, 1028. 3 Chit. Cr. L. 921; R. *v.* Hedge, R. & R. 160; Kebs *v.* People, 81 Ill. 899.

[3] The statutes, it is true, do not always retain the distinctive features of the English statutes; and in many cases the two classes of embezzlement are merged in one. Thus, in Indiana (State *v.* Wingo, 89 Ind. 204) in South Carolina (State *v.* Shiver, 20 S. C. 392), and in Alabama (Planters' Ins. Co. *v.* Tunstall, 72 Ala. 142), larcenies by servants having bare charge have been made embezzlements. The Kentucky statute provides that "if any carrier, porter, or other person to whom money or other property or thing which may be the subject of larceny may be delivered to be carried for hire, or any other person who may be intrusted with such property, embezzle, or fraudulently convert to his own use, or secrete with intent to do so, any such property, either in mass or otherwise, before delivery at the place, or to the person to whom the same were to be delivered, he shall be confined in the penitentiary not less than one nor more than five years." This statute has been held to embrace the case of servants receiving their master's property, and embezzling the same before it reaches him. Johnson *v.* Com., 5 Bush, 430. In New York all the common law distinctions were swept away by § 528 of Penal Code of 1882, which made larceny, embezzlement, and obtaining goods by false pretence a single offence under the name of larceny with a common definition. For prior New York law, see *infra*, § 1029. As to Califor-

that it is within the power of the legislature, as has been recently done in England, to provide, that under an indictment for larceny, or for larceny in one count and embezzlement in another, there may be a conviction of either offence.[1]

Statutes make it embezzlement for servant or clerk to appropriate master's goods before he receives them.

§ 1010. In those of the embezzlement statutes which were passed to meet the case of servants, or persons having a bare charge, appropriating their master's goods before such goods have reached him, the term "servant," "clerk," and "agent," are used to designate those on whom this species of embezzlement may be charged. "Servant," in the English statute, is the first term used, and is that which is invested with the most general signification. Some of the decisions made in this connection will now be noticed.

Employment need not be permanent.

§ 1011. To bring a servant under the operation of the statute the employment need not be permanent.[2] Thus, where the prosecutor, having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was held to be a servant within the meaning of the act.[3] And a drover who was employed to drive two cows to a purchaser and receive the purchase-money, and embezzled the money, was ruled to be a servant within the meaning of the act.[4] A single transaction may be enough to constitute service.[5] The test is subordination to a master.[6]

§ 1012. It has, however, been determined, that where the treasurer of a charitable institution, in his individual capacity, permitted

nia, see Hedley, *ex parte*, 31 Cal. 108; People *v.* Salorse, 62 Ibid. 139.

Embezzlement, under the federal statutes, is not an infamous crime. U. S. *v.* Reilly, 20 Fed. Rep. 46.

[1] R. *v.* Cooper, L. R. 2 C. C. 123.

[2] Com. *v.* Foster, 107 Mass. 221. But see Johnson *v.* State, 9 Baxt. 279.

While in England embezzlement is thus made larceny, in North Carolina, while punishable as larceny, it does not become larceny. State *v.* Lanier, 89 N. C. 517.

[3] R. *v.* Spencer, R. & R. 299. See R. *v.* Smith, Ibid. 516; R. *v.* Carr, Ibid. 198; R. *v.* Hoggins, Ibid. 145; R. *v.* Tongue, Bell C. C. 289.

[4] R. *v.* Hughes, 1 Mood. C. C. 370; State *v.* Costin, 89 N. C. 511. See McCann *v.* U. S., 2 Wy. T. 267.

[5] R. *v.* Negus, L. R. 2 C. C. 34; Campbell *v.* State, 35 Ohio St. 70.

[6] Gravatt *v.* State, 25 Ohio St. 162.

But mere volunteer not within the statute.

the defendant (the schoolmaster of the charity-school, appointed by a committee of which the treasurer was a member, and whose sole duty was confined to the instruction of children) in one single instance to receive a voluntary contribution, for which he was to have no remuneration, the defendant was not a clerk or servant, or person employed for the purpose, or in the capacity of a clerk or servant.[1] We may therefore conclude that a mere volunteer, permitted specially to collect a particular sum, is neither "clerk" nor "servant."[2]

Servant employed to change note or sell produce is within the statute.

§ 1013. It has been already seen that if a servant, who, having bare charge, is employed to change a note or to sell goods, steal the note or the goods, this is larceny, as his possession is the possession of his master.[3] If, however, he obtain change for the note or sell the goods, and then secrete or abscond with the produce, this is not larceny, but embezzlement, as the owner never was in possession.[4] But a person employed specially, merely to get a cheque cashed, "for which he was to receive sixpence," is not a servant under the statute.[5] And the same view has been taken as to a broker undertaking, on a particular occasion, to purchase a certain bill.[6]

Compensation is requisite to constitute service.

§ 1014. It is essential to constitute a servant that his services should be for some consideration. Yet this consideration need not be money; for if it consist in clothes, food, or home, it is, on general principles, sufficient to sustain an action against the servant for neglect, and hence a prosecution for embezzlement. Even a right given to the servant to

[1] R. *v.* Nettleton, 1 Mood. C. C. 259.

[2] R. *v.* Mayle, 11 Cox C. C. 150; R. *v.* Tyree, L. R. 1 C. C. 177; 11 Cox C. C. 241. See R. *v.* Freeman, 5 C. & P. 534. But see Ricard, *ex parte*, 11 Nev. 287.

In State *v.* Johnson, 48 Iowa, 370, it was held that under the Iowa statute the servant or employé must have been authorized to receive the property, or the nature, scope, and extent of the employment must have been such as to warrant the receipt of the property embezzled.

[3] *Supra*, §§ 956 *et seq.*

[4] R. *v.* Sullens, 1 Mood. C. C. 129; R. *v.* Winnall, 5 Cox C. C. 326; R. *v.* Hartley, R. & R. 139; R. *v.* Keena, 11 Cox C. C. 123; L. R. 1 C. C. 113; R. *v.* Gale, 13 Cox C. C. 340; State *v.* Foster, 37 Iowa, 404; Johnson *v.* Com., 5 Bush, 430.

[5] R. *v.* Freeman, 5 C. & P. 534. See R. *v.* Mayle, 11 Cox C. C. 150; People *v.* Dalton, 15 Wend. 581.

[6] Com. *v.* Davis, 7 Bost. Law Rep. 94, per Allen, J.

receive the gratuities and fees of an office is enough ;[1] and *a fortiori* is this the case with commissions on a proportion of the profits,[2] when such are fixed by rule.[3] There must, however, be *wages* or compensation in some shape, or else the prosecution fails.[4]

Members of societies or partners in firms not servants within the statutes.

§ 1015. A prosecution cannot be maintained against members of societies or against partners for embezzlements of this class: because (1) the possession of the particular member or partner is the possession of the whole society or firm ;[5] and (2) such members or partners cannot be *servants* under the act to the firms or societies to which they belong.[6] For the same reason a city officer, having a distinct status, is not the *servant* of the municipal corporation ;[7] though it is otherwise when the officer is subordinate to the corporation ;[8] in which case the relation of master and servant may exist though the appointing power be elsewhere.[9] It is also otherwise in cases where the government of a society is vested in trustees, to whom the defendant, as treasurer, is distinctively subject.[10]

Goods may be followed through successive reinvestments.

§ 1016. In larceny, where it is necessary that the thing stolen should, *in specie*, have been at the time of stealing in possession of the prosecutor, it is fatal to the prosecution if it appear that the money charged as stolen was not that which had been in the prosecutor's possession, but was its produce.[11] But it is not so in the present form of embezzlement, since the very essence of this offence is that the thing stolen should *not* have been in the prosecutor's possession. Hence a prosecution for embezzlement may follow

[1] See R. *v.* Adey, 1 Den. C. C. 571; R. *v.* White, 8 C. & P. 742.

[2] R. *v.* McDonald, L. & C. 85; 9 Cox C. C. 10; Com. *v.* Smith, 129 Mass. 104; Campbell *v.* State, 35 Ohio St. 70.

[3] R. *v.* Hartley, R. & R. 139; R. *v.* Thomas, 6 Cox C. C. 403.

[4] R. *v.* Tyree, L. R. 1 C. C. 177; 11 Cox C. C. 241. See R. *v.* Stainer, L. R. 1 C. C. 231.

[5] See *supra*, § 935 ; *infra*, § 1054.

[6] R. *v.* Marsh, 3 F. & F. 523; R. *v.* Bren, L. & C. 346; 9 Cox C. C. 398; R. *v.* Diprose, 11 Ibid. 185; R. *v.* Taffs, 4 Ibid. 169. See Com. *v.* Berry, 99 Mass. 428, and see *infra*, § 1054.

[7] R. *v.* Burton, 1 Mood. C. C. 237; Williams *v.* Stott, 3 Tyrw. 689.

[8] R. *v.* Carpenter, L. R. 1 C. C. 29; though see Coats *v.* People, 22 N. Y. 245. *Infra*, § 1035.

[9] R. *v.* Callahan, 8 C. & P. 154. See R. *v.* Jenson, 1 Mood. C. C. 434.

[10] R. *v.* Proud, L. & C. 97; 9 Cox C. C. 22; R. *v.* Hall, 1 Mood. C. C. 474; R. *v.* Carr, R. & R. 198.

[11] See *supra*, § 962.

money embezzled through a dozen reinvestments, so long as it is in the embezzler's hands.[1] The money which has flowed into the defendant's hands by virtue of his employment may have become mixed with other moneys of the defendant, or may have been turned into other shapes or forms of security. But, notwithstanding this, the embezzler and his assignees with notice, may be prosecuted for embezzling the funds received.[2]

The "servant" need not be the servant of the prosecutors.

§ 1017. An officer, it should be remembered, may be a servant, and may embezzle money as such, and yet not bear the relation of an immediate servant to the prosecutors in an indictment. Thus, the treasurer of a society may be a servant of the society, and as such may be guilty of embezzling the funds of the society; but if he be elected by the society, and governed by rules prescribed by the society, he is to be described as their servant, and not as the servant of the board of directors or trustees.[3] Nor does it make any difference that the appointment was in the trustees. The appointment may be in a principal officer, and the mastership in a subordinate, or *vice versâ*.[4] In this respect, as will be hereafter seen, the New York statute varies from the English.[5]

"Servant" includes employés of all kinds.

§ 1018. The term "servant," in the statutes, has been held to include:—

Employés in general, in respect to the particular master by whom they are paid and to whom they are accountable ;[6] female house servants or domestics ;[7] appren-

[1] See R. *v.* Bailey, 12 Cox C. C. 49; R. *v.* Taylor, 3 B. & P. 596; 2 Leach, 974; R. *v.* Hall, 3 Stark. 67; R. *v.* Gale, L. R. 2 Q. B. D. (C. C. R.) 141, cited *infra*, § 1033. But see Leonard *v.* State, 7 Tex. Ap. 417; Webb *v.* State, 8 Ibid. 310. As to the right to follow produce, see *infra*, § 1037.

[2] But see apparently *contra*, Com. *v.* Libbey, 11 Met. 64; Com. *v.* Stearns, 2 Met. 243; discussed *infra*, §§ 1018, 1033, 1037. As to conversion of produce, see more fully *infra*, § 1037.

[3] R. *v.* Tyree, L. R 1 C. C. 177; 11 Cox C. C. 241. In this case, however, there was another ground for acquittal, viz., that the treasurer was a volunteer, with no salary. As to gratuitous servants, see *infra*, § 1019; *supra*, § 1014.

[4] See R. *v.* Salisbury, 5 C. & P. 155; R. *v.* Thorpe, Dears. & B. 562; 8 Cox C. C. 29.

[5] *Infra*, §§ 1029, 1033. As to middlemen see *infra*, § 1034.

[6] Per Bayley, J., in Williams *v.* Stott, 1 Cr. & M. 675; R. *v.* Dixon, 11 Cox C. C. 178; R. *v.* Thomas, 6 Ibid. 403; R. *v.* Foulkes, 13 Ibid. 63. See *infra*, § 1024.

[7] R. *v.* Smith, R. & R. 267; R. *v.* Williams, 7 C. & P. 338.

tices ;[1] day laborers employed to take vegetables to market for sale and to bring back the price ;[2] cashiers and collectors of business concerns, although admitted to a share of the profits, if they are not liable for losses, nor entitled to any control of the business ;[3] commercial travellers ;[4] managers of insurance companies ;[5] stage drivers ;[6] treasurers of railway corporations ;[7] treasurers of townships and other bodies corporate ;[8] solicitors appointed to collect debts for a salary ;[9] and tax collectors.[10] The fact that the transaction was

[1] R. *v.* Mellish, R. & R. 80.

[2] R. *v.* Winnall, 5 Cox C. C. 326.

