APPENDIX OF NOTES.

NOTE I.
(To Article 30.)

Hardly any legal doctrine is less satisfactory than the one embodied in this Article. The rule has been too long settled to be disputed; but on examining the authorities in their historical order, it appears to me to have originated, like some other doctrines, in the anxiety of judges to devise means by which the excessive severity of the old criminal law might be evaded.

The doctrine as it now stands is uncertain in its extent and irrational as far as it goes. It is, besides, rendered nearly unmeaning by the rule that the presumption is liable to be rebutted by circumstances. The first authority on the subject is Bracton, in whose time the more recent doctrine appears to have been unknown. He says:—"Uxor vero dedit desponte, non tenebitur ex furto viri, quia virum accusare non debet nec detegere furturn suum nec feloniam, cum ipsa sui potestatem non habeat, sed vir. Consentire tamen non debet felonias viri sui nec conscriptio eam, sed nequitiam et feloniam viri impedire debet quantum potest. In certis vero casibus de furto tenebitur, si furtem inventarius sub clavisibus uxoriae, quae quidem claves habere debet uxor sub custodia et cura sua. Claves videlicet dispensare suae, aequo suo, et scribi sui: et si aliquando furtem sub clavisibus istis inventarius, uxor cum viro culpabilis erit. Sed quid si res furtiva in manu uxoria inventatur, numquid tenebitur vir? Non ut videtur, nisi ei expresso consentient, vel cum rem ei warrantizaverit cum ipsum vocaverit ad warrantum, et tuuo consentisse presumitur nisi expresso dissentiat, vel nisi de eo presumatur quod fidelis sit et quod societatem talis uxoria devitavit in quantum potuit. Item quid erit si uxor cum viro conjuncta fuerit, vel confessam quod viro
THE CRIMINAL LAW.

suo consilium presstitit et auxiliam, nunquam tenebuntur ambo? Imout videtur, quia vir potest teneri per se cum sit malus, et uxor poterit esse bona et fidelia et liberari. Item uxor mala per se et vir fidelia. Cum ergo uterque possit esse malus per se et alter eorum bonus, ita poterit uterque eorum, simul et conjunctum, esse malus sicut bonus. Solutio. Non igitur erit in omni casu uxor deliberanda propter consensum, auxiliam, et consensus, desint sunt participes in criminis, ita erunt participes in poena. Et licet obedire debeat viro, in atrocioribus tamen suis latrocinii ei non erit obediendum. Poterit quidem vir ligare et tenere, et uxor sponte et non coarta occidere, et ita ut videtur teneretur maleficio uterque. De concubina vero, vel familia domus, non erit sicut de uxore. Ipsa vero accusare tenetur, vel a servitio recedere aliquo videtur consentire."

The effect of this passage is that the wife is not bound to accuse her husband, nor is she to be regarded as accessory after the fact to a theft committed by him merely because she receives the stolen goods, though she may be so regarded if she so conducts herself as to show actual consent to the theft. The passage does not contain a word about her right to steal with impunity in his presence.

The next authority is Assises (27 Edw. 3), which is in these words:—"Un femme fuit arraine de o q el aver folon enble ii s de pain; o disq. I le fis per commandement de celuy qui fait son baron a cel temps. Et les justices ne voient prendre pur pite a sa coni, mes priseront l'enquest ; per q fut trove que el' le fit per cohersion de son baron maugre le ne per que el' ala quitte, et dit fut q p command de baron sans autre cohersion, ne serva nul manner de folon," &c.

In this case the jury seem to have found actual coercion by the husband. The dictum that the husband's command, he being absent, relieves the wife from guilt is clearly wrong according to more modern authorities. In Fitzherbert's Abridgment (A.D. 1565), Corone, 109, the case in the Book of Assizes is quoted in an abridged form; and Staunforde (A.D. 1583), ch. 19, quotes Fitzherbert, but adds a quere to the dictum appended to the case, on which Fitzherbert relies. He does not, however, quote the case itself.

Coke (3rd Inst, ch. xlvi. p. 106) says:—"A femme covert committed not larceny if she does it by the coercion of her husband; but a femme covert may commit larceny if she doth it
without the coercion of her husband." He quotes 27 Ass. 40, and Stanniforde, but does not say that the bare presence of the husband is to be regarded as coercion, and does not notice the dictum as to the husband's command.

Bacon, upon the maxim "Necessitas inducit privilegium quoad jura privata," observes, "the second necessity is of obedience, and therefore where baron and femme commit a felony, the femme can neither be principal nor accessory, because the law intends her to have no will in regard of the subject and obedience she owes to her husband." For this he quotes the passage in Stanniforde already referred to, and Fitzherbert (Corone, 160), which states, as the effect of a case, in 2 Edw. 3, that eight men and a woman being convicted of felony, and the woman declaring that she was the wife of one of the men, and the jury saying they knew nothing of it, the judge inquired of the bishop. Lord Bacon's proposition thus goes infinitely beyond his authorities.

Dalton (Justice, ch. civii.) says:—"A femme covert doth steal goods by the compulsion or constraint of her husband. This is no felony in her." And he quotes Fitzherbert and the case quoted by Fitzherbert. He also quotes Bracton in a very unintelligible and fragmentary way, and says that in murder and treason the husband's compulsion does not excuse the wife. As to murder, his authority is Marrow,1 an author of the time of Henry VII. As to treason, he quotes Fitzherbert (Cor. 130). This passage refers to the case of a woman sentenced to be burnt for coining, respited on the ground of pregnancy, delivered of her child, and becoming pregnant again before she was burnt. The case does not say that she was married at all, and rather implies that she was not.

Hale (1 P. C. 45) says:—"If she (the wife) commit larceny by the coercion of the husband, she is not guilty (27 Ass. 40), and according to some, if it be by the command of her husband, which seems to be law if the husband be present, but not if her husband be absent at the time and place of the felony committed."

"But this command or coercion of the husband doth not excuse in case of treason nor of murder, or in regard of the heinous-

1 Lambard's "Preface" begins, "To write of the office and duties of a Justice of the peace, after H. Marrow," is like "bringing owls to Athens." In Wilks v. Bridge, 2 B. & Ald. 262, Marrow is said to have been a Master in Chancery.
ness of those crimes." He quotes for this the passage in Dalton
given above and the cases of Arden and Somerville as to treason,
and Lady Somerset as to murder. He goes on: "If the husband
and wife together commit larceny or burglary, by the opinion
of Bracton (lib. iii. ch. xxxii. s. 10), both are guilty," (Bracton
says nothing of the sort,) "and so it hath been practised by
some judges. Vide Dalt., ubi supra, ch. civ." (Dalton does
not say so.) "And possibly, in strictness of law, unless the
actual coercion of the husband appears, she may be guilty in
such a case; for it may many times happen that the husband
doth commit larceny by the instigation, though he cannot in
law do it by the coercion, of his wife; but the latter practice
hath obtained, that if the husband and wife commit burglary
and larceny together, the wife shall be acquitted, and the hus-
band only convicted; and with this agrees the old book (2 E. 3,
Corone, 160). And this being the modern practice, and, in
favorum sitis, is fittest to be followed; and the rather because
otherwise for the same felony the husband may be saved by the
benefit of his clergy, and the wife hanged, where the case is
within clergy, though I confess this reason is but of small value;
for in manslaughter committed jointly by husband and wife
the husband may have his clergy, and yet the wife is not
on that account to be privileged by her covertures.