[3] R. *v.* McDonald, L. & C. 85 ; 9 Cox C. C. 10 ; R. *v.* Turner, 11 Ibid. 552.

[4] R. *v.* Tite, L. & C. 29 ; 8 Cox C. C. 458 ; R. *v.* Carr, R. & R. 198. *Infra*, § 1025.

[5] R. *v.* Gale, L. R. 2 Q. B. D. (C. C. R.) 141.

[6] People *v.* Sherman, 10 Wend. 298.

[7] Com. *v.* Tuckerman, 10 Gray, 173.

[8] R. *v.* Squire, R. & R. 348 ; 2 Stark. 349 ; R. *v.* Welch, 2 C. & K. 296 ; 1 Den. C. C. 199 ; 2 Cox C. C. 85 ; R. *v.* Guelder, Bell C. C. 284 ; 8 Cox C. C. 372 ; R. *v.* Carpenter, L. R. 1 C. C. 29. See R. *v.* Tyers, R. & R. 402 ; R. *v.* Beacall, 1 Mood. C. C. 16.

[9] R. *v.* Gibson, 8 Cox C. C. 436.

[10] R. *v.* Adey, 1 Den. C. C. 571 ; though see R. *v.* Truman, 2 Cox C. C. 306.

Sir J. F. Stephen (art. 309), thus states the law :—

"A man may be a clerk or servant although he was appointed or elected to the employment in respect of which he is a clerk or servant by some other person than the master whose orders is bound to obey ;

"Although he is paid for his services by a commission or share in the profits of a business ;

. . . . . .

"Although he is the clerk or servant of more masters than one" (see R. *v.* Leech, 3 Stark. 70 ; R. *v.* Batty, 2 Moody, 257 ; R. *v.* Carr, R. & R. 198. *Infra*, § 1046).

"Although he acts as clerk or servant only occasionally, or only on the particular occasion on which his offence is committed.

"But an agent or other person who undertakes to transact business for another, without undertaking to obey his orders, not necessarily a servant—

"Because he receives a salary, or

"Because he has undertaken not to accept employment of a similar kind from any one else, or

"Because he is under a duty (statutory or otherwise) to account for money or other property received by him.

"It seems that in order that a clerk or servant may be within the meaning of this article, it is necessary that the objects of his service should not be criminal, but a man may be such a clerk or servant although the objects of his service are in part illegal, as being contrary to public policy."

These points he illustrates as follows :—

"A. was engaged by B. to solicit orders. He was to be paid by commission. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other person than B. A. was not B.'s servant. R. *v.* Negus, L. R. 2 C. C. R. 34. (Aff. in R. *v.* Goas, London Law Times, Feb. 18, 1882.)

"The treasurer of a friendly society,

out of the ordinary run of the servant's business does not take the case out of the statute.[1]

§ 1019. But fiduciary discretion to be exercised by the agent according to his judgment, unshackled by fixed rules, is inconsistent

under 18 & 19 Vict. c. 63, is not the servant of the trustees of the society, though by section 22 he is bound before seven days, after being required by the trustees (in whom the money is vested by section 18), to account to the trustees. R. *v.* Tyree, L. R. 1 C. C. R. 177. A treasurer would appear, as a rule, to be rather a banker than a servant, but every case depends on its special circumstances. In R. *v.* Murphy, 4 Cox C. C. 101, the prisoner was both clerk and treasurer. See the explanation of this case given in R. *v.* Tyree. In R. *v.* Welch (1 Den. 199), the circumstances were very similar to those of R., *v.* Tyree, and Coleridge, J., appears to have been satisfied that the prisoner was a servant, and did not reserve the point. It is singular that this case is not referred to in R. *v.* Tyree.

"A parish clerk is not a servant, because he is not under the orders of any particular person. R. *v.* Burton, 1 M. C. C. R. 237, explained in Williams *v.* Stott, 3 Tyrw. 688 ; 1 Cr. & M. 675.

"The chamberlain of the commons of a corporation, chosen and sworn in at a court, but whose duty it is to superintend the commons, and to receive certain duties, which he kept till the end of the year, when his accounts were audited and the balance paid over to his successor, is not a servant, because he holds a distinct office, and is not bound to pay at any time. Williams *v.* Stott, 3 Tyrw. 688 ; 1 Cr. & M. 675.

"The servant of a trade union may be convicted of the embezzlement of its funds, although some of its rules are void, as being in restraint of trade. R. *v.* Stainer, L. R. 1 C. C. R. 230. In the argument on this case both sides assumed that, if the society was criminal, the conviction could not be sustained. Cockburn, C. J., said : 'It is unnecessary to consider how far the criminal purpose of a society might affect its title to property.' As stolen property may be stolen from the thief who stole it (1 Hale P. C. 507), the question might deserve consideration if it ever arose. R. *v.* Hunt, in the next illustration, is in point, yet it is only a *nisi prius* decision.

"The servant of a society, the members of which took an unlawful oath under 37 Geo. III. c. 123, and 52 Geo. III. c. 104, cannot be convicted of embezzlement for misappropriating the funds of the society. R. *v.* Hunt, 8 C. & P. 642, by Mirehouse (Com. Serj.), after consulting Bosanquet and Coleridge, JJ."

In Massachusetts it has been held, as we will hereafter see (§ 1033), that when an auctioneer has power to mingle his principal's goods with his own he is not a "servant" under the statute, of the person whose property he sells ; Com. *v.* Stearns, 2 Met. (Mass.) ; and that a collector of bills with this right is not the servant or agent of his employer ; Com. *v.* Libby, 11 Metc. (Mass.) 64 ; see State *v.* Kent, 22 Minn. 41. But although this may be correct under the Massachusetts statute, where a series of terms are used antithetically, it cannot hold where the terms "servant" and "agent" are used in a general sense.

[1] State *v.* Costin, 89 N. C. 511.

with the character of a servant; and where such discretion exists the party cannot be a servant under the statute. Thus the relation of servant and master is held not to exist where A., being insolvent, assigns his estate to assignees for the benefit of creditors, and is appointed by them as agent to collect the debts due the estate;[1] nor where the bailiff of a county court in England receives funds for the high bailiff;[2] nor where a person employed to get orders for goods and to receive payment for them is at liberty to get the orders and receive the money when and where he thinks proper, being paid by a commission on the goods sold;[3] nor where there is nothing but an illusory salary, and where the whole business is left very much to the agent's discretion;[4] nor where the prosecutors decline to appoint B. as an "agent," but say, "For all business you do for us we shall be happy to pay you a commission;"[5] nor where the defendant, without any agreement as to remuneration, is simply to collect debts as he pleases;[6] nor where a broker is employed specially to purchase a particular draft;[7] nor where the business of the defendant is to receive stock from the prosecutor to be worked up into shoes in the defendant's shop;[8] nor where a constable is

But not those invested with fiduciary discretion.

[1] R. *v.* Barnes, 8 Cox C. C. 129.

[2] R. *v.* Glover, L. & C. 466; 9 Cox C. C. 500.

[3] R. *v.* Bowers, L. R. 1 C. C. 41. *Infra*, § 1021. See, to same effect, R. *v.* Negus, 42 L. J. M. C. 62; L. R. 2 C. C. 34. "Where the prosecutor said: 'I paid the prisoner commission but no salary; he was not obliged to be at my office at any particular time excepting on Friday and Saturday, to account for what money he had received for me; I did not give the prisoner directions to go to any particular place for orders; he went where he pleased,' it was held that he was not a clerk or servant. R. *v.* Marshall, 11 Cox C. C. 490, C. C. R. But where the prisoner was bound by the terms of his agreement, 'diligently to employ himself in going from town to town and soliciting orders,' he was ruled by Lush, J., to be a clerk or servant. That learned judge, in remarkably clear language, thus states the law: 'If a person says to another carrying on an independent trade, "If you get any orders for me I will pay you a commission,"—and that person receives money and applies it to his own use, he is not a "clerk or servant;" but if a man says, "I employ you and will pay you, not by salary, but by commission,"—then the person employed is a servant.' R. *v.* Turner, 11 Cox C. C. 551." Roscoe's Cr. Ev. p. 447.

[4] R. *v.* Walker, Dears. & B. 600; 8 Cox C. C. 1. See R. *v.* Mayle, 11 Ibid. 150.

[5] R. *v.* May, L. & C. 13; 8 Cox C. C. 421.

[6] R. *v.* Hoare, 1 F. & F. 647.

[7] See Com. *v.* Davis, 7 Bost. Law R. 94.

[8] Com. *v.* Young, 9 Gray, 5.

employed with discretionary powers to collect or sue.[1] In fine, unless there is a settled arrangement that the servant in the particular matter acts for pay in obedience to a particular line prescribed by the employer, he is not a "servant" under the statutes.[2]

§ 1020. A person employed as middleman or go-between between a manufacturer and operatives, to have work done by the latter on the former's material, is not a servant of the operatives under the statute.[3]

A middleman is not a servant.

§ 1021. A "clerk," in the sense in which the term is used in this line of statutes, is a person employed by a superior to keep accounts and to receive payments thereon. Money received by a clerk on bills given him to collect is money received in the course of his employment.[4] The term *clerk*, as used in the statutes, has been held to include persons acting as commercial travellers, even though their compensation is by commission;[5] and though representing several distinct houses;[6] but if there be unlimited discretion given, neither the term "clerk" nor "servant" applies;[7] and the money or goods embezzled must be received in the course of employment.[8]

A "clerk" is a person employed to keep accounts and collect money thereon.

§ 1022. As used in the Massachusetts statute, the term "agents" is much wider in its signification than "servants" or "clerks." The latter are restricted to the performance of specific acts in a specific way; the former may or may not be restricted, and may, in fact, be clothed with full powers to represent their principal with the same discretion as he might exercise himself.[9] In New Hampshire a single act may

"Agent" is wider in meaning than clerk.

[1] People *v.* Allen, 5 Denio, 76.

[2] Williams *v.* Stott, 1 Cr. & M. 675.

[3] R. *v.* Gibbs, Dears. C. C. 448; 6 Cox C. C. 455. See Com. *v.* Young, 9 Gray, 5.

[4] Com. *v.* King, 9 Cush. 284. See People *v.* Hennessey, 13 Wend. 147; Case *v.* State, 26 Ala. 17; Lowenthal *v.* State, 32 Ibid. 589; Jones *v.* State, 59 Ind. 229.

[5] R. *v.* Turner, 11 Cox C. C. 552.

[6] R. *v.* Carr, R. & R. 198; R. *v.* Tite, L. & C. 29; 8 Cox C. C. 458. See R. *v.* Bailey, 12 Ibid. 56.

[7] R. *v.* Mayle 11 Cox C. C. 150. See R. *v.* Bowers, L. R. 1 C. C. 41; R. *v.* Negus, L. R. 2 C. C. 34; 12 Cox C. C. 493; R. *v.* Hall, 13 Ibid. 49. *Supra*, § 1019.

[8] *Infra*, § 1032; R. *v.* Cullum, 12 Cox C. C. 469; L. R. 2 C. C. 28.

[9] See Com. *v.* Young, 9 Gray, 5, and see Com. *v.* Libbey, 11 Met. 64. As to "agents," see further, *infra*, § 1053 *a*.

constitute an agency.[1] But under the English statute, there must be an employment in a line of agency to constitute an agent.[2]

Bailees, trustees, and officers are terms to be hereafter discussed.[3] In these cases, also, the offence is supplementary to common law larceny.[4]

"Virtue of employment" as test in old statutes.

§ 1023. It was necessary to the constitution of the offence, under the English statute as originally framed, that the defendant should have received the money, by virtue of his employment,[5] for the embezzlement of money by a servant not authorized to receive it was not within the statute ;[6] although the party paying it to him supposes that he is so authorized.[7] Under the more recent statute, in which "virtue of employment" is left out, the goods must be received in the name and on account of the master.[8]

[1] State *v.* Barter, 58 N. H. 604.

[2] R. *v.* Cosser, 13 Cox C. C. 187.

[3] *Infra*, §§ 1051, 1055–6.

[4] See *infra*, § 1049.

[5] See R. *v.* Prince, M. & M. 21; R. *v.* Batty, 2 Mood. C. C. 257; People *v.* Sherman, 10 Wend. 298; People *v.* Hennessey, 15 Ibid. 147; Hedley, *ex parte*, 31 Cal. 108.

[6] R. *v.* Thorley, 1 Mood. C. C. 343; R. *v.* Arman, Dears. C. C. 575; 7 Cox C. C. 45; R. *v.* Mellish, R. & R. 80; R. *v.* May, L. & C. 13; 8 Cox C. C. 421; R. *v.* Harris, 6 Ibid. 363; Dears. C. C. 344. As to Iowa, see *supra*, § 1012.

[7] R. *v.* Hawtin, 7 C. & P. 281.

[8] R. *v.* Cullum, 12 Cox C. C. 469; L. R. 2 C. C. 28. As construing phrase by "virtue of employment," see *infra*, § 1024; R. *v.* Beechey, R. & R. 319; R. *v.* Smith, Ibid. 516; R. *v.* Barker, 1 D. & R. N. P. 19; R. *v.* Mellish, R. & R. 80; R. *v.* Nettleton, 1 Mood. C. C. 259; R. *v.* May, L. & C. 13; 8 Cox C. C. 421; People *v.* Dalton, 15 Wend. 581; Com. *v.* Hayes, 14 Gray, 62—a case which is on another branch of the law, but is by analogy applicable to this.

In Griffin *v.* State, 4 Tex. Ap. 390, we have the following from Winkler, J. :—

"There are two separate classes of cases defined in the Penal Code in which the crime of embezzlement may be committed. The first is that class found in c. 3, title 6, of the Penal Code, P. Dig. art. 1854 (art. 235 of the Code) *et seq.*, under the head, 'Embezzlement or Misapplication of Public Money.' To this class belonged the case of State *v.* Brooks, 42 Tex. 62, where it was held that a deputy sheriff is an officer within the meaning of the law punishing embezzlement of public money, which see for an indictment held sufficient. The other class is found in c. 10, of title 20, P. Dig. art. 2421 (art. 771 of the Code), under the head of 'Embezzlement of Property by Private Persons,' which was amended by act of the fifteenth legislature. Gen. Laws of 1877, p. 9. It is to the latter class that the present case belongs. State *v.* Johnson, 21 Tex. 775, furnishes an interpretation of the statute under consideration, and indicates not only that a trust relation must exist as to the fund embezzled, but that that relation must exist between the owner of the subject embezzled and the party accused. Wise *v.* State, 41 Tex. 139.

"We consider Riley v. State, 32 Tex. 763, as overruled, so far as it holds that an indictment for embezzlement will support a conviction on proof of theft."

Not necessary that the thing embezzled should have been received in direct conformity with employer's directions.

§ 1024. It is not, however, necessary that the thing embezzled should have been received by the defendant in conformity with the employer's express directions. While the reason of the thing requires that the money embezzled should have been received by the defendant within the orbit of his employment, yet where he succeeds in getting money on the basis of such employment from third parties, and when there is a legal duty resting on him to pay over such money to his employers, then the embezzlement of such money is within the statute.[1] It is otherwise, however, when the thing embezzled was taken out of the orbit of employment, and without authority.[2]

Not material as to prosecutor's title against third parties.

§ 1025. It has been held that the servant cannot, as is elsewhere seen,[3] defend himself on the ground that his employer is not entitled in law to receive the money embezzled. For if, as between the master and servant, the servant hold the money for the master, the question whether the master could have claimed the money from a third party is irrelevant.[4] Nor is it any defence that the money was intrusted to the defendant for an illegal purpose.[5] But the money or goods must belong, in some sense, to the master.[6]

§ 1026. As to under payments there has been some vacillation in the English rulings. Can the reception by a servant of a sum below

[1] R. *v.* Beechey, R. &. R. 319; R. *v.* Orman, 36 Eng. L. & Eq. 611; Dears. C. C. 575; 7 Cox C. C. 45—which case goes to overrule R. *v.* Harris, 25 Eng. L. & Eq. 579; Dears. C. C. 344; 6 Cox C. C. 363; *infra*, § 1032; so far as the latter holds that money received by a servant for his master outside of the servant's prescribed line of duty cannot be the subject of embezzlement. See R. *v.* Cullum, L. R. 2 C. C. 28; 12 Cox C. C. 469; R. *v.* Christian, Ibid.; L. R. 2 C. C. 94.

In Hedly, *ex parte*, 31 Cal. 108, it was held that when the money was obtained by an agent in a way not authorized by the principal, it comes within the statute. See, also, Ricard, *ex parte*, 11 Nev. 287; *supra*, § 1012, *infra*, § 1053.

[2] R. *v.* Mellish, R. & R. 80; R. *v.* Hawtin; 7 C. & P. 281; R. *v.* May, L. & C. 13; 8 Cox C. C. 421; State *v.* Johnson, 48 Iowa, 370. *Supra*, 1012.

[3] *Infra*, § 1038.

[4] R. *v.* Orman, *supra*; R. *v.* Beacall, 1 C. & P. 464; Campbell *v.* State, 35 Ohio St. 70.

[5] Com. *v.* Cooper, 180 Mass. 285. *Infra*, § 1038.

[6] *Infra*, § 1032.

that authorized by the master be said to be in obedience to the master's instructions? Taking up this question in this narrow shape, Parke, J., held that money received by a servant less than that which he was authorized by his employer to take, is not within the statute.[1] But this case is now no longer followed; and though the money received by the servant is below the restricted limit, he is now held properly accountable for it, and liable to prosecution for its embezzlement.[2]

No defence that money received was under restricted limit.

§ 1027. If the case is larceny at common law, from the fact that the money was taken from the prosecutor's possession, the prosecution for embezzlement fails. It is scarcely necessary, in support of this position, to repeat the statement,[3] that the embezzlement statutes were passed, not to touch any cases within the common law range of larceny, but to cover new cases outside of that range. Hence that which is larceny at common law, from the fact that the goods were taken from the owner's possession, is not embezzlement.[4] We must therefore at this point recur to the doctrine of constructive possession heretofore discussed.[5] Goods which have reached their destination are constructively in the owner's possession, though he may not yet have touched them; and hence, after such termination of transit, the servant who converts them is guilty, not of embezzlement, but of larceny.[6]

If case is larceny at common law, it is not embezzlement, *e. g.*, when goods are stolen after reaching master.

Following out this general principle, the Supreme Court of Massachusetts has correctly ruled, where the servant of a copartnership fraudulently converted money, which one of the firm had directed him to carry to another, that the goods were constructively in the possession of the employers, and that consequently the offence was not embezzlement, but larceny.[7] The same conclusion

[1] R. *v.* Beechey, R. & R. 319.

[2] R. *v.* Aston, 2 Cox C. C. 234—Patteson, J.

[3] See *supra*, § 1009.

[4] R. *v.* Hayward, 1 C. & K. 518—Tindall, C. J.; R. *v.* Goode, C. & M. 582; R. *v.* Wilson, 9 C. & P. 27; R. *v.* Heath, 2 Mood. C. C. 33; Temp. & M. 342; R. *v.* Hawkins, 4 Cox C. C. 224; R. *v.* Watts, 2 Den. C. C. 14; R. *v.* Jennings, Dears. & B. 447; 7 Cox C. C. 397; Com. *v.* King, 9 Cush. 284; Com. *v.* Berry, 99 Mass. 428; Com. *v.* Doherty, 127 Ibid. 26; State *v.* Fann, 65 N. C. 317; Fulton *v.* State, 8 Eng. (Ark.) 168. See U. S. *v.* Clew, 4 Wash. C. C. 700. *Supra*, § 956; *infra*, §§ 1049, 1055.

[5] *Supra*, §§ 944, 961, 1009.

[6] R. *v.* Reed, Dears. C. C. 257; R. *v.* Watts, 2 Den. C. C. 14.

[7] Com. *v.* Berry, 99 Mass. 428.

was reached by the same court where a swindler absconded with money given him by the prosecutor to count;[1] and where a clerk, who, though sometimes permitted to sell goods, had no general powers of sale, appropriated such goods.[2] To the same effect (*i. e.*, that larceny at common law by a servant is not within the embezzlement statutes) is the reasoning of Judge Grier and Judge Kane, in an embezzlement case tried in the United States Circuit Court in Philadelphia.[3]

§ 1028. No inconvenience can arise from the maintenance of this distinction, since it is allowable as well as prudent to join a count for larceny to that for embezzlement.[4] But great inconvenience would follow from the acceptance of the principle that the embezzlement statutes absorb all cases of larceny by servants. For, if this be the case, the old common law indictments for larceny would no longer hold when servants are defendants, for the reason that the embezzlement statutes would have to be followed, and in indictments for embezzlement it is necessary that the special fiduciary circumstances constituting the offence should be set out. All that would be requisite, therefore, on an indictment for larceny, to obtain an acquittal, would be to prove that the defendant was a servant or clerk. By the same reasoning, whenever it should appear in a trial for larceny that false pretences were used, it would be necessary, although the case was clearly larceny at common law, to direct an acquittal, because the false pretences were not specially averred. Far better is it to treat the embezzlement and false pretence statutes as in no way invading the province of larceny at common law, but as simply covering cases which larceny at common law does not reach.[5] Yet while such is the case in principle, it is in full accordance with the modern policy of simplification of pleading that it should be provided by statute that if the case should turn out to be one of larceny there should be no acquittal if the evidence

Embezzlement covers only cases which common law larceny does not include.

[1] Com. *v.* O'Malley, 97 Mass. 584.

[2] Com. *v.* Davis, 104 Mass. 548.

[3] U. S. *v.* Hutchinson, reported in Whart. Prec. 461. *Supra*, § 960. See State *v.* Coombs, 55 Me. 477; State *v.* Healey, 48 Mo. 531; Fulton *v.* State, 8 Eng., 168, and cases cited *supra*, §§ 885, 907, 1009. *Infra*, § 1050.

[4] See *infra*, § 1047.

[5] See State *v.* Sias, 17 N. H. 558.

show the case to be embezzlement, and the indictment, or bill of particulars, give adequate notice of the offence.[1]

§ 1029. In divergence from the rule above expressed is a decision in New York,[2] which, as based on a statute since repealed, it is not necessary now to criticize. It is sufficient here to say that in the legislation in New York, the law of embezzlement has been uniformly treated as not supplementary to but as more or less amendatory of the law of larceny. The same may be said of the legislation in Alabama.[3] In New York, as has been already noticed, all distinctions have, at least on paper, been swept away by the statutory amalgamation in 1882, of larceny, embezzlement, and obtaining goods on false pretences, in one common offence. This, however, cannot prevent their distinctive features being presented, if not in indictments at least in bills of particulars, and their peculiar characters being this way exhibited to courts of error.[4] The objects gained by giving the three a common title is simplicity in pleading, and the avoidance of acquittals on account of variance between indictment and evidence as to averments distinguishing larceny from embezzlement and false pretences. But the same difficulties may arise in variances between bill of particulars and evidence.

Diverging view in New York.

§ 1030. Since embezzlement necessarily involves secrecy and stealth, if the defendant, in rendering his account, instead of denying the appropriation of property, admit the appropriation, alleging a right in himself, no matter how unfounded, his offence in taking and keeping is no embezzlement.[5] So, if a person, whose duty it is to receive money for his employer, receive money and render a true account of all the money he has received, he is not guilty of embezzlement, but of larceny, if he

Fraud is to be inferred from facts.

[1] R. *v.* Cooper, L. R. 2 C. C. 123.

[2] Cowen, J., in People *v.* Dalton, 15 Wend. 581. See, also, People *v.* Hennessy, Ibid. 147, and criticism of these cases by Hoar, J., in Com. *v.* Berry, 99 Mass. 430. See *supra*, §§ 956 *et seq.*

[3] Lowenthal *v.* State, 32 Ala. 589. The Alabama statute leaves out the phrase "without the consent of his master or employer." Hence under the Alabama statute any embezzlement by a trustee is included—a phase of crime which, in other jurisdictions, is covered by a distinct statute. See *infra*, §§ 1049, 1052.

[4] See *supra*, §§ 888, 1009.

[5] R. *v.* Norman, C. & M. 501; R. *v.* Creed, 1 C. & K. 63. See R. *v.* Lister, D. & B. 118. *Infra*, § 1062 *a*. So as to claim of title generally, *supra*, § 884.

abscond and does not pay over the money; but if he had received the money and rendered an account in which it was omitted, the necessary proof of concealed appropriation is supplied.[1] The fraudulent appropriation is to be inferred from facts,[2] among which is the denial of the reception or the suppression of the fact of such reception.[3] And it is usual to require in addition to proof of recep-

[1] R. *v.* Creed, 1 C. & K. 63; R. *v.* Jackson, Ibid. 384; R. *v.* Wortley, T. & M. 636; 2 Den. C. C. 339; 5 Cox C. C. 382; R. *v.* Winnall, 5 Ibid. 326; Com. *v.* Tuckerman, 10 Gray, 173; Com. *v.* Berry, 99 Mass. 428; State *v.* Cameron, 3 Heisk. 78.