"And accordingly in the modern practice where the husband
and wife, by the name of his wife, have been indicted for a
larceny or burglary jointly, and have pleaded to the indictment,
and the wife convicted, and the husband acquitted, merciful
judges have used to reprieve the wife before judgment, because
they have thought, or at least doubted, that the indictment was
void against the wife, she appearing by the indictment to be a
wife, and yet charged with felony jointly with her husband.

"But this is not agreeable to law, for the indictment stands
good against the wife, inasmuch as every indictment is as well
several as joint."

This extract probably gives the key to the confusion of the
law upon this subject. It was thought hard that a woman
should be hanged for a theft for which her husband had his
clergy, and accordingly a loophole was devised for married
women, similar, as far as theft was concerned, to clergy for men.
Hale's remark as to manslaughter shows how incomplete and
unsystematic the arrangement was.
Hawkins (1—4) says: If she . . . be guilty of treason, murder, or robbery, in company with, or by the coercion of, her husband, she is punishable as much as if she were sole.” And Blackstone excepts “treason and rape in sc, as murder and the like.”

The recent cases on the subject are referred to in the Illustrations to the Article and in the foot-note.

Surely, as matters now stand, and have stood for a great length of time, married women ought, as regards the commission of crimes, to be on exactly the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on almost every occasion where it ought to be applied.

NOTE II.

(to Article 47.)

In R. v. Welham (1 Cox, C. C. 193), Mr. Justice Patteson, after consulting Baron Parke, said, “We are both clearly of opinion that there can be no inciting to commit a felony unless the party incited knows that the act in which he is to engage is a felony.” Upon this Mr. Greaves (1 Russ. Cr. 84, note (o)) asks, “How can the guilt of the inciter depend upon the state of mind of the incited? The inciting and the intention of the inciter constitute the offence.” As I understand the facts of R. v. Welham, Welham incited Hood to carry off corn which Hood supposed Welham to have a right to carry off. If this were so, Welham’s offence, if any, was an attempt to commit a felony by an innocent agent, and not an incitement to commit a felony which view would justify the language of the two eminent judges. A tells B to put into C’s tea something which B supposed to be powdered sugar, but which is really arsenic. This is an attempt by A to murder C, but it is not an inciting B to commit murder.

This view is strengthened by Williams’ Case (1 Den. C. C. 39), in which it was held that to instigate a person to poison another under such circumstances that the instigator would have been an accessory before the fact if the poison had been given, was not an attempt to administer poison.
NOTE III.

(to Article 141; Maintenance.)

It is not without hesitation that I have inserted these vague and practically obsolete definitions in this book. As, however, maintenance and champertry hold a place in all the text books, I have not thought it proper to omit all notice of them. A full account of the crimes themselves, of the vagueness of the manner in which they are defined, and of the reasons why they have so long since become obsolete, may be seen in the Fifth Report of the Criminal Law Commissioners, pp. 34-9. The Commissioners observe in conclusion: "Prosecutions for offences comprehended under the general head of maintenance are so rare that their very rarity has been a protection against the disapproval of judges, and those alterations which a frequent recurrence of doubt and vexation would probably have occasioned... But although no cases have occurred where the doctrine of maintenance has been discussed in the Courts, it is by no means true that this law has not been used as the means of great vexation. Instances of this have fallen within our own professional observation in the case of prosecutions commenced, although not persevered in." The Commissioners recommend that all these offences should be abolished. The definition of barratry in particular is so vague as to be quite absurd; and the statutory provision as to attorneys practising after a conviction would be utterly intolerable if it had not been long forgotten. I should suppose that there is no other enactment in the whole statute book which authorises any judge to sentence a man to seven years penal servitude after a summary inquiry conducted by himself in his own way.

These offences, as sufficiently appears from the preambles of the various statutes relating to them, are relics of an age when courts of justice were liable to intimidation by the rich and powerful and their dependants. As long as the verdict of a jury was, more or less, in the nature of a sworn report of local opinion, made by witnesses officially appointed to make such reports, intimidation must have been possible, and, in many cases, easy. Many statutes on this subject\(^1\) are still in force, and the law relating to it is to be found in 1 Hawkins, 454.

\(^1\) 3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 28 Edw. 1, c. 11; 39 Edw. 3, c. 4; 1 Hen. 2, c. 4; 1 Hen. 3, c. 5; 32 Hen. 8, c. 9.
The exceptions to the general rule, that a man is not to assist another in a quarrel in which the maintainer has no interest, are so numerous, and, in some cases, so vague (e.g. a man may assist his neighbour from charity), that no less vague proposition than the one in the text would faithfully represent the law.

NOTE IV.
(to Articles 156, 157.)

These offences have, at least in modern times, been made the subject of few, if of any, prosecutions. The excessive severity of the judgment for misprision of treason no doubt escaped notice when forfeitures for felony were abolished. The 33 & 34 Vict. c. 23, takes no notice of misprisions.

The definition of misprision of felony is extremely vague. I have found no authority as to what amounts to a concealment. The obligation to discover treason to a judge or magistrate is mentioned by Hale. In early times, when the offence was commoner and more important, the obligation was very clearly set forth. "Si sit aliquis qui alium noverit indo" (i.e. of treason) "esse culpabilium, vel in aliquo crimine, statim et sine intervallo aliquo accedere debet ad ipsam regem si possit, vel imittere si venire non possit ad aliquem regis familiarem et omnia ei manifestare per ordinem. Nec enim debet morari in uno loco per duas noctes vel per duos diebus ante quam personam regis vident, nec debet ad aliquam negotia quamvis urgentissima se convertere, quis vix permittitur ei ut retro aspiat." Bracton, Lib. III., fo. 118 b.

NOTE V.
(to Article 172.)

The latter part of this Article is grounded partly upon general considerations and partly upon the case referred to in the Illustrations. Further illustrations of the same principle might easily be given. For instance, the publication of an edition of Juvenal, Aristophanes, Swift, Defoe, Bayle's Dictionary, Rabelais, Brantôme, Boccaccio, Chaucer, &c., cannot be regarded as a crime; yet each of these books contains more or less obscenity for which it is impossible to offer any excuse whatever. I know not how the publication of them could be justified except by the consideration that upon the whole it is
for the public good that the works of remarkable men should be published as they are, so that we may be able to form as complete an estimate as possible of their characters and of the times in which they lived. On the other hand, a collection of indecencies might be formed from any one of the authors I have mentioned the separate publication of which would deserve severe punishment.

In scientific matters the line between obscenity and purity may be said to trace itself, as is also the case in reference to the administration of justices. It may be more difficult to draw the line in reference to works of art, because it undoubtedly is part of the aim of art to appeal to emotions connected with sexual passion. Practically I do not think any difficulty could ever arise, or has ever arisen. The difference between naked figures which pure-minded men and women could criticise without the slightest sense of impropriety, and figures for the exhibition of which ignominious punishment would be the only appropriate consequence, makes itself felt at once, though it would be difficult to define it.

NOTE VI.

(to Articles 179–181.)

There is a good deal of difficulty in bringing into a clear and systematic form the provisions of the various statutes relating to the suppression of disorderly houses, and especially gaming-houses. I think, however, that the text represents their effect with substantial accuracy.