According to Sir J. F. Stephen (Dig. C. L. art. 312):—

"The inference that a prisoner has embezzled property, by fraudulently converting it to his own use, may be drawn from the fact that he has not paid the money or delivered the property in due course to the owner; or

"From the fact that he has not accounted for the money or other property which he has received; or

"From the fact that he has falsely accounted for it; or

"From the fact that he has absconded; or

"From the fact that upon the examination of his accounts there appeared a general deficiency unaccounted for. R. *v.* Grove, 1 Mood. C. C. 447; 2 Russ. Cr. 459, 460. The authority of this case, decided by eight judges to seven, has been doubted. See R. *v.* Moah, Dears. 626, 639; see, too, R. *v.* Lambert, 2 Cox C. C. 309; R. *v.* Jones, 8 C. & P. 287; R. *v.* Chapman, 1 C. & K. 119; R. *v.* King, 12 Cox C. C. 73.

"But none of these facts constitutes in itself the offence of embezzlement; nor is the fact that the alleged offender rendered a correct account of the money or other property intrusted to him inconsistent with his having embezzled it. R. *v.* Hodgson, 3 C. & P. 422; R. *v.* Winnall, 5 Cox C. C. 326. Mr. Greaves's note on this case disapproves of the summing up of Erle, J., on what appears to me to be a misconception of its purport. Mr. Greaves's view, that the fraudulent conversion constitutes the offence and that everything else is only evidence of it, is obviously correct; but I think that Erle, J., did not mean to say anything inconsistent with this." But the weight of authority is that mere non-accounting for balance, without proof of appropriating some particular sum, cannot sustain a conviction of embezzlement. R. *v.* Jones, 8 C. & P. 288; R. *v.* Wolsteinholme, 11 Cox C. C. 310. *Infra*, § 1044. But wilful false accounting is now in England a substantive offence. See 38 & 39 Vict. c. 24, s. 2; R. *v.* Guelder, Bell C. C. 284; R. *v.* Lister, D. & B. 118. Compare *infra*, § 1062 *a*.

[2] R. *v.* Murdock, 2 Den. C. C. 298; R. *v.* Wortley, Ibid. 334; R. *v.* Betts, 8 Cox C. C. 140; Com. *v.* Shepard, 1 Allen, 595; Com. *v.* Tuckerman, 10 Gray, 173; Com. *v.* Berry, 99 Mass. 428; Com. *v.* Gately, 126 Mass. 52; Bartow *v.* People, 78 N. Y. 377; Calkins *v.* State, 18 Ohio St. 366; Kibs *v.* People, 81 Ill. 599. *Infra*, § 1062 *a*.

[3] R. *v.* Murdock, 2 Den. C. C. 298; R. *v.* Wortley, Ibid. 333; R. *v.* Jackson, 1 C. & K. 384; R. *v.* White, 8 C. & P. 742.

A conviction was sustained where the defendant, a clerk, upon being called upon to produce the money with which he had charged himself on

tion, some proof of attempted concealment, flight, or other facts inferring fraud ;[1] among which facts the falsification of accounts is to be noticed as peculiarly significant.[2] The question is, "Did the defendant appropriate furtively money coming to his master, but not as yet received by the latter?" And to prove this satisfactorily, not only the reception by the defendant must be shown, but the illicit use.[3] For here two difficulties stand in the prosecutor's way, if the indictment be simply for embezzlement. The first is, that if the defendant took money actually paid into his employer's hands, the offence is larceny, not embezzlement. The second is, that if the allegation be that the defendant fraudulently appropriated the money before it reached his employer's hands, the fraud must be shown. And to show this, flight, insolvency, concealment, or evasions, form strong elements of proof.[4] As notes of concealment and evasion, false entries are to be regarded as conspicuous.[5] Pledging to a third person, also, is evidence of embezzling.[6] And where there is this proof of evasion or misappropriation, it is not necessary to prove demand by employer and refusal by servant.[7]

No defence that money was received from another servant.

§ 1031. Nor does it matter that the money was received, not directly from a customer, but from another servant. The defendant is responsible, under the statute, notwithstanding there may have been intermediate links between himself and the customer, provided the master was not one of these links.[8] If, however, the goods have reached

his books, was unable to produce it, and threw himself at his employer's feet, imploring mercy. R. *v.* Grove, 7 C. & P. 635 ; 1 Mood. C. C. 447 ; criticized above. *Infra*, § 1062 *a*. A confession of misappropriation, however, is by itself inadequate.

[1] See R. *v.* Jones, 8 C. & P. 288 ; R. *v.* Williams, 7 Ibid. 338 ; Com. *v.* Berry, *ut sup.*

[2] R. *v.* Taylor, R. & R. 63 ; 3 B. & P. 596 ; R. *v.* Hall, R. & R. 463.

[3] See Johnson *v.* Com., 5 Bush, 430.

[4] See R. *v.* Jackson, 1 C. & K. 384 ; R. *v.* Murdock, and other cases cited in prior notes to this section ; Johnson *v.* Com., 5 Bush, 530 ; State *v.* Leonard, 6 Cold. (Tenn.) 307 ; Hedley, *ex parte*, 31 Cal. 108. *Infra*, § 1062 *a*.

[5] R. *v.* Hall, R. & R. 463 ; R. *v.* Welch, 1 Den. C. C. 199.

[6] Com. *v.* Butterick, 100 Mass. 1 ; *infra*, §§ 1040–1044.

[7] Ibid. ; State *v.* Hunnicutt, 34 Ark. 562, where it was held that failure to pay without good reason was sufficient. Whart. Cr. Ev. § 632.

But mere non-payment is not sufficient proof, R. *v.* Smith, R. & R. 267.

[8] R. *v.* Masters, 1 Den. C. C. 332 ; 2 C. & K. 930.

their destination, and are virtually in the master's possession, the case, as we have seen, is one of larceny.[1]

Goods must have been received on account of master.

§ 1032. If the goods were not received on account of the master, to whom they belong, the prosecution fails.[2]

The goods must not belong to the defendant.

§ 1033. Under the English statute, the goods for which embezzlement lies must be the goods of the servant's master ; and hence, where the prosecutor specially employs another person's servant for a single job, the indictment does not not lie.[3] It is otherwise in New York, where it is enough if the goods taken belong to "any other person" than the taker, and hence need not be the goods of the servant's master.[4] But, as is elsewhere noticed, the goods must not belong to the defendant, either in whole or in part.[5] And they must have been received on account of the prosecutor.[6]

[1] *Supra*, § 1027.

[2] R. *v.* Glover, L. & C. 466 ; R. *v.* Harris, Dears. C. C. 344 ; 6 Cox C. C. 363 ; R. *v.* Cullum, L. R. 2 C. C. 28 ; R. *v.* Beaumont, Dears. C. C. 270 ; 6 Cox C. C. 269. But see *supra*, § 1024.

In R. *v.* Beaumont, Dears. C. C. 270, it appeared that one W. had engaged with a railway company to find horses and carmen to deliver the company's coals, and that he or his carmen should deliver to the company's manager all the money received from the customers. The delivery notes were entered by W. in his book, and the receipted invoices given to the customers. The prisoner was one of W.'s carmen, whose duty it was to pay over directly to the manager the money which he received from the customers. No account of money so received and paid was kept between W. and the company. It was held by a majority of the Court of Criminal Appeal, that the prisoner was the servant of the company and not of W., and that the money was received by him on their account and not on the account of W., and that consequently an indictment against the prisoner, as the servant of W., for embezzling money received in that capacity, could not be supported. A somewhat similar case was that of R. *v.* Thorpe, D. & B. C. C. 562. Roscoe's Cr. Ev. p. 450. See Quarman *v.* Burnett, 6 M. & W. 499.

[3] R. *v.* Freeman, 5 C. & P. 534.

[4] See People *v.* Dalton, 15 Wend. 581. See Com. *v.* Stearns, 2 Met. 343 ; Whart. Prec. 462. *Supra*, § 1017.

[5] See § 1015 ; State *v.* Kent, 22 Minn. 41 ; Parli *v.* Reed, 30 Kan. 534.

[6] In R. *v.* Gale, L. R. 2 Q. B. D. (C. C. R.) 141, the defendant was clerk and servant of an insurance company, and head manager in their chief office at L. In the ordinary course of business he received several cheques payable to his order from the managers of branch offices, which it was his duty to indorse and hand over to the company's cashier. Instead of doing so, he indorsed the cheques and obtained money for them from friends of his own, who paid the cheques into their own banks. He then took the amount so received to the cashier, and handed it over to him, saying he wished it to go against his salary, which was over-

§ 1034. A middleman, or agent between the chief employer and the servant, may be a prosecutor. Thus, a person undertaking to deliver goods for a railway company, and pay over the proceeds to the company, and who in such capacity employs draymen to do the hauling, may prosecute the latter for embezzling money received by them for the company and in the company's name.[1]

Middleman may be prosecutor.

§ 1035. There is no question that under the statutes generally a corporation is regarded as a person, and as such may be prosecutor in a trial for embezzlement.[2] In New York, however, under a statute making it penal for an officer of "an incorporated company" to embezzle, it was held that the term "incorporated company" did not include public bodies whether politic or corporate.[3] And this is certainly the case as to illegal societies.[4] But where a society is legal, though some of its rules are void as being in restraint of trade, the servant of the society may be convicted of embezzlement;[5] and so where the action of the corporation in holding the property is *ultra vires*.[6]

Corporation may be a prosecutor, but not illegal corporation.

§ 1036. It is no defence that the defendant fraudulently deposited a worthless security in place of money embezzled. Hence, where a banker's clerk fraudulently taking money from the till put in its place the cheque of a customer, such cheque being really valueless and fraudulently obtained by the clerk, this was held embezzlement.[7]

No defence that worthless security was given.

drawn to a like amount; and he got back from the cashier I. O. U.'s which he had previously given for the amount of the overdraft. The prisoner having been convicted of embezzling the proceeds of the cheques, it was ruled that the proceeds of the cheques, though received not from the bankers but from third persons, were received on account of the company, and that the prisoner was rightly convicted.

In Massachusetts it has been argued that if the defendant had a right to throw cash received by him in common stock with his own, then he cannot be convicted of embezzling it. It is not the "property" of another. *Supra*, § 932. Com. *v.* Stearns, 2 Met. 343; Com. *v.* Libbey, 11 Ibid. 64. This view, however, is in conflict with the English rule. *Supra*, § 1016. It is clear that when the money is received as a special deposit for the owner, it is capable of being embezzled. Com. *v.* Foster, 107 Mass. 221.

[1] R. *v.* Thorpe, Dears. & B. 562; 8 Cox C. C. 29. See *supra* § 1017.

[2] See *supra*, § 1015.

[3] Coats *v.* People, 22 N. Y. 245.

[4] R. *v.* Hunt, 8 C. & P. 642.

[5] R. *v.* Stainer, L. R. 1 C. C. 230; Roscoe's Cr. Ev. p. 445. *Infra*, § 1038.

[6] Leonard *v.* State, 7 Tex. Ap. 417. *Supra*, §§ 932, 1025.

[7] R. *v.* Hammon, R. & R. 221; 2 Leach, 1083.

§ 1037. It is no defence that the defendant, a clerk, through the false manipulation of his accounts, paid over certain particular notes received by him to his master, if he appropriated the sum such notes represented.[1] And the fraudulent conversion by an innkeeper of trunks obtained by him on checks given to him by a guest is embezzlement under the statute.[2] So the appropriation of the produce of the principal's bonds is an embezzlement of the principal's property.[3]

Conversion of produce enough.

§ 1038. It is no defence that the principals have no right, as against third parties, to the money which the servant embezzles, or that their title was wrongful.[4] If he fraudulently take it on their account and then embezzle it, the offence is complete.[5] Nor is it any defence that the money embezzled was the proceeds of the sale of liquor kept in violation of law.[6]

No defence that principals have no title to the money.

§ 1039. It has been shown[7] that the mere marking of money in the master's usual place of custody, with the intention of catching a servant suspected of stealing, does not estop the master from proceeding criminally against the prisoner. This doctrine has been carried out in prosecutions for embezzlement. Thus, where the prosecutor gave some marked money to a customer to expend in the prosecutor's shop, for the purpose of detecting a suspected servant, and the servant was convicted of embezzling the marked money, it was held that the conviction was right.[8]

No defence that a trap was laid for the defendant.

§ 1040. The remarks heretofore made as to continuous takings[9] apply with peculiar force to embezzlements, which (until detected)

[1] R. *v.* Hall, 3 Stark. 67; Bowman *v.* Brown, 52 Iowa, 437. See *supra*, § 1016. But see Leonard *v.* State, 7 Tex. Ap. 417.

[2] People *v.* Husband, 36 Mich. 306.

[3] Bork *v.* People, 91 N. Y. 5.

[4] *Supra*, § 1025. See Com. *v.* Cooper, 130 Mass. 285.

[5] R. *v.* Beacall, 1 C. & P. 310; R. *v.* Wellings, Ibid. 454; R. *v.* Orman, Dears. C. C. 575; 7 Cox C. C. 45; R. *v.* Stainer, L. R. 1 C. C. 230; Leonard *v.* State, 7 Tex. Ap. 417. *Supra*, §§ 1025, 1035. See State *v.* Turney, 81 Ind. 559. That the prosecutor's title was wrongful does not bar prosecution for larceny, see *supra*, § 882 *a*, 945.

[6] Com. *v.* Smith, 129 Mass. 104. *Supra*, §§ 882 *a*, 1025.

[7] *Supra*, §§ 149, 917; *infra*, § 1190.

[8] R. *v.* Gill, Dears. C. C. 289; 6 Cox C. C. 295; R. *v.* Headge, 2 Leach, 1033; R. & R. 160; R. *v.* Whittingham, 2 Leach, 912; R. *v.* Aston, 2 Cox C. C. 234.

[9] See *supra*, §§ 288, 928.

Defendant may be tried in any place of embezzlement.

may spread over an extended duration of time and occupy several jurisdictions. The defendant may be tried in any county where any part of the embezzlement was committed, or where, upon being called upon to account, he disowned having received the money.[1]

Embezzlements created by federal statutes must be tried in federal courts.

§ 1041. When an embezzlement is an offence against two sovereigns, each has jurisdiction, and each may prosecute for the offence against himself.[2] It has, however, been held, that a federal statute establishing embezzlement as an offence by officers of national banks absorbs the jurisdiction.[3] And in pursuance of this principle it has been ruled in Massachusetts that even an accessary to an embezzlement from a national bank, by one of its officers, cannot be punished in Massachusetts, though such offence is not provided for by the federal statutes. The reasoning of the court is, that jurisdiction over a *principal* is a condition precedent to jurisdiction over an *accessary*.[4]

Simultaneous embezzlements may be joined.

§ 1042. Several articles embezzled simultaneously may be included in the same indictment, if these articles have not different owners.[5] It is proper, however, to say, that in Massachusetts, in prosecutions for embezzlement, it is held that there may be separate indictments for articles simultaneously embezzled.[6] And in any view the offence must be distinctively individuated.[7]

[1] See *supra*, § 288; R. *v.* Murdock, 2 Den. C. C. 298; 8 Eng. L. & Eq. 577; R. *v.* Hobson, R. & R. 56; R. *v.* Taylor, 3 B. & P. 596; Larkins *v.* People, 61 Barbour, 226; Campbell *v.* State, 35 Ohio St. 70; but see Com. *v.* Butterick, 100 Mass. 1. The mere reception in a county does not give jurisdiction. People *v.* Murphy, 51 Cal. 376. Otherwise if there is no proof of carrying the money elsewhere. State *v.* New, 22 Minn. 76. That statutes giving jurisdiction are constitutional, see Mack *v.* People, 82 N. Y. 235.

[2] See *supra*, §§ 265–6.

[3] Com. *v.* Fuller, 8 Metc. 313; Com. *v.* Tenney, 97 Mass. 50; Com. *v.* Felton, 101 Ibid. 204, State *v.* Tuller, 34 Conn. 280; and see discussion, *supra*, § 266. *Cf.* U. S. *v.* Taintor, *infra*, § 1051.

[4] Com. *v.* Felton, 101 Mass. 204. See *supra*, §§ 265–6.

[5] *Supra*, § 948.

[6] "It is an ancient and well established rule," said Foster, J., in the Supreme Court of Massachusetts, in 1868, "that the taking of divers articles at one time may be treated as constituting a distinct larceny of each article stolen." Com. *v.* Butterick, 100 Mass. 9. But this position, though right in principle, is not generally sustained. See *supra*, §§ 931, 948. Whart. Cr. Pl. & Pr., §§ 252, 470,

[7] State *v.* Messenger, 58 N. H. 348; Goodhue *v.* People, 94 Ill. 37; State *v.* Barter, 58 N. H. 604; McCann *v.* U. S., 2 Wy. T. 267.

Fiduciary relations must be averred.

§ 1043. The distinguishing features (*e. g.*, the defendant's fiduciary character) which divide embezzlement from larceny must be specially detailed;[1] though when agency is averred, the instructions need not be given.[2] When refusal to pay over is the charge, a demand should be averred.[3]

The name of the person from whom the money was received need not be stated.[4]

It is not necessary, however, to aver that the defendant was a "*professed* agent," under a statute designating "agents."[5]

Goods embezzled and ownership must be accurately stated.

§ 1044. Unless the pleader is relieved from this exactness by special statute, the goods and ownership must be set out and proved with the same completeness as in larceny.[6] But it is not necessary to set forth the exact sum taken,[7] if a sum covered by the indictment is proved to be embezzled,[8] though "it is not sufficient to prove at the

[1] Com. *v.* Simpson, 9 Met. 138; Com. *v.* Smart, 6 Gray, 15; Com. *v.* Wyman, 8 Met. 247; Com. *v.* Merrifield, 4 Met. 468; Com. *v.* Doherty, 127 Mass. 20; Coats *v.* People, 4 Parker C. R. 662; S. C., 22 N. Y. 245; People *v.* Allen, 5 Denio, 76; Bartow *v.* People, 78 N. Y. 377; People *v.* Tryon, 4 Mich. 665; State *v.* Butler, 26 Minn. 90; Lowenthal, *v.* State, 32 Ala. 589; State *v.* Porter, 26 Mo. 201; Fulton *v.* State, 8 Eng. (Ark.) 168; People *v.* Cohen, 8 Cal. 42. Under Pennsylvania statute, see Com. *v.* Leisenring, 11 Phila. 392. Under Louisiana statute, see State *v.* Palmer, 32 La. An. 565; and see State *v.* Goss, 69 Me. 22; McCann *v.* U. S., 2 Wy. T. 267. Under Michigan statute, see People *v.* Bringard, 39 Mich. 22.

[2] State *v.* Meyers, 68 Mo. 266.

[3] State *v.* Munch, 22 Minn. 67; State *v.* Bancroft, 7 Kan. 170.

[4] State *v.* Lanier, 89 N. C. 519.

[5] Com. *v.* Newcomer, 49 Penn. St. 478.

[6] R. *v.* McGregor, 3 B. & P. 106; R. *v.* Furneaux, R. & R. 335; Com. *v.* Stebbins, 8 Gray, 492; Com. *v.* O'Connell, 12 Allen, 451; Com. *v.* Butterick, 100 Mass. 1; Bullock *v.* State, 10 Ga. 47; State *v.* Mims, 26 Minn. 191; Ricord *v.* State, 15 Nev. 167; People *v.* Cohen, 8 Cal. 42; People *v.* Cox, 40 Cal. 275; Reside *v.* State, 10 Tex. Ap. 676. In Com. *v.* Gately, 126 Mass. 52, the question of variance was held to be for the jury. In State *v.* Thompson, 32 La. An. 796, a precise description of money was held unnecessary. In State *v.* Lanier, 89 N. C. 547, it was held not necessary to state from whom the money was received. That the ownership must be averred if known, see 1 Whart. Prec. 470, and cases cited above. State *v.* Lyon 45 N. J. (16 Vroom) 272. See Washington *v.* State, 72 Ala. 272.

[7] R. *v.* Carson, R. & R. 303; R. *v.* Grove, 1 Moody, 447; State *v.* Ring, 29 Minn. 78.

[8] *Supra*, § 979; Whart. Cr. Ev. § 121.

trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen."[1]

Proof of embezzling a cheque will not sustain an indictment for stealing money.[2]

It is not necessary, in cases of servants and clerks, to aver from whom the money was received.[3]

When "feloniously," must be used.

§ 1045. "*Feloniously*" when the offence is a felony, must be used,[4] though it is sufficient if the term qualify the concluding averment of "steal and take."[5] But the statutory characteristics of the offence must be given.[6] The "felonious intent" must be proved.[7]

Servant of joint masters may be averred to be servant of either.

§ 1046. The servant of joint owners or partners may be rightly described as the servant of either,[8] or in a joint employment, as the servant of all the employers.[9]

Embezzlement may be joined with larceny.

§ 1047. Counts for larceny may be joined with counts for embezzlement, framed under various statutes;[10] nor, unless the evidence shows cases relating to entirely distinct transactions, should the prosecution be called upon to elect until its case is closed.[11] Different phases of the offence cannot be run together, but must be described in separate counts.[1] In England it seems that the court may, at its discretion, compel an election at an earlier period.[2]

Bill of particulars should be required.

§ 1048. A bill of particulars may be required in all cases in which the indictment is general in its terms, and the bill should at least state from what persons the money alleged to have been embezzled was received.[3]

II. AGAINST TRUSTEES, AGENTS, BAILEES, AND OTHERS, APPROPRIATING GOODS RECEIVED BONA FIDE.

Statute covers cases of trustees or agents fraudulently appropriating goods received *bonâ fide* for principal.

§ 1049. It has already been stated[4] that the object of the embezzlement statutes is to provide punishment for fraudulent appropriations, which the common law definition of larceny does not reach. The first of these offences, which has just been discussed, is that of a servant or other agent appropriating his master's goods before these goods have reached the master, and, consequently, before the master has acquired such possession in them as will enable him to maintain larceny at common law. The second offence, to which a second class of embezzlement statutes is directed, is that of a trustee or bailee appropriating goods which he received *bonâ fide*. When a trustee or bailee obtains possession of goods fraudulently and afterwards fraudulently converts such goods to his own use, this is larceny at common law,[5] and, consequently, is not within the scope of the statutes we are about to scrutinize. The object of these statutes is to cover that which is not larceny at common law, viz., the case of a trustee or bailee receiving *bonâ fide* goods from or in behalf of his principal, and then fraudulently appropriating such goods. The terms of the English statutes point out plainly this distinction. Thus that of 24 & 25 Vict. c. 96, s. 75, directed particularly to the case of agents and bankers, provides that "whosoever, having been intrusted, etc., as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or

[1] Alderson, B., in R. *v.* Jones, 8 C. & P. 288. *Supra*, § 1030, and see R. *v.* Tyers, R. & R. 402; R. *v.* Chapman, 1 C. & K. 119, to the effect that the prosecution must show a definite sum received by the defendant from the employer.

Under the New York statute it is not necessary to aver value unless restitution be claimed. People *v.* Bork, 96 N. Y. 188.

Where the prisoner had to account weekly in gross sums, and he was alleged in the indictment to have embezzled three such sums, it was held that such aggregate sums might be shown to be made up of smaller sums which he had embezzled, and with the embezzlement of which he might have been charged. R. *v.* Balls, L. R. 1 C. C. 328; Rosc. Cr. Ev. p. 458.

[2] R. *v.* Keena, L. R. 1 C. C. 113; 11 Cox C. C. 123.

[3] R. *v.* Beacall, 1 C. & P. 310.

[4] Whart. Cr. Pl. & Pr. § 260.

[5] R. *v.* Crighton, R. & R. 62.

[6] Com. *v.* Pratt, 132 Mass. 246.

[7] Beaty *v.* State, 82 Ind. 228.

[8] R. *v.* Leach, 3 Stark. 70; R. *v.* White, 8 C. & P. 742.

[9] R. *v.* Bailey, 7 Cox C. C. 179; Dears. & B. 600.

[10] R. *v.* Johnson, 3 M. & S. 539; R. *v.* Murray, 5 C. & P. 145, n.; State *v.* Porter, 26 Mo. 201; Mayo *v.* State, 30 Ala. 32; Whart. Cr. Pl. & Pr. §§ 285–293–4.

[11] See Whart. Cr. Pl. & Pr. § 293.

[1] State *v.* Barter, 58 N. H. 604, and cases cited *supra*, § 1042.

[2] R. *v.* Holman, 9 Cox C. C. 201; L. & C. 177.

[3] R. *v.* Hodgson, 3 C. & P. 422; R. *v.* Bootyman, 5 Ibid. 300; State *v.* Cushing, 11 R. I. 313. Whart. Cr. Pl. & Pr. §§ 157, 702.

[4] *Supra*, § 1009.

[5] *Supra*, § 964.

the proceeds, or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or to the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively;" and also whosoever, being intrusted, etc., with any chattel or security, shall sell, negotiate, or pledge the same, "shall be guilty of a misdemeanor," etc. Further sections apply to the cases of factors fraudulently obtaining advances on property of principals; and of trustees who, "with intent to defraud, shall convert and appropriate" trust funds. The cases here enumerated are none of them larceny at common law.[1]

If case one of larceny at common law embezzlement fails.