The matter stands thus. The earliest Act upon the subject now in force is 33 Hen. 8, c. 9, “An Act for Maintenance of Artillery and Debarring of Unlawful Games.” This Act was intended to compel people to practise archery by making all other amusements unlawful, and it accordingly forbids by name bowls, queits, tennis, and various other games, cards and dice, and all other unlawful games prohibited by any of the statutes which it repealed, as well as all other unlawful games to be subsequently invented. The expression “unlawful games” is nowhere defined, unless it means every amusement except archery.

By the 10 Will. 3, c. 23, lotteries were forbidden. By the 12
Geo. 2, c. 28, "the games of ace of hearts, pharaoh, basset and hazard," were declared to be lotteries, and, as well as what we now call raffles, were forbidden under penalties. By the 13 Geo. 2, c. 10, the same course was taken as to a game called passage, "and all other games invented or to be invented with one or more dice," backgammon only excepted. By 18 Geo. 2, c. 34, these enactments were extended to "a certain pernicious game called roulet or roly poly," and that game and "any game at cards or dice, already prohibited by law," were prohibited afresh.

The 8 & 9 Vict. c. 100, repeals so much of the Act of Henry VIII as relates to games of mere skill, and provides that upon any information or indictment for keeping a common gaming-house "it shall be sufficient to prove" the matter stated in Article 188.

This enactment was passed in order to dispose of doubts that apart from its provisions it would have been necessary to prove that the parties played at one of the games specifically prohibited by the Acts of Geo. II, or at one of the games of chance prohibited by the Act of Henry VIII.

NOTE VII.

(General Note to Part V.)

The arrangement of this part, and in particular the composition of Chapters XXI. and XXII., has been the most difficult portion of the task of preparing this Digest. No one who has not made a special study of the subject, can have any adequate notion of the extreme confusion of the authorities, or of the difficulty of extracting anything systematic and definite from a number of scattered hints and isolated decisions upon particular cases—mostly relating to the law of homicide. Upon a full examination of the authorities on this subject it appeared to me that the law contained in them ought to be divided into four parts; namely:—1. Cases in which it is not criminal to inflict death, or bodily harm intentionally. These are the execution of legal sentences, keeping the peace, prevention of crime, self-defence, the use of lawful force, consent and accident. The expression "lawful force" is unavoidably vague. To enumerate every case in which the use of personal violence may be justified would be inconsistent with the scheme of this work. It would, for instance, be going beyond the limits of criminal law to enquire...
into the extent of the right of correction vested in parents, masters, captains of merchant ships, &c., or of the right of the owner of a personal chattel to take it away from a trespasser, or to try to enumerate all the cases in which civil and criminal process may be executed by the use of force, and the conditions necessary to make it legal. I have accordingly confined myself to the general principles stated in Articles 200–201.

2. Cases in which the infliction of death or bodily harm by omissions is or is not criminal. Injuries caused by the omission to do an act which the negligent person is under a legal duty to do stand on the same footing as injuries caused by unlawful acts. It is, therefore, necessary to define the commoner and more important of the legal duties which tend to the preservation of life. I have, therefore, deduced them in Chapter XXII. from the different decisions in which a violation of them has been held to occur. Of course the chapter does not contain an exhaustive list of all the duties which might tend to the preservation of life under particular circumstances, though I hope it notices the most important of them.

3. Cases relating to homicide generally and apart from the distinction between murder and manslaughter. Such are the point of time at which a child becomes a human being, the degree of connection between an act and the death caused by it necessary in order to enable us to say that the agent has killed the deceased, and the case in which the act done is not the sole cause of death. Thus, if an unborn child receives an injury of which it dies before it is fully born, the infliction of the injury cannot be either murder or manslaughter. If it dies after it is fully born the infliction of the injury may be either justifiable homicide, accidental homicide, manslaughter, or murder, according to circumstances. This makes it possible to enumerate the cases in which homicide is unlawful, and so to give a specific meaning to the expression "unlawful homicide."

4. The definition of malice aforesaid. Unlawful homicide must be manslaughter at least, and may be murder if it is accompanied by malice aforesaid; and, after dealing with this, the transition to the less serious bodily injuries, felonious or otherwise, is easy.

When this division of the subject is carried out it looks simple; at least I hope so; but any one who will try the
experiment of referring to the authorities will believe me when I assert that it cost me weeks of thought and labour to put the matter in this shape. I believe, however, that it is now not very incomplete.

The table on p. 377 shows, I think, that every imaginable kind of homicide has been considered, and has been classified as lawful or unlawful in some part or other of Chapters XXI, XXII, and XXIII, and if this be so the definitions of murder and manslaughter must also be complete.

This table gives seven distinct kinds of homicide, as follows:

1. Homicide by an act accompanied by a lawful intention to kill or hurt (Chapter XXI).
2. Homicide by an act accompanied by an unlawful intention to kill or hurt (Article 223 (a)).
3. Homicide by an act in itself lawful, and not accompanied by an intention to kill or hurt (Article 210).
4. Homicide by an act in itself unlawful, but not accompanied by an intention to kill or hurt (Article 223 (c)).
5. Homicide by an omission to discharge a legal duty amounting to culpable negligence (Chapter XXII, Article 223 (b)).
6. Homicide by an omission to discharge a legal duty not amounting to culpable negligence (Article 211).
7. Homicide by an omission to do an act not amounting to a legal duty (Article 212).

Of these Nos. 1, 3, 6, and 7 are not unlawful in the sense of being criminal. Nos. 2, 4, and 5 are unlawful. Every act falling within these definitions must be manslaughter at least, and may be murder if it is accompanied by malice aforethought, as defined in the next chapter, and is not provoked.

Unless some kind of homicide can be suggested which is not comprehended in one or other of these classes, the subject is exhausted in these chapters.

NOTE VIII.

(Article 223.)

Definition of Murder and Manslaughter.

This definition represents the solution at which I have arrived after much consideration of one of the most difficult
Homine
must be committed
either

By an act, or By an omission.

Accompanied by an intention to kill or hurt, or Not accompanied by an intention to kill or hurt, or

To discharge a legal duty, or To do an act not amounting to a legal duty.

Such intention being lawful, or Such intention being unlawful, or The act itself being lawful, or The act itself being unlawful, or

Amounting to culpable negligence, or Not amounting to culpable negligence.
problems presented by the criminal law—the problem of giving in a short compass the result of a great number of decisions and statements by authoritative writers upon the subject of murder.

I do not propose in this note to examine the history of the law on this subject, or to enter into any inquiry as to its merits and demerits. I propose simply to shew that it is stated correctly in the text. It will be sufficient for this purpose to shew, first, that the definition which I have given coincides with the theory laid down by the authorities on the subject; and secondly, that all the points decided by the various cases relating to any form of homicide are comprehended in what I have said on the subject in the different Articles contained in Chapters XXI.—XXIV., both inclusive, for the various decisions in question range over all the subjects treated of in those chapters indiscriminately. The first of these points I shall try to establish by shewing that my definition of murder and manslaughter respectively will be found upon examination to be equivalent to what is stated in Coke's 3rd Institute, Chapters VII. and VIII., 1 Hale’s Plea of the Crown, pp. 411—502 (Chapters XXXI.—XLII. both inclusive), and Foster’s Discourse on Homicide (Crown Law, 255—337).

The existing law on the subject is founded mainly upon these works, and the almost innumerable decisions bearing upon the subject are all applications of the theory which is there laid down. The decisions have been collected more or less fully, and arranged in a more or less satisfactory way, by various writers, but for every practical purpose the collection contained in Russell on Crimes is sufficient, though in point of arrangement it is, I think, inferior to the older work of East. 1 It fills 213 pages (340–552).

1 Only two decisions on the subject of the law of murder of any great importance were given between 1865, when the 4th edition of Russell was published, and 1878, when the 5th edition was published. These decisions not having been reported in the ordinary law reports, have not been noticed in the last edition of Russell. They are the cases of R. v. Allen and Others, the Fenians, tried at Manchester for the murder of the policeman Brett, in 1867, and the case of R. v. Desmond and Others, for killing people by blowing up the wall of Clerkenwell Prison, in 1838. Neither of these cases is reported in the common reports. I have quoted what was said by Lord Chief Justice Cockburn in Desmond’s Case in Art. 220, Inst. (8), and I have repeated in the note next following from the Times, the correspondence which passed between the counsel for the prisoner and Lord (then Mr. Justice) Blackburn, in R. v. Allen and Others. Though not in form it constitutes in fact an argument and a written judgment on a very important point. The difference of ten pages between the collection of cases in the 4th and the collection in the 5th.
THE CRIMINAL LAW.


After establishing the correctness of the general definition in the manner already described, I will give an analysis of the collection of cases in Russell, and show how each group of cases is accounted for in the text of the Digest. The intricacy, confusion, and uncertainty of this branch of the law may be traced to the statute 23 Hen. 3, c. 1, s. 3, which took away benefit of clergy in cases of "wilful murder of malice prepense," and which thus created the necessity of preserving the expression, "malice prepense," and at the same time explaining it away. Coke endeavoured to effect this by the doctrine of constructive or fictitious malice, of which, if not the author, he was the most conspicuous expounder, and he shewed in his exposition of it that utter incapacity for anything like correct language or consecutive thought which was one of his great characteristics. Hale amplifies Coke, Foster rationalizes Hale, and the judges have, in an unsystematic occasional way, worked out, bit by bit, the result recorded in the text.

According to Coke malice aforethought is the criterion by which murder is distinguished from manslaughter. Malice may be either express or implied.

1 "Malice prepense is where one compasseth to kill, wound, or beat another and doth it sedato animo."
2 "Malice implied is in three cases:—
First, in respect of the manner of the deed, as if one killeth another without any provocation of the part of him that is slain, the law implies malice.
Second, in respect of the person slain. As if a magistrate or known officer, or any other that hath lawful warrant, and in doing or offering to do his office or to execute his warrant, is slain, this is murder by malice implied in law, as the "person killed is "the minister of the king."

edition of Russell is owing to the circumstances that in the 4th edition a large number of cases are referred to twice over, once in order to show what degree of provocation reduces murder to manslaughter, and again in order to show what amount of provocation justifies a charge of manslaughter as distinguished from murder. A cat is produced twice, first to show the difference between tigers and cats, and again to show the resemblance between cats and tigers.

1 3rd Inst. 51.
2 Ibid. 52.
3 The sentence here is not even grammatical.
"Third, in respect of the person killing. If A assault B to rob him, and in resisting A killeth B (i.e. if B resists and A kills him) this is murder by malice implied, albeit he" (A) "never saw or knew him" (B) "before."

These passages, overloaded, as Coke's manner is, with a quantity of loose rambling gossip, form the essence of his account of murder.

Hale, who arranges his matter more systematically (though he also is exceedingly confused), adopts Coke's theory in slightly different language. "Such a malice, therefore, that makes the killing of a man to be murder is of two kinds: 1. Malice in fact, or 2. malice in law, or ex presumptione legis."

"Malice in fact is a deliberate intention of doing some corporal harm to the person of another."

"Malice in law, or presumed malice, is of several kinds, viz., 1. In respect of the manner of the homicide, when without provocation. 2. In respect of the person killed, viz., a minister of justice in the execution of his office. 3. In respect of the person killing." (As to which he afterwards repeats Coke in an abridged form.)

Manslaughter, Coke 3 tells us (in the middle of a bewildering chapter about homicide in general) is homicide, "not of malice forthought" [but] "upon some sudden falling out."

Manslaughter is treated by Hale in a manner so meagre and yet so confused, that not much of it can be obtained except by reading through Chapters XXXVIII.—XL., and trying to make sense of them. Hale's whole definition of the offence is in these words, "Manslaughter, or simple homicide, is the voluntary killing of another without malice express or implied."

These definitions are open to the remark that the definition of express malice includes all the three cases of implied malice.

Express malice means the deliberate intentional infliction of bodily harm. Malice is implied if the act is done without provocation, or in resisting an officer of justice, or in committing a crime. But in each of these cases the infliction of bodily harm must be intentional, and there is no reason why in each of them it should not be deliberate.

1 1 Hale, P. C. 431.  
2 Page 435.  
3 3rd Inst. 53.
THE CRIMINAL LAW.

Thus the distinction between express and implied malice is a distinction without a difference.

It has involved the whole subject in an obscurity from which it can never be rescued except by legislation, though I think the way in which it is stated in the text is correct, and may contribute to dispelling the confusion.

Coke's theory, however, and that of Hale may be exhibited in the following propositions:

1. Unlawful killing by any sort of premeditated intentional personal violence is murder.

2. Premeditation is to be presumed if the violence is intentional and unprompted.

3. Unlawful killing by unprompted intentional personal violence is murder if the violence is employed in the commission of a crime or in resistance to lawful authority.

4. Unlawful killing by unprompted intentional violence provoked is manslaughter.

These four propositions may be also stated thus—so as to show their connection:

Unlawful killing by any sort of intentional personal violence, is murder, unless such violence is used "upon a sudden falling out," constituting provocation to the offender, but neither the exercise of force by an officer of justice against an offender, nor resistance to the offender by a person against whom a crime is attempted, constitutes such a provocation, and killing in such cases is murder.

That this proposition is the equivalent of the four propositions given above is thus proved:

1 All intentional violence must be either provoked or unprompted.

All intentional violence must be either premeditated or unprompted.

1 This may be expressed thus in a tabular form:


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<th>Intentional Violence Must Be</th>
<th>Premeditated or Unpremeditated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provoked</td>
<td>Murder by proposition 1.</td>
</tr>
<tr>
<td>or</td>
<td>Not murder by proposition 4, except in cases under proposition 3.</td>
</tr>
<tr>
<td>Unprovoked</td>
<td>Murder by proposition 1.</td>
</tr>
<tr>
<td></td>
<td>Murder by proposition 2.</td>
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</tbody>
</table>
Killing by premeditated intentional personal violence is murder by (1).

Killing by unpremeditated, unprovoked intentional personal violence is, by (2), equivalent to killing by premeditated intentional personal violence, and is therefore murder. Therefore all killing by intentional personal violence is murder, unless such violence is both provoked and unpremeditated.

By (3) killing by intentional personal violence unpremeditated, and provoked only by the exercise of lawful force in the ways mentioned, is murder.

Therefore the four propositions are equivalent to the one last stated.

The legal character of unintentional killing was held by Coke and Hale to depend on the character of the act by which death was caused. If the act was unlawful the offence was murder. If lawful the death was killing by misadventure, which, in Hale's time, seems to have covered, at all events in part, the ground now occupied by manslaughter by negligence. As to this Hale says:—1 "Though the killing of another per infortunium be not in truth felony, nor subjects the party to a capital punishment, though it was not his crime, but his misfortune, yet, because the King hath lost his subject, and that men may be more careful, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed," &c.