§ 1050. If the case is larceny at common law, from the fact the possession of the goods was originally obtained by the bailee fraudulently, *animo furandi*, the prosecution for embezzlement, under these statutes, fails.[2] Failure of justice hereby is in some jurisdictions prevented by statutes authorizing in such cases convictions of larceny; while in others, in which statutes overlap, the question of form is at the election of the prosecution.[3]

In New York and Alabama, if not in other American States, the question has been complicated by the loose and general terms in which the embezzlement statutes are couched, so that on their face they seem to include all fraudulent conversions by agents of all classes. But, if we look at the general object of the embezzlement statutes rather than at their mere terms, we must conclude, contrary to the decisions of the courts in the States just mentioned, that the statutes legitimately include only such cases of appropria-

[1] As to Georgia's statute see Snell *v.* State, 50 Ga. 219; Hoyt *v.* State, 50 Ibid. 313. As to proof of fraud, see *infra*, § 1062 *a*. As to definition of trustees, see *infra*, § 1052. As to attorney, see State *v.* Belden, 35 La. An. 823.

In U. S. *v.* Hall, 98 U. S. 343, it was held that an indictment lies in the Circuit Court of the United States against a guardian for the embezzlement of pension money of his ward paid to him. It was further held that Congress has power to declare the embezzlement by a guardian, of pension money paid to him, to be an offence against the United States (citing U. S. *v.* Hudson, 7 Cranch C. C. 32; U. S. *v.* Coolidge, 1 Wheat. 415; 1 Am. Cr. L. § 163).

[2] R. *v.* Hawkins, 1 Den. C. C. 584; T. & M. 328. See R. *v.* Murray, 5 C. & P. 145, n.; 1 Mood. C. C. 276; and see *supra*, §§ 964, 1027 *et seq.*

[3] *Supra*, §§ 27 *a*, 641 *a*.

tions by agents as are not reached by common law prosecutions for larceny.[1]

"Officer" may be a *nomen generalissimum*.

§ 1051. The term "officer," when used alternatively with "cashier," or with any other phrase indicating it to be a *nomen generalissimum*, is to have a wide application. In Massachusetts, for instance, it has been held to embrace the president and the directors of a bank.[2]

Trustee is one holding property for another.

§ 1052. A trustee is one to whom certain property is given to hold and use for the benefit of a principal called a *cestui que trust*. The term, therefore, is more comprehensive than bailee, a bailee being simply the custodian of specific property, and is less comprehensive than that of agent, an agent being employed to acquire as well as to hold.[3] A trustee as such is only indictable for a violation of his trust; and if he be authorized to act venturously, or to mix the trust fund with his own, he is not indictable for so doing.[4] But wherever there is an appropriation to the trustee's personal use, of the trust fund, to the prejudice of the *cestui que trust*, there an indictment lies.[5]

The term "trustee" has, in England, been held to include the case of a person who was the secretary, trustee, and treasurer of a savings bank, and who, by the rules of the bank, was required to hand over money deposited with him to the treasurer, who was then required to hand it over, when demanded, to the trustees, whose duty it was to invest it in the public funds.[6]

[1] See for reasoning sustaining this, *supra*, §§ 1027–9; and see, also, State *v.* Coombs, 55 Me. 477; People *v.* Cohen, 8 Cal. 42; Fulton *v.* State, 18 Eng. (Ark.) 168; Cobletz *v.* State, 36 Tex. 353.

[2] Com. *v.* Wyman, 8 Met. 247.

[3] See Hutchinson *v.* Com., 82 Penn. St. 472.

[4] People *v.* Howe, 2 N. Y. Sup. Ct. N. S. 383. See State *v.* Henry, 1 Lea, 729.

[5] R. *v.* Christian, L. R. 2 C. C. 94; 12 Cox C. C. 469; R. *v.* Townshend, 15 Ibid. 466; Com. *v.* Butterick, 100 Mass. 1; State *v.* Orwig, 24 Iowa, 102.

[6] R. *v.* Fletcher, L. & C. 180; 9 Cox C. C. 189. See Com. *v.* Tenney, 97 Mass. 50. As to Alabama statute, see *supra*, § 1029. As to Mass. Stat. 1859, c. 233, see Com. *v.* Hays, 14 Gray, 62. It is embezzlement to fraudulently convert the proceeds of a promissory note given to the defendant to sell and pay over such proceeds to a third person. It is otherwise, in Massachusetts, if as broker, he had authority to mix the proceeds with his own funds. Com. *v.* Foster, 107 Mass. 221; Com. *v.* Libbey, 11 Met. 64. But see *supra*, §§ 1016, 1033.

The Pennsylvania Revised Code, § 114, provides that if any person "being a banker, broker, attorney, mer-

§ 1053. Insolvency, flight, falsification of accounts, or refusal to pay, are the usual and most effective evidences of conversion,[1] though these are not the sole facts from which embezzlement can be inferred.[2] It has been held a fraudulent conversion for a trustee to pay out of his trust funds £1409 to his private bankers; and then to draw out the whole with the exception of £28, and to pay out of the fund a private debt.[3]

Fraud to be inferred from circumstances.

It is sufficient under the Massachusetts statute to prove that the defendant, having received certain bonds from the maker of a note indorsed by the defendant, as security to protect the defendant in his indorsement, then, after payment of the note by the maker, fraudulently pledged the bonds thus taken as security in payment of his own personal indebtedness.[4]

Mere false entries by an officer of a bank will not constitute

chant, or agent, and being entrusted, for safe custody, with the property of any other person, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use, or the use of any other person, such property, or any part thereof, he shall be guilty of a misdemeanor." This section is taken from act of 20 and 21 Vict. c. 54, which has been the subject of several of the adjudications already given under this particular statute. It is, therefore, clear that under it larceny is not included. Com. *v.* Newcomer, 49 Penn. St. 478.

In U. S. *v.* Taintor, 11 Blatchf. 374, the defendant was indicted under the 55th section of the National Banking Act of June 3, 1864 (13 U. S. Stat. at Large, 116), for embezzling, abstracting, and wilfully misapplying the moneys and funds of a bank of which he was cashier, with intent to injure and defraud the bank. On the trial it was shown that he took moneys and funds of the bank, and used them in stock speculations carried on in his own name, by depositing them with a stock-broker, as margins. The defendant offered to prove that such acts of his were known to the president and some of the directors of the bank, and were sanctioned by them, and that such dealings of his with the funds of the bank were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, although there was no resolution of the board of directors authorizing or sanctioning them. The evidence was offered only to disprove the averments in the indictment, that the acts were done "with intent to injure and defraud" the bank. It was held that the evidence was properly excluded.

[1] See U. S. *v.* Taintor, *supra;* State *v.* Leonard, 6 Cold. (Tenn.) 307; Hoyt *v.* State, 50 Ga. 313; State *v.* Mims, 26 Minn. 183, and fully *supra*, § 1030; *infra*, § 1062 *a*.

[2] State *v.* Tompkins, 32 La. An. 620.

[3] Wadham *v.* Rigg, 1 Drew. & Sm. 216.

[4] Com. *v.* Butterick, 100 Mass. 1.

such breach of trust, unless connected with an actual conversion of goods.[1]

A mere failure on the part of a borrower of money to properly account for it does not constitute embezzlement.[2]

§ 1053 *a*. The term "agent," as we have already seen,[3] includes all cases where one person in a distinct capacity is authorized to represent another,[4] whether such other

"Agents."

[1] Com. *v.* Shepard, 1 Allen, 575.

Where wheat could not leave a warehouse except upon a shipping order issued by the defendant, who was in charge of the wheat, it was held to be a fraudulent conversion for him to set afloat in the market "grain-orders," and therefor issue "shipping orders," and appropriate the proceeds to his own use. Calkins *v.* State, 18 Ohio St. 366.

[2] Kribs *v.* People, 82 Ill. 425.

[3] *Supra*, § 1022.

[4] See R. *v.* Cosser, 13 Cox C. C. 187; R. *v.* Brownlow, 39 L. T. (N. S.) 479; R. *v.* Bredin, 15 Cox C. C. 412. As to "servant," see Gravatt *v.* State, 25 Ohio St. 162. As to "clerk," see Ricord, *ex parte*, 11 Neb. 287. That a priest who appropriates money collected for his parish is an "agent," see Gerdemann *v.* Com., 11 Phila. 374.

In R. *v.* Christian, L. R. 2 C. C. 74, we have the following:—

Blackburn, J.: "Before turning to the words of the statute, look at the facts. The prisoner, being an agent within the meaning of the statute (for as to that no question is reserved), consents to act on the terms contained in his first letter of the 12th November. He accordingly receives instructions to buy, and various securities are bought. It seems immaterial to consider whether any privity of contract was established between the prosecutrix and the sellers. There is at any rate no doubt that the prisoner must have made himself personally liable to them, and therefore he would have a right, after paying for shares, if he did pay, to refuse to hand them over till he was repaid. He would also have a right to require cash beforehand, so as to keep him out of advances. In this state of things, he writes his letter of the 27th November, and the prosecutrix her answer of the same date. Now, looking at the facts and writing down what seems to have been her meaning as to the cheque, I have no doubt as to what it must be: 'Inasmuch as there is a sum of £336 which I have to pay to get the Japanese bonds, get the proceeds of the cheque in the way most convenient to yourself and pay for the bonds.' I think if the prisoner had handed over the cheque itself, or handed over the actual notes received for it, he would have been within his instructions. I think he would have been so, also, if he had paid it into his own bank *bonâ fide*, for the purpose of meeting a cheque of his own given to the seller, although a hundred things might intervene to prevent the cheque being actually met. I think, then, that the prosecutrix's letter was a direction to apply the cheque or its proceeds to getting the bonds for her free from any lien or claim on the part of the seller.

"Turning, then, to the statute, and applying its words to the facts of the case, we find that the prisoner was an agent, and he received a direction in writing to apply the cheque or its pro-

person be a private individual or a corporation, either public or private.[1] "Clerks" and "servants" have been already distinctively discussed.[2]

§ 1054. Agency cannot be regarded as constituted, under the statute, by the mere relation assumed by one member of a business association to another.[1] And a partner or person having an interest in property embezzled cannot ordinarily be convicted of embezzling it.[2] But a mere right to receive part payment in commissions, to be paid by the employer, the employé having no right to deduct the commissions from the sum received, does not create such an interest as precludes conviction.[3]

Copartners and members of common society not "agents."

ceeds to a certain purpose. And the jury have found that in violation of good faith, and contrary to that direction, he applied them to his own use. I have no doubt, therefore, that he was rightfully convicted."

In State *v.* Foster, 37 Iowa, 146, Beck, C. J., thus writes: "The words indicating the relation that must exist between the accused and another, which is a necessary ingredient of the offence, are 'employer,' 'master,' 'employment.' We will, without notice of the word 'master,' consider the term 'employer' and 'employment.' They are not of the technical language of the law, or of any science or pursuit, and must therefore be construed according to the context and the approved usage of the language. Rev. Stat. § 29, p. 2.

"The words are defined as follows: '*Employment* — The act of employing or using. 2. Occupation; business. 3. Agency or service for another or for the public. *Employer*—One who employs; one who engages or keeps in service.'

"The verb 'employ' is defined as follows, when used with a human being either as its subject or object: 'To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs.' Webster.

"It will be seen from the definition of these words that the statute contemplates the relation of agency, a contract for services, whereby the accused is bound to do or perform something in connection with the property embezzled, and that by virtue of such relation he acquired possession thereof. It by no means appears that the idea of bailment or bailee is excluded from these definitions, but without following the thought or relying upon it, we will inquire whether the evidence establishes a relation of agency or service existing between the accused and Furlong, and whether such relation is contemplated by the instructions above quoted. We think it is in each. The watch was received under an agreement that the accused was to act for Furlong in making a contract of sale of the property, *i. e.*, exchanging the watch for a wagon. Can it be doubted that any proper contract of sale within the scope of the accused's authority would have bound Furlong? Certainly he would have been bound thereby; and one of the ingredients of the transaction creating it a binding contract upon him would have been the relation of agency existing between him and the accused. We conclude that the idea of agency is clearly expressed, both by the language of the indictment and instructions, and the relation is established by the evidence, or rather that there was evidence tending to establish it rendering the instruction relevant and proper, upon which the jury may well have found its existence."

[1] State *v.* Bancroft, 22 Kan. 170.

[2] *Supra*, §§ 1021, 1022.

§ 1055. The term bailee is one to be used, not in its large, but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods first *bonâ fide*,[4] and then fraudulently convert.[5] Any other construction would make larceny and embezzlement in part overlap.[6] Hence it follows that not only must the evidence show, but the indictment must aver, the facts distinguishing the case from larceny at common law.[7] And thus when it does not appear that any fiduciary duty is imposed on the defendant to restore the specific goods of which the alleged bailment is composed, a bailment under the statute is not

"Bailee" to be used in restricted sense.

[1] R. *v.* Mason, D. & R. N. P. C. 22. See *supra*, § 1022.

[2] *Supra*, §§ 922, 1033; State *v.* Kent, 22 Minn. 41; Carter *v.* State, 53 Ga. 326.

[3] *Supra*, § 1014; Com. *v.* Smith, 129 Mass. 104. As to indictment against agent, see Lycan *v.* People, 107 Ill. 423; Washington *v.* People, 72 Ala. 272.