Upon the whole, the law as to unlawful homicide, as understood by Coke and Hale (the effect of what they say on justifiable homicide is given in Chapter XXI.) may be summed up as follows:—

Murder is unlawful killing

(a.) by any intentional personal violence not inflicted upon a sudden falling out;

(b.) by any unintentional personal violence inflicted in an unlawful act.

Manslaughter is killing by any intentional personal violence inflicted upon a sudden falling out, provided that if a man attempting to commit a crime upon another is resisted, and kills the person resisting, or if a man resists an officer of justice in the exercise of his duty, and kills him, the offence is murder, and not manslaughter, although there is something which may be described as a sudden falling out between the parties.

1 Hale, P. C. 477.
The following theory was collateral to this definition, and was supposed to be its basis:—

In all murder there is malice aforethought. In murder as defined in (a.) there is express malice aforethought if the circumstances shew premi¬ditation. There is implied malice aforethought if the act was done suddenly, and without provocation.

In murder as defined in (b.), and in the proviso to the definition of manslaughter, the malice is always implied.

In manslaughter there is no express malice aforethought, and it is not thought proper to imply it.

These explanations shew the true nature and real use of the expression "malice aforethought"—a mere popular phrase un¬luckily introduced into an Act of Parliament, and half explained away by the judges. It throws no light whatever on the nature of the crime of murder, and never was used in its natural sense of premi¬ditation. On the other hand, it served as a sort of standing hint at the kind of definition which was wanted, for it was equivalent to saying that there were two degrees of homicide—homicide with premi¬ditation, or other circumstances indicating the same sort of malignity; and homicide provoked by a sudden quarrel, or accompanied with other circumstances indicative of a less degree of malignity.

Foster's discourse on Homicide is little more than an amplification of this thesis. He goes through all the principal cases which have been decided in his time, and compares them with the theories of Hale and Coke, drawing the conclusion that malice means "that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and fatally bent upon mischief;" 1 a principle more shortly expressed by Holt, L.C.J., in the words, "He that doth a cruel act voluntarily doth it of malice prepensed." 2

This principle gives its due prominence to a distinction which appears to have been quite unknown to Coke, though it had attracted the attention of Hale, and is, one would think, obvious enough in itself, the distinction, namely, between causing death

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1 Foster, 266.
2 * R. v. Massridge*, Kelyng (3rd ed.), 174. This judgment contains an admirable summary of the law of murder and manslaughter as it was understood in the beginning of the eighteenth century.
unintentionally by an act likely to cause death, and causing death unintentionally by an act unlikely to cause death.

According to Coke and Hale a settled design to beat a man makes killing him by such beating murder. Hale, however, seems to doubt whether, if the beating was moderate, the killing might not be manslaughter, and mentions one case in which, a soldier having killed a woman who abused him by throwing a broomstick at her, the judges were divided on the question whether the act was murder or not, and recommended a pardon. This view of the matter is developed at length by Foster, who discusses many cases in connection with it, and may be regarded as having laid the foundation of the modern doctrine on the subject, which has since been recognised in a vast number of cases, that the general presumption of malice which arises from the fact of killing is rebutted if it appear that the means used were not likely to cause death.

Foster to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence, by confining it to cases in which the unintentional violence is offered in the commission of a felony. This rule has in modern times had a singular and unexpected effect. When Coke and Hale wrote, the infliction of hardly any bodily injury short of a main was a felony. Cutting with intent to disfigure was made felony by the Coventry Act; shooting was made felony by what was called the Black Act; and by later statutes it has been provided that the intentional infliction of grievous bodily harm in any way whatever shall be felony (see Article 236 (a.)). The result is that Foster’s rule as to the intent to do grievous, as distinguished from minor, bodily harm being essential to malice aforethought now rests on statutory authority, for no one can intentionally inflict on another grievous bodily harm without committing a felony, and to cause death by a felonious act is murder.

The law as to homicide by omission is more modern, but closely follows the lines of the older part of the law. The authorities on it will be found in the Illustrations.

I now pass to the cases, and propose to shew, by going

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1 3rd Inst. 50.
2 1 Hale, P. C. 472.
3 1 Hale, P. C. 465.
4 * Cutting out the tongue, or putting out the eyes, was felony by 5 Hen. 4, c. 5.
through the collection contained in 1 Russell, Cr. pp. 667-898, that all the
points which have been decided are included in one part or another of the
Digest—I hope in a more intelligible order.

These cases fill the first three chapters of the Third Book, which
chapters are entitled:—
Pages 687, 688 contain extracts from the text writers as to
malice; as to which see the earlier part of this note, also the
rule of evidence embodied in Article 230.

669. Provocation no answer in cases of express malice. Art.
225. Party killing must be a free agent. See Article 27
670-674. Cases as to the time when a child becomes a human
being. Art. 218.

Means of killing:—
675. If probable consequence of act is death, it is murder
Art. 223 (b), (c), and see Illustration (5).
676. Forcing a person to kill himself is murder. Art. 220 (c).
677. Harsh treatment of an apprentice. Art. 221 (b),
Illustration (1).
678-856. Cases on causing death by omission to supply
necessaries, and on the extent of the legal duty of doing so.
See Chapter XXII.
687. Savage animals. Art. 216.
699. Lord Hale’s query as to infection. Art. 221, note (2).
700. Year and a day. Art. 221 (a).
700-702. Treatment of wounds being the immediate cause of
death. Art. 220 (a).
220 (d).
703. Poisoning (superfluous).
706-710. Accessories before and after the fact. See Chap-
ter IV.
710. Punishment. Art. 231.
Petit treason abolished (superfluous).
The general part of Chapter I. is followed by seven sections,
as follows:—
   5. Indictment and trial (under which is included the law as to concealment of birth); pp. 753-759.

Sect. 1. Provocation.—Pages 711-727.
Pages 711-717. Words, &c., no provocation. Art. 224 (f.).
712. Act of killing without adequate provocation a form of malice. Art. 223.
Words of menace. Art. 224 (f.).
713-716. Provocation by assault. Art. 224 (a.). And see Art. 225.
716-727. Intention to kill or do personal bodily harm is one test as to murder and manslaughter. Art. 223 (a.).
Much of this is to the same purpose as pp. 713-716. Art. 225.

Sect. 2. Cases of Mutual Combat.—Pages 727-732.
Page 727. Deliberate duelling is murder. Art. 207.
730-732. Major Oneby's case (and others); provocation. Art. 225.

Sect. 3. Resisting Officers of Justice executing Legal Process.—Pages 732-738.
Art. 223 (a.).

Sect. 4. Cases where the killing takes place in the prosecution of some other criminal, unlawful, or treason act.—Pages 739-746.
Pages 739-742. Cases in which one person was killed by

1 This strange arrangement is suggested by the circumstance that a woman indicted for murder may be convicted of concealment. This is as bad a specimen of arrangement as the introduction of the plea of _ante facio_ equal under the head of burglary. It is fair to say that the credit of these additions is due to the late Sir William Russell, and not to his editors. After all, it is not more surprising than the arrangement (if such it can be called) of the Pandects.
injury designed for another, Art. 223 (a.) and (b.); and cases in which death was caused by an injury not intended to cause death, but inflicted in the commission of a felony. Art. 223 (c.). 742-746. Cases in which all the persons joining in a common enterprise are responsible for the act of any one. See Chapter IV. on accessories.

SECTION 5. Killing by a lawful act criminally or improperly performed.—Pages 747-752.

A "lawful act criminally performed" is a contradiction in terms. If a police officer arrests a thief who neither resists nor runs away by giving him a violent blow on the head, it is as absurd to call the blow a "lawful act criminally performed," because the arrest might have been lawfully made, as it would be to call picking a pocket a lawful act criminally performed, because the thief had a right to walk along the street without picking pockets.

A lawful act improperly performed can mean only culpable negligence in the performance of a lawful act. The cases in this section are accordingly superfluous. All of them fall directly under the definitions of murder or manslaughter given in Articles 223, 224. Thus, for example, in R. v. Smith (p. 749), A shoots B dead for pretending to be a ghost and frightening people. This was held to be murder. It would fall under Articles 223 and 224, thus:—It was unlawful homicide, because the deed was done by an act intended to cause bodily harm not falling within any of the exceptions specified in the Article. The homicide was with malice aforethought, because the intention was (if not to kill) at least to cause grievous bodily harm.

In R. v. Hopley (p. 751) a schoolmaster was convicted of manslaughter for flogging a boy with extreme severity. Here the homicide was unlawful, because the act which caused death was intended to cause bodily harm, and was not within the exceptions (see particularly Art. 204). If the prisoner had been indicted for murder (as Mr. Greaves thinks he ought to have been, and I agree with him), the question for the jury would have been whether or not his acts were such as, according to common knowledge, would cause death or grievous bodily harm.

2 c 2
sect. 6. Indictment, Trial, &c.—Pages 759-774.
This is foreign to my purpose.
Pages 774-780. Concealment of the birth of children. See Article 235.

Sext. 6. Judgment and Execution.—Pages 780-782.
As to judgment, see Articles 231, 232.
Execution is part of the law of procedure; but see Art. 231 (note 2).
Chapter II. relates to manslaughter; pp. 783-882.
Page 783. The page begins by defining manslaughter (see Art. 223).
The rest of the page is about accessories in manslaughter (see Art. 229).
The rest of the chapter is divided into six sections:
  5. Lawful act improperly performed; pp. 856-880.
The greater part of the matter of these six sections repeats what is contained in the chapter on murder.

Sect. 1. Provocation.—Pages 784-790.
This adds nothing to what is said on the same subject in pp. 711-727. See Articles 224-6.
Some cases are referred to in this section which contributed to the establishment of the general rule that to cause death by the infliction of injury intended to cause slight harm only is manslaughter, e.g., A drowns a pickpocket, meaning only to duck him (Fray's case, p. 787); A seeing his son bleed from a fight with another boy runs after the other boy and gives him a slight stroke with a stick, which happens to kill him (787; and See Foster, 264, for a careful discussion of the case).

Sect. 2. Mutual Combat.—Pages 790-798.
Repeats 727-737. See Art. 290 (d.).
Some of the cases referred to in this section relate also to the
THE CRIMINAL LAW.

case of one person being killed by a blow intended for another. See Art. 223 (a.).

Sect. 3. Resistance to Arrest by Officers, &c.—Pages 793–848.

Nearly the whole of this section is made up of reports of cases on the authority of different persons to arrest in particular cases, on notice, &c. This seems to me to belong rather to the law of civil and criminal procedure than to the criminal law. One point of importance is, however, noticed in Art. 224 (a.).

Sect. 4. Killing in an unlawful, criminal, or wanted act.—Pages 849–856.

Page 849. One person killed by violence intended for another. See Art. 223.

849–854. Negligent acts. Chapter XXII.; and see Articles 222, 228.

855, 856. See Art. 210 (gk).

Sect. 5. Killing by a lawful act improperly performed.—Pages 856–880.

Pages 856–864. These are cases of excess in the use of force when some force would have been lawful. See Art. 201.

864–880. These are all cases of negligence in doing acts which are or may be dangerous. Art. 210. Pages 877, 878 contain cases relating to the law as to the effect of joint negligence, Art. 220 (a.); and at 864 are cases bearing on the degree of remoteness consistent with an act being the cause of death. Art. 219.

Sect. 6. Indictment and Judgment.—Pages 890–882.

As to the punishment for manslaughter, see Art. 232. The rest is omitted as belonging to the subject of procedure.

Chapter III. Excusable and Justifiable Homicide.—Pages 883–898.

As the distinction between excusable and justifiable homicide is now unimportant (see 24 & 25 Vict. c. 100, s. 7), I have not noticed it.


886–889. Gives over again what is said in 861, &c., as to man- 
slaughter by negligence.
893-895. Justifiable homicide. Chapter XXI.

All the cases referred to in Russell on Crimes are thus disposed of in the different Articles of the Digest. Nothing short of studying the contents of these 200 pages can give any one any notion, either of the amount of patient thought and sound good sense which have been employed in the decision of particular cases by many generations of judges, or of the immense amount of material which has been gradually accumulated by reporters, or of the helpless bewilderment, the utter incapacity to take general views, or to see the relation to each other of different principles, or to arrange an intricate question according to the natural distribution of the subject, which characterizes English text writers. The cases above referred to, as they stand in Russell, are like the stores at Balaklava, in the winter of 1854-5. Every thing is there, nothing is in its place, and the few feeble attempts at arrangement which have been made serve only to bring the mass of confusion to light.

NOTE IX.

(to Articles 224 (c.), 225.)

The following correspondence was published in the Times of Nov. 21, 1867. It refers to the case of R. v. Allen and Others, convicted at the Manchester Special Commission of the murder of Brett, a police officer, whom they shot in an attempt to rescue a Fenian prisoner from a police van in Manchester. There is no legal report of the case so far as I know, but, as will be seen, the letter of the prisoner's counsel, and the reply of Lord (then Mr. Justice) Blackburn are substantially an argument and a judgment on a matter of very great importance. I have, therefore, republished them from the Times with Lord Blackburn's permission.

STATEMENT submitted to Mr. Justice Blackburn and Mr. Justice Mellor.

"REGINA v. ALLEN AND OTHERS.

"Upon the trial of Allen and Others, for the murder of Sergeant Brett, two points of law arise, under the following circumstances:—

"On the morning of the 11th of September last, two men,
who turned out afterwards to be Kelly and Deasy, were arrested by a Manchester policeman, as he alleged, under section 215 of the Manchester Police Act (7 & 8 Vict. c. 40), which enacts that it shall be lawful for any constable belonging to the police force of the borough to take into custody, without a warrant, all loose, idle or disorderly persons whom he may find disturbing the public peace, or in his own view committing an offence against this Act, or whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor, or breach of the peace, or to instigate or abet any such breach.

"The two men, who gave the names of White and Williams, were taken before a magistrate on the 11th, and remanded until the 16th by a warrant, which stated the charges against them to be, not for suspicion of felony, on which charge they were arrested, but for 'felony,' and omitted to specify what felony, or other offence they were charged with. They were brought up again on the 16th, when no evidence whatever was given upon the charge on which they were alleged to have been arrested, but an inspector of detectives from London, who stated he had a warrant against Kelly for treasonable practices, alleged to have been committed in Ireland, and a constable from Ireland, who was stated to have a similar warrant against Deasy, appeared, and on their application, without the production of either of the warrants, which, in fact, were not then backed as the statute required, the prisoners were again remanded for a week.

"No warrant for such second remand was produced upon the trial, but it was stated that a warrant had been signed, a copy of that signed on the 11th inst., and had been destroyed by the police after the escape of the prisoners.