[4] That a bailee is one who is to return to the depositor a specific article deposited with him, see R. *v.* Clegg, 11 Cox C. C. 212; R. *v.* Aden, 12 Ibid. 512; R. *v.* Richmond, Ibid. 495. That this covers articles on which the bailee is to bestow certain work, see Whart. on Neg. §§ 435–478; R. *v.* Daynes, 12 Cox C. C. 514.

[5] Krause *v.* Com., 93 Penn. St. 418. See Watson *v.* State, 70 Ala. 13.

[6] R. *v.* Hunt, 8 Cox C. C. 495; People *v.* Cohen, 8 Cal. 42; Leonard *v.* State, 7 Tex. Ap. 417. *Supra*, §§ 1027, 1049, 1050. A recent English statute provides that "whoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any other person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny." 24 & 25 Victoria, c. 96, s. 3. See R. *v.* Loose, Bell C. C. 259; 8 Cox C. C. 302; Fisher's Digest (Am. ed.), p. 258; R. *v.* Cosser, 13 Cox C. C. 187; R. *v.* Tatlock, Ibid. 328; L. R. 2 Q. B. D. 157; R. *v.* Tomkinson, 14 Cox C. C. 603; 44 L. T. N. S. 82. Compare Baker *v.* State, 6 Tex. Ap. 344. *Infra*, § 1057. As to Missouri statute, see State *v.* Broderick, 7 Mo. Ap. 19.

[7] People *v.* Cohen, 8 Cal. 42; People *v.* Peterson, 9 Ibid. 313; see, however, People *v.* Poggi, 19 Ibid. 600, taking a wider view. See *supra*, §§ 1009, 1027, 1050.

constituted,[1] though it is otherwise when a specific thing, whether money, securities, or goods, is received in trust and then appropriated.[2] Unlike embezzlement by servants of goods not yet come to their master's possession,[3] it is the essence of this form of embezzlement that the offence should be limited to the particular article bailed or its proceeds; and if the agent have discretionary power over such article,[4] then he is not a bailee under the statute. But, as will be seen, when a carrier delivers goods and embezzles the price, although he cannot be indicted for embezzling the goods, he may be for embezzling the money.[5] And such is the case with a person appropriating goods given to him to effect a "trade,"[6] or to obtain a loan,[7] or to hold as a loan;[8] and with other modes of fraudulent conversion by bailee.[9] This includes a fraudulent conversion by an inn-keeper of baggage intrusted to him.[10]

A person who, after being employed to discount negotiable paper, fraudulently appropriates the proceeds, is guilty of embezzlement;[11] but there must be, to sustain a conviction, proof of both bailment and conversion.[12]

Person not capable of contracting may be bailee.

§ 1056. It was once thought in England that a married woman, not being capable of contracting, could not be a bailee;[13] but this was based hurriedly on the impression that a person not capable of contracting cannot be liable for a tort, which is an error, and the case may now be considered

[1] R. v. Hassell, L. & C. 58; 8 Cox C. C. 491; 9 W. R. 708; R. v. Garrett, 8 Cox C. C. 368; 2 F. & F. 14; R. v. Oxenham, 13 Cox C. C. 349; Gaddy v. State, 8 Tex. Ap. 127; Webb v. State, Ibid. 310.

[2] R. v. Aden, 12 Cox C. C. 512; R. v. Tomkinson, 44 L. T. N. S. 822.

[3] See *supra*, § 1016.

[4] See R. v. Hoare, 1 F. & F. 647; R. v. Hunt, 8 Cox C. C. 495.

[5] R. v. Wells, 1 F. & F. 109; R. v. Aden, 12 Cox C. C. 512. In R. v. De Banks, L. R. 13 Q. B. D. 29; 50 L. T. (N. S.) 427; 15 Cox C. C. 450, it was held that a person employed to take charge of a horse for a few days and then to sell it, was a bailee of the money. As to other cases, see *supra*, § 1027.

[6] State v. Foster, 37 Iowa, 404.

[7] R. v. Tomkinson, 44 L. T. (N. S.) 821.

[8] Com. v. Chathams, 50 Penn. St. 181.

[9] Hutchison v. Com., 82 Penn. St. 472; Com. v. Maher, 11 Philad. 425. See People v. Murphy, 51 Cal. 378; Baker v. State, 6 Tex. Ap. 344.

[10] People v. Husband, 36 Mich. 306; and see Bork v. People, 91 N. Y. 5.

[11] R. v. Oxenham, 46 L. J. 125; 13 Cox C. C. 349.

[12] R. v. Weekes, 10 Cox C. C. 224; R. v. Cosser, 13 Ibid. 187. See comments in London Law Times, June 10, 1882, p. 95.

[13] R. v. Denmour, 8 Cox C. C. 440, per Martin, B.

as overruled.[1] An infant, not capable of contracting, may certainly be liable criminally for criminal non-performance of duty; and *a fortiori* is this the case with married women, under the present phase of legislation.

Goods need not have been received directly from prosecutor.

§ 1057. It is not essential under the English statute that the thing embezzled should have been received from the bailor.[2] Thus indictments for embezzlement have been sustained where a carrier delivered goods committed to him by the prosecutor, and fraudulently converted their price;[3] and where the carrier (an "expressman," as he would be called in the United States) received money from the prosecutor to buy goods to be returned to the prosecutor in the carrier's cart, and obtained the goods in his own name, and on his way to the prosecutor's abstracted some of them for his own use.[4]

[1] See R. v. Robson, L. & C. 93; 9 Cox C. C. 29; 10 W. R. 61.

[2] Where the prosecutor, being "somewhat tipsy" and partly asleep, saw the defendant take his (the prosecutor's) watch out of his pocket, which he took no steps to prevent, believing that the defendant was acting solely from friendly motives, it was held by Crowder, J., that this was a sufficient bailment under the statutes. R. v. Reeves, 5 Jur. (N. S.) 716.

[3] R. v. Wells, 1 F. & F. 109.

[4] R. v. Bunkall, L. & C. 371; 9 Cox C. C. 419; 12 W. R. 414. See State v. Lillie, 21 Kans. 728.

In Hutchison v. Com., 82 Penn. St. 472, the evidence was that B. owned a large number of barrels of crude petroleum. This oil was in the tanks and pipes of a carrier, intermingled with and undistinguishable from thousands of barrels of other oil in the same tanks and pipes. B. held orders, accepted by the carrier, for the quantity of petroleum mentioned, which he delivered to the defendants for the purpose of having them store the petroleum, taking back from them a receipt setting forth that fact. The defendants deposited these orders to the credit of their general account with the carrier, as they did other like orders, and drew petroleum from the carrier thereon. The petroleum drawn was disposed of from time to time by them for their own benefit, until they became insolvent. B. then demanded his petroleum, but they were unable to deliver it, by reason of having nearly exhausted the quantity of oil they were entitled to draw from the carrier's pipes. The defendants were then indicted for larceny as bailees. The Supreme Court held, Mercur, J., dissenting, that (1) by the rules of the trade there was a delivery; (2) that there was a bailment; and (3) that the drawing of the petroleum and selling it on their own account by the defendants was a conversion to their own use.

According to Sir J. F. Stephen (Dig. C. L., art. 345), the 24 & 25 Vict. does not extend to an agent who disposes of a chattel, valuable security, or power of attorney according to unwritten instructions given to him, and subsequently misappropriates the proceeds thereof, unless (possibly) he is proved to have had an intention to misapro-

§ 1058. Subject to the qualifications above expressed, it is necessary, to sustain a conviction, that there should have been put in proof some act of conversion by the bailee, inconsistent with the terms of the bailment.[1] As an illustration of such breach of bailment, may be mentioned an English conviction sustained on proof that the defendant, a carrier, employed by the prosecutor to deliver in his (the defendant's) cart a boat's cargo of coals to persons named in a list, and only to such persons, fraudulently sold some of the coals and appropriated the proceeds.[2]

Conversion must be shown inconsistent with character of bailment.

§ 1059. Some act of conversion or appropriation by the bailee or carrier must be alleged and proved to have taken place within the jurisdiction of the court.[3]

Some act of conversion must be in jurisdiction.

§ 1060. In general, the rules laid down with regard to embezzlements by servants for appropriating goods which have not yet reached their masters, apply (with the exception of the averment as to the masters' non-reception of the goods) with equal force to embezzlements by trustees and bailees.[4] The following points, peculiar to the last class of embezzlements, are now to be noticed.

Indictment must conform to statute.

§ 1061. The special conditions of particular statutes are to be expressed in the indictment. As these are what constitute the *differentia* of the offence, as distinguishing it from larceny, they must be set forth in the indictment.[5] Hence the indictment must aver not merely the bailment or trust, but the special circumstances which make the case embezzlement under the statute.[6] And so it is necessary to state in the indictment

Special facts to be averred.

priate the proceeds at the time when he disposed of the chattel, valuable security, or power of attorney. This, he says, seems to be the effect of R. *v.* Tatlock, L. R. 2 Q. B. D. 157; and R. *v.* Cooper, L. R. 2 C. C. 123. In R. *v.* Tatlock the judges were not unanimous.

[1] See R. *v.* Jackson, 9 Cox C. C. 505; Larkin *v.* People, 61 Barb. 226.

[2] R. *v.* Davies, 14 W. R. 679; 14 L. T. N. S. 491; Calkins *v.* State, 18 Ohio St. 366; R. *v.* Aden, 12 Cox C. C. 512. As to conversion by a solicitor, see R. *v.* Fullerger, 14 Ibid. 370; R. *v.* Newman, London Law Times, March 15, 1882; S. C., 46 L. T. N. S. 394.

[3] Larkin *v.* People, 61 Barb. 226. See *supra*, §§ 248–251, 1040, 1058; State *v.* Bancroft, 22 Kan. 170.

[4] See *supra*, § 1043.

[5] R. *v.* Golde, 2 M. & Rob. 425; Com. *v.* Smart, 6 Gray, 15. See Com. *v.* Hays, 14 Ibid. 62; Com. *v.* Simpson, 9 Met. 138; Larkin *v.* People, 61 Barb. 226; People *v.* Tryon, 4 Mich. 665; People *v.* Bailey, 23 Cal. 577.

[6] State *v.* Walton, 62 Me. 106; Com. *v.* Wyman, 8 Met. 247; Wise *v.* State, 41 Tex. 139; State *v.* Longworth, Ibid. 162. In Massachusetts, the particulars of embezzlement need not now (by statute) be stated. Com. *v.* Bennett, 118 Mass. 443.

That value on gross to a number of articles is enough, see State *v.* Mook, 40 Ohio St. 588.

[1] Com. *v.* Smart, 6 Gray, 15; People *v.* Cohen, 8 Cal. 42.

[2] Com. *v.* Wyman, 8 Met. 247. As giving a laxer view, see State *v.* Stimson, 4 Zab. 9; State *v.* Porter, 26 Mo. 201; and see Com. *v.* Newcomer, 49 Penn. St. 478.

An indictment of B. for embezzling securities in money held by him from H. in "trust and confidence to be by B. safely kept for H. until H. shall call for the same," sets forth a trust on the part of H. with sufficient exactness to warrant a conviction of B. on proof of his fraudulent conversion of the trust funds so held. Com. *v.* Butterick, 100 Mass. 1.

In Wright *v.* People, 61 Ill. 382, it was held that the Illinois act of March 4, 1869, entitled an act for the protection of consignors of fruit, grain, flour, etc., to be sold on commission, which provides that any warehouseman, storage, forwarding or commission merchant, who, having converted to his own use the proceeds or profits arising from the sale of any goods, otherwise than as instructed by the consignor of the goods, on demand of the consignor fails to deliver over the proceeds or profits of such goods, after deducting the usual per cent. on sales as commissions, shall be guilty of a misdemeanor, etc., being a penal statute, must receive a strict construction; and an actual demand to be made by the consignor upon the commission merchant is an indispensable prerequisite to a conviction under it.

In a case under this statute, the prosecutor testified that, when he went to the place of the accused, the latter said: "I know what you have come for, but it is impossible for me to pay you anything now." The witness stated that the accused knew well enough what he had come for, and this was all the demand he claimed to have been made. It was held that while in a civil cause, where a demand was necessary, such evidence might be sufficient for a jury to find a waiver, it could not sustain a criminal prosecution. The demand for the latter purpose should be made in such a manner as to fairly apprise the merchant that he would be subject to the penalties of the statute if he failed to comply. Ibid.