"Kelly and Deasy were then placed in the prison van, for the purpose of being taken to prison, and on the way the van was attacked, the prisoners rescued, and Brett killed.

"The two questions were: 1st, whether or not Kelly and Deasy were in legal custody; and 2nd, if they were not in legal custody, whether the crime of killing Brett, in the act of rescuing them, amounted to murder or manslaughter.

"As to the first point, it would seem (1st) that the magistrate had no jurisdiction to commit for felony, no charge of felony having been made; and (2nd) that the magistrate had no
jurisdiction to entertain the charge of reasonable practices committed in Ireland, or to remand the prisoners upon such a charge. By the 11 & 12 Vict. c. 42, s. 22, justices are empowered to take the examination of witnesses against persons who are brought before them charged with an offence alleged to have been committed in any county or place within England and Wales wherein they have not jurisdiction. By sect. 2 of the same Act they are empowered to issue their warrant to apprehend any one within their jurisdiction charged with having committed any crime or offence on the high seas, or in any creek, harbour, &c., or any crimes or offences committed on lands beyond the seas for which an indictment may legally be preferred in any place within England or Wales. By sect. 11, where an English warrant is backed in England, the offender, when apprehended, may be taken before the justice who issues the warrant, or, if so directed by the justice backing the warrant, before such last-mentioned justice, or any other justice of the same county or place; but by sect. 12, where an Irish warrant is backed in England, the offender must be taken before the justice who granted the warrant, and there is no power to take him before the magistrate who has backed it. It would seem, therefore, that in this case the proper course would have been, in the case of Deasy, at least, for the magistrate to have backed the Irish warrant, and for the prisoner to have been taken, under the authority of the warrant so backed, to Ireland, and that the magistrate had no jurisdiction to examine any witnesses against Deasy, or to remand him upon the charge of felony.

"Thirdly."—It is laid down in Coke's Second Institute, p. 691, when speaking of prison breaking, that a mittimus must contain the cause, but not so certainly as an indictment ought, and yet with such convenient certainty as it may appear judicially that the offence (prison breaking), tale judicium requisit as pro altâ predictione, viz. in persona domini regis, &c., or pro feloniâ, viz., pro morte talis, &c., and he lays it down that a mittimus pro feloniâ generally is bad. So again, Hale (P. C. vol. ii. p. 122), says that a mittimus must contain the certainty of the cause, and therefore if it be for felony, it ought not to be generally pro feloniâ, but it must contain the especial nature of the felony briefly, as for felony for the death of J. S., or for burglary in breaking the house of J. S., &c., and the reason is
because it may appear to the Judges of the King's Bench upon an aebens corpus whether it be a felony or not.' Hale, however, adds, that he does not think the absence of such particularity would make the warrant void. It is worthy of notice that in the forms of remand given by Chitty in his Criminal Law, vol. iv. pp. 33, 116, and in the form given in the 11 & 12 Vict. c. 42 (Q. 1), the felony is specifically described.

"The second point, which appears to be of the greater importance, looking at the actual direction to the jury, and to the fact that they were not asked to find the existence, contents, or form of the warrant, is whether, assuming the detention of one or both of the prisoners to have been illegal, the killing of Brett amounted to murder.

"The first case on the subject is that of Sir H. Ferrers (Cro. Cas. 371) who was arrested for debt, and thereupon Nightingale, his servant, in seeking to rescue him, as was pretended, killed the bailiff; but because the warrant to arrest him was by the name of Henry Ferrers, Knight, and he never was a knight, it was held by all the Court that it was at variance in an essential part of the name, and they had no authority by that warrant to arrest Sir Henry Ferrers, Baronet, so it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder.' This case is also reported by Sir W. Jones (p. 346), where it is said to have been held not to be murder either in the servant or in the prisoner, because the warrant was not good.

"The next case is that of Hopkins Nuggets, which was tried in 1666, and is best reported in Kelyng (p. 59). In that case, Nuggets and three others pursued three constables who had impressed a man, and demanded to see their warrant. The constables showed a paper which the prisoner said was no warrant, and thereupon they drew their swords, and Nuggets killed one of the constables. Of the twelve judges eight delivered their opinion that this was no murder, but only manslaughter, and they said that if a man be unduly arrested or restrained of his liberty by three men, although he be quiet himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends, but strangers also, for common humanity's sake, as my Lord Bridgman said, to endeavour his rescue; and if in such endeavour of rescue, they kill any one, that is no murder, but only manslaughter. The four other judges held it
murder, and thought the case in question to be much the stronger, because the party himself who was impressed was quiet and made no resistance, and they who meddled were no friends of his or acquaintances, but mere strangers, and did not so much as desire them which had him in custody to let him go. Although all the Judges of the King's Bench thought it murder, they conformed to the opinion of the other eight, and gave judgment of imprisonment for eleven months.

"In _Reg. v. Masebridge_, which was tried in 1707 (Kelyng, 136), the Chief Justice alludes to _Hugget's Case_ as having settled the law upon the point.

"In _Tooley's Case_ (2 Lord Raymond, 1296), which was tried in 1710, Ann Dakin was in custody of one Bray, when the prisoners, who were strangers to Dakin, assaulted Bray, but withdrew. They afterwards assaulted Bray again, after the woman had been locked up, and killed one Dent, whom Bray had called to his assistance. One of the prisoners gave the stroke, the two others were aiding and abetting. Seven of the twelve judges held this to be manslaughter, and five held it to be murder, one of the five thinking that the constable had authority. Those judges who held the offence to be manslaughter only, so held on the opinion that the prisoners had sufficient provocation, for if, say they, one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, much more where it is done under a colour of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England.

"In _Reg. v. Adey_ (1 Leach, 208), which was tried in 1779, a somewhat similar point arose, and the presiding judge, on the authority of _Tooley's Case_, reserved the point for the consideration of the twelve judges. The prisoner escaped in the riots of 1780, and no judgment was given, but Leach says that it was understood the judges held it to be manslaughter only.

"Again, in _Reg. v. Owen_ (5 East, 304), argued in 1804, Lord Ellenborough, C.J., says, that 'if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.'

"In _Reg. v. Phelps_ (Car. & M. 180), tried in 1841, a policeman attempted to apprehend a man on suspicion of having stolen growing potatoes. He resisted, and some persons came to his
aid and killed one Southwood, whom the policeman had called to his assistance. Upon proof of these facts, Colman, J., directed the jury that as the policeman had no right to apprehend the man the offence of those who killed Southwood was manslaughter only, and not murder.

"These appear to be the cases bearing most closely on the subject, but turning to the authority of text writers, and the dicta of judges, we find Hawkins, in his Pleas of the Crown (Book I. chap. xxxi. sec. 60), stating the law as it was laid down in Hugglet's and Tooley's Cases, and adding that 'since in the event it appears that the persons slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.'

"Hale (P.C. vol. 1. p. 465) also cites Hugglet's Case, and apparently with approval.

"On the other hand, Foster, J., in his Discourse upon Crown Law (p. 312), while he appears to approve of the law as laid down in Hugglet's Case, combats the doctrine of the majority of the judges in Tooley's Case, and appears to doubt the propriety of that decision, partly upon general principles, and partly because the second assault on the constable seemed to him rather to have been grounded upon resentment or a principle of revenge for what had before passed, than upon any hope or endeavour to assist the woman.