[3] R. *v.* Haigh, 7 Cox C. C. 403.

the purpose for which the defendant was intrusted with the property;[1] and the specific act of fraud with which the defendant is charged.[2]

§ 1062. A mere common law indictment for larceny is not enough, unless made so specially by statute. In England at one time an opinion was ventured at *nisi prius* to the effect that a common law indictment for larceny would be good in embezzlements by bailees;[3] but this case was exceptional, and not only was disregarded in subsequent adjudications, but was practically overruled by a series of decisions already referred to, in which it was held that the special nature of the trust

At common law indictment for larceny not enough.

should be set forth. These were followed by the 24 & 25 of Victoria, c. 96, s. 3, which provided that in prosecutions of bailees fraudulently converting the bailed goods, an indictment for larceny should be sufficient. Where a statute to this effect is not in operation, it is essential in all cases of embezzlement as distinguished from larceny, that the fiduciary character and duties of the bailee should be set forth in the mode already specified.[1]

We have already seen that counts for larceny may be joined with those for embezzlement.[2]

Evidence inferential.

§ 1062 *a*. The evidence in cases of embezzlement, both as to the nature of the trust, the embezzling act, and the intent, is inferential.[3]

[1] *Supra*, § 1043.

[2] *Supra*, § 1047.

[3] *As to Nature of Trust.*—The acting in an office is sufficient proof of authority. Whart. Cr. Ev. §§ 834–5. Thus if a person receive money as a steward of another, this is sufficient evidence of his being a steward to support an indictment for embezzling such money. R. *v.* Beacall, 1 C. & P. 312; R. *v.* Wellings, Ibid. 454, 457.

The presumption of due appointment applies also to the person from whom goods are embezzled, if he be a trustee.

Where there has been a written agreement between master and servant, in which the nature of the service is defined, on an indictment for embezzlement against the latter, parol evidence of the service is inadmissible, unless notice has been given to produce the agreement. R. *v.* Clapton, 3 Cox C. C. 126.

Where a clerk to a savings bank was convicted on an indictment charging him with embezzlement, the property being laid in T.; and in order to prove that T. was a trustee of the bank, he was called, and stated that since the commission of the offence he had been acting as a trustee, but that before that date he had attended only one meeting, having on that occasion been requested to do so lest there should be a deficiency of trustees; but he was also a manager of the bank, and it did not appear that any act was done by him at that meeting which he might not have done as a manager; it was held that this was insufficient evidence of acting to support the inference of the legal appointment of T. as a trustee, and that the conviction was wrong. R. *v.* Essex, Dears. & B. C. C. 369; 4 Jur. N. S. 15; 7 Cox C. C. 384.

An admission by a person indicted as servant to guardians of the poor of a parish, such admission being contained in the condition of his bond for the performance of his duties as treasurer, coupled with an act of parliament specifying those duties, is sufficient evidence of the nature of his appointment. R. *v.* Welch, 1 Den. C. C 199; 2 C. & K. 296.

That a decoy has been used is no defence. *Supra*, §§ 149, 1039. Where B., a brewer, sent his drayman, S., out with porter, with authority to sell it at fixed prices only; and S. sold some of it to P. at an under price, but did not receive the money at the time; B., having heard of this, unknown to S., told P. to pay S. the amount, which P. did, and S., when asked for it by B., denied the receipt of the money; embezzlement was held to be made out. R. *v.* Aston, 2 C. & K. 413.

Intent may be inferred from absconding. Thus where S., a servant of M., being sent to receive rent due M., received it, and immediately went off with it to Ireland; it was held that this was evidence from which the jury might infer that S. intended to embezzle the money. R. *v.* Williams, 7 C. & P. 338. *Supra*, § 1030.

Other acts of embezzlement may be introduced to prove intent. Whart. Crim. Ev. § 53. Thus where an indictment charged the prisoner with having embezzled three sums of twenty-one pounds, the moneys of his employers, he being a clerk or servant, evidence having been given of the embezzlement of these sums, it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled; and this was admitted, to show that if it should be contended the sums charged in the indictment were subjects of a mistake in keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion. R. *v.* Richardson, 8 Cox C. C. 448; 2 F. & F. 343.

Denial of Receipt necessary.—It is not enough to prove that a clerk has received a sum of money without entering it in his book, unless there is also evidence that he has denied its receipt. R. *v.* Jones, 7 C. & P. 833. But this denial may be inferential. See R. *v.* Grove, 7 C. & P. 635; 1 M. C. C. 447. *Supra*, §§ 1030, 1053.

[1] For rulings under such statutes see U. S. *v.* Cook, 17 Wall. 168; U. S. *v.* Taintor, 11 Blatch. 374; U. S. *v.* Bixby, 10 Biss. 238; U. S. *v.* Forsythe, 6 McL. 584; U. S. *v.* Voorhees, 9 Fed. Rep. 143; U. S. *v.* Lee, 12 Ibid. 816; U. S. *v.* Conant, Lowell, J., 9 Cent. L. J. 1879, 129; U. S. *v.* Bogart, 3 Ben. 257; State *v.* Walton, 62 Me. 106; State *v.* Boody, 53 N. H. 610; Com. *v.* Morrisey, 86 Penn. St. 416; Calkins *v.* State, 18 Ohio St. 366; State *v.* Newton, 26 Ibid. 265; People *v.* Bringard, 39 Mich. 22; State *v.* Hebel, 72 Ind. 361; State *v.* Brandt, 41 Iowa, 593; State *v.* Munch, 22 Minn. 67; State *v.* Baumhager, 28 Minn. 226; State *v.* Ring, 29 Minn. 48; State *v.* Smith, 13 Kans. 274; State *v.* Carrick, 16 Nev. 120; Hoyt *v.* State, 50 Ga. 313; Johnson *v.* Com., 5 Bush, 430; State *v.* Leonard, 6 Cold. 307; State *v.* Bittinger, 55 Mo. 596; State *v.* Flint, 62 Ibid. 393; State *v.* Hays, 78 Ibid. 600; State *v.* Doherty, 25 La. An. 119; State *v.* Exnicios, 33 Ibid. 253; Gibbs *v.* State, 41 Tex. 491.

III. PUBLIC OFFICERS.

Embezzlement by statutory officers.

§ 1063. Public officers, under statutes varying in different jurisdictions, are made indictable for embezzlement. The statutes, however, are so various, abounding in such numerous distinctions, that it would exceed the limits of the present work to exhibit them in detail.[1] Holding office is, in such cases, proof of official status, it not being necessary to prove

institution or taking an official oath.[1] And in any view a *de facto* officer is indictable for the embezzlement of public money.[2]

Embezzlement from post-offices is hereafter distinctively considered.[3]

Under the term public officer, in State statutes, are included town collectors of taxes and selectmen.[4] Mere retention of public

[1] Whart. Crim. Ev. §§ 164, 183; Fortenberry *v.* State, 56 Miss. 286; State *v.* Mims, 26 Minn. 183.

[2] Ibid. R. *v.* Barrett, 6 C. & P. 124; Sate *v.* Goss, 69 Me. 22; State *v.* McEntyre, 3 Ired. L. 171; State *v.* Mayberry, Ibid.; Diggs *v.* State, 49 Ala. 311; State *v.* Spaulding, 24 Kan. 1.

[3] *Infra*, § 1827.

[4] In State *v.* Walton, 62 Me. 106, it was held not to be necessary, in an indictment against a town officer for the embezzlement or fraudulent conversion to his own use of moneys in his possession and under his control by virtue of his office, to allege to whom the money belonged, or that it was the property of another.

It was further held that under the statute (R. S. c. 120, § 7), which declares three different classes of offenders liable to be deemed guilty of larceny, it is not necessary to the validity of an indictment, under the provisions there found, to set out the various facts that would be necessary to constitute larceny as elsewhere defined. It is sufficient to allege the acts and facts which that section declares shall be deemed larceny.

It was further ruled that a town collector of taxes is a public officer within the meaning of that section, and cannot successfully object to the maintenance of an indictment under that section for the fraudulent conversion to his own use of moneys which have come into his possession and under his control, by virtue of his office, that he and his sureties are liable to account to the town for the money which he collects for it, according to his bond, and that the money is not the town's money until it is paid into the treasury.

In the opinion of the court it was said by Barrows, J.: "The case of The People *v.* Bedell (2 Hill, 196) arose under a New York statute, which provides that 'where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty . . . . shall be a misdemeanor punishable as herein described.'

"The defendant was appointed collector of the Geneva Village Corporation, by the trustees, and gave bonds for the faithful discharge of his duty, Warrants and tax-bills were given him for collection. He finally went off a defaulter for from three to five hundred dollars, and was indicted under this statute. It was objected that the charter of the village corporation did not authorize the appointment by trustees, and, if it did, defendant was not a public officer within the meaning of the statute. The collector is not mentioned among the officers to be chosen for the corporation, but power is given to the trustees to apppoint one attorney, street commissioner, fire-wardens, and certain other officers specially named, and also 'such other officers as shall be authorized by this act.' The collector is not named in any list of officers in the act; but one section provides that 'the collector shall collect all moneys which shall be ordered by

funds in their proper deposit, without appropriation or conversion, is not embezzlement;[1] though it is otherwise where such retention

the corporation to be raised by tax.' Hereupon, in an opinion drawn by Bronson, J., the court held: I. That the collector was one of the officers authorized by the act, and might be appointed by the trustees. II. That he was a public officer; and that officers of such a corporation are 'none the less public officers because their powers are confined in narrow territorial limits.' The court remarked that he was required to take the oath and to give bail for the faithful performance of his duties, 'and he was not the less a public officer because the office is not mentioned in the statute enumeration and classification of public officers.'"

In State *v.* Boody, 53 N. H. 610, it was held that a selectman is a "public officer," and may be "a receiver of public money" within the intendment of c. 257, § 7, of the Maine Gen. Stats.

In the course of his opinion, Foster, J., said: "But the terms of the statute relating to embezzlements are not restricted nor defined by the application and definitions of the provisions of title xvii.; and, as used in § 8 of c. 258, Gen. Stats., the term 'public corporation' may properly be applied to a town.

"Of this there can be no doubt. Every municipal corporation is necessarily a public corporation. 'All corporations intended as agencies in the administration of civil government are *public*, as distinguished from private, corporations. Thus, an incorporated school district or county, as well as a city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a *municipal* corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political, or public corporations are not, in the proper use of language, municipal corporations.' Dillon Mun. Corp. § 10.

"In this State, public corporations are understood to include all those which are created for public purposes, and whose property is devoted to the object for which they are created. Such, it is said, are counties, towns, parishes, school districts, etc. Private corporations are those which are created for the immediate advantage of individuals. Such, it is said, are insurance and manufacturing companies, and such, also, are canals, turnpikes, toll-bridges, and railroads, although the uses of these latter are public. Dartmouth College *v.* Woodward, 1 N. H. 116, 117; Eustis *v.* Parker, Ibid. 275; School District *v.* Blaisdell, 6 Ibid. 199; Concord Railroad *v.* Greeley, 17 Ibid. 47; Foster *v.* Lane, 30 Ibid. 305; Petition of Mt. Washington Road Co., 35 Ibid. 134."

In Zschocke *v.* People, 62 Ill. 127, a constable, having an execution placed in his hands, levied upon and took possession of certain goods belonging to the judgment debtor, and put them in possession of the judgment creditor. A short time afterward the constable took the goods away, with the consent of the judgment creditor, and sold them at private sale, receiving therefor the sum of $55, which he converted to his own use. In a prosecution against the constable, under an indictment charging him with having stolen divers United States notes and current bank

[1] State *v.* Hunnicutt, 34 Ark. 862.

is accompanied by refusal to pay over on the fraudulent excuse of non-possession of the money.[1] In such case a general refusal to pay over will sustain the charge.[2]

IV. RECEIVING EMBEZZLED GOODS.

Indictable at common law.

§ 1064. Receiving knowingly embezzled goods is generally held a misdemeanor at common law wherever the embezzlement is made penal by statute. But, aside from this view, wherever embezzlement is made larceny by statute, there receiving embezzled goods stands on the same footing as receiving stolen goods.[3] But where "receiving" is made a statutory offence, and is exclusively confined to goods *stolen*, this may preclude the receiving of *embezzled* goods from being indictable at common law.[4] It is clearly otherwise where embezzlement is made larceny by statute.[5]

bills for the payment of $55, and of that value, of divers issues and denominations to the grand jury unknown, the personal goods and property of Mathias Eck, who was the judgment creditor, it was held the prosecution could not be maintained, under sec. 71 of the Criminal Code of Illinois, declaring the felonious conversion of money, goods, etc., by a bailee, to be larceny, because in no sense could the constable be regarded as the bailee of the judgment creditor.

[1] *Supra*, § 1053; State *v.* Mims, 26 Minn. 183. See Comstock *v.* Gage, 91 Ill. 330.

[2] State *v.* Ring, 29 Minn. 78.

[3] *Supra*, § 996. See, however, Leal *v.* State, 12 Tex. Ap. 279.

[4] See *supra*, § 994.

[5] R. *v.* Frampton, D. & B. 585.