"It is these observations of Foster, J., which Alderson, B., appears to have had in his mind when he is reported to have said in Reg. v. Warner (1 Moore. C. C. 385), that Tooley's Case had been overruled. Tooley's Case had, in fact, no bearing upon Warner's Case, in which no attempt was made to arrest the prisoners at all, and Alderson, B., does not refer to any authority for his statement. A similar remark was made by Pollock, C.B., in Reg. v. Davis (Leigh & Cavo, C. C. 71), but there again no authority is given.

"East, in his Pleas of the Crown, vol. i. p. 325, states the question with the arguments on either side, without shewing much leaning either way; and so does Russell (Criminal Law, vol. i. p. 632), although his editor, Mr. Greaves, from his note (p. 848 of the 4th edition), appears to have been convinced by the arguments adduced by Foster.
"It would thus seem that the doctrine laid down by the majority of the judges in the cases of Ferrers, Houghton, and Hooley, has been acted upon, not only in those cases, but also in R. v. Adye and Reg. v. Phelps, and recognised in R. v. Mawbridge, and R. v. Osmum, and by Hawkins and Hale.

"The opposite doctrine is supported by a minority of the Judges in Houghton and Hooley's Cases, and by Foster, J., and receives some sort of sanction from the observations of Alderson, B., and Pollock, C.B., if they can be considered to display a sufficiently accurate knowledge of the subject to entitle them to any weight. This view of the law, however, has never once been acted upon and it follows that if the prisoners convicted at Manchester be executed without any discussion of the law, they will be put to death in opposition to the decided cases on the subject, upon the authority solely of extra-judicial arguments and dicta.

"In some of these arguments a distinction has been taken between the interference of a friend or a relative, and that of a mere stranger; but this distinction does not appear to rest on any authority. Hawkins in his Pleas of the Crown (Book I. ch. xxxi. ss. 56 and 57), says, that 'if a man's servant, or friend, or even a stranger, coming suddenly and, seeing him fighting with another, side with him and kill the other—or, seeing his sword broken, send him another wherewith he kills the other—he is guilty of manslaughter only.' Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c., in the due execution of his duty, such friend, or servant, &c., are guilty of murder, whether they knew that the person slain were an officer or not.

"For these and other reasons, we are of opinion that the points raised in this case are of such a grave and serious character as to demand further discussion and consideration, and that they ought only to be decided after full and deliberate argument before the Court of Criminal Appeal.

"W. Dick Seymours, Q.C.
"Michael O'Brien, S.J.
"Ernest Jones.
"James Cunningham.
"Lewis W. Cave."
REPLY OF MR. JUSTICE BLACKBURN.

"November 20, 1867.

"Dearest Mr. Simeon,

"Mr. Justice Mellor and I have received and carefully perused the paper signed by you, my brother O'Brien, and Mr. Cave.

"It contains nothing that is new to us, but it puts all the authorities in the light most favourable for your clients, and I need not say that it is a great satisfaction to us to think that nothing has been overlooked which could bear on so grave a question.

"The Legislature have by the 11th and 12th of Victoria, cap. 72, cast upon the presiding Judges the very disagreeable and invincible duty of determining whether their own view of the law at the trial is or is not so questionable as to justify an appeal. If they refuse to reserve any point made, it is still open to the prisoners to appeal to the equitable consideration of the Sovereign, but no appeal lies to any Court of law.

"In the present case my brother Mellor and I considered the points raised before us on the trial, and entertained no doubt that the direction which we then gave was strictly according to law. We, therefore, reserved no question for the Court of Appeal at the time, but simply postponed our final determination on the subject until we had the means of referring to the authorities and considering the case more at leisure. We have now consulted the authorities, and have consulted the other Judges, not with a view of dividing our responsibility, nor in order to obtain a judicial opinion from them which they could not give on a point not regularly before them, but because, in a case so serious, we were very anxious to have the best advice and assistance that we could obtain for our guidance. I do not say, that if the result of such consultation and research had been to lead to the conclusion that there was doubt enough to justify a further appeal, it would have relieved us from a most painful responsibility. I regret to say that the result has been to satisfy us that the law is too clear to justify us in reserving any point for the consideration of the Court of Criminal Appeal.

"Entertaining that opinion, we have officially informed the Secretary of State for the Home Department, that there will be
no further appeal to a Court of law, and that it is now for Her Majesty's Government alone to determine what shall be done with the convicts.

"This decision of ours is final; but, as a satisfaction to you and the other Counsel for the prisoners, I will briefly state the reasons which have induced us to think the law too clear for argument.

"When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently if he is killed in the execution of his duty, it is in general murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But where the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and consequently the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation.

"The cases which you have cited are authorities that where the affray is sudden, and not premeditated, when, as Lord Holt says in R. v. Tooley (2 Lord Raymond, 1300), 'it is acting without any precedent malice or apparent design of doing hurt,' the mere fact that the arrest was not warranted may be a sufficient provocation.

"But in every one of these cases the affray was sudden and unpunmeditated.

"In the present case the form of warrants adopted may be open to objection, and probably might, on application to the Court for a writ of habeas, have entitled the prisoners to be discharged from custody; but we entirely agree with the opinion of Lord Hale (2 Pleas of the Crown) that, though defective in form, the gaoler or officer is bound to obey a warrant in this general form, and consequently is protected by it. This is a point which, had the affray been sudden and unpunmeditated, we probably should have thought it right to reserve.

"In the present case, however, it was clearly proved that there was on the part of the convicts a deliberate, prearranged conspiracy to attack the police with firearms, and shoot them, if
necessary, for the purpose of rescuing the two prisoners in their custody, and that they were all well aware that the police were acting in obedience to the commands of a justice of the peace, who had full power to remand the prisoners to gaol if he made a proper warrant for the purpose. It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant, and that they knew well that if there was any defect in the warrant, or illegality in the custody, that the courts of law were open to an application for their release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter.

— To cast any doubt upon this subject would, we think, be productive of the most serious mischief, by discouraging the police in the performance of their duties, and by encouraging the lawless in a disregard of the authority of the law.

— We feel bound, under these circumstances, to decline to take a course which might lead to the belief that we considered the matter as open to doubt.

"Colin Blackburn."

NOTE X.
(to Chapter XXXII.)

LIBEL.

The statement of the law of libel contained in this chapter is, I believe, complete, though it is very short in comparison to the standard works on the subject.

Polkard's edition of Starkie on Slander and Libel consists of 775 large 8vo pages, besides an appendix of statutes. It contains much other matter besides a definition of the crime of libel; but that definition and the explanation of the offence itself, fill more than 150 pages.

The greater part of this mass of matter consists of illustrations, but something is also due to the singularly complicated manner in which the law has grown up.

The word "malicious" in reference to the offence of libel has been elaborated by the judges into a whole body of doctrine on
the subject in the same sort of way as the words "malice aforethought" in the definition of murder.

The process was of this sort. Malice was first divided into malice in fact and malice in law—malice in fact being personal spite, and malice in law being defined to be "a wrongful act done intentionally, and without just cause or excuse."

Inasmuch as the publication of a libel must always be intentional, and inasmuch as the Courts held that to publish defamatory matter of another was, generally speaking, a wrongful act, the result of this was that every publication of defamatory matter was a crime, unless there was some just cause or excuse for it. What amounts to a "just cause or excuse" was decided by a multitude of cases. The phraseology employed in their decision has been as follows. Defamatory matter which it was considered lawful to publish has been described as a "privileged communication." This "privilege" has been regarded as rebutting the presumption of malice arising from the fact of publication; and it has further been divided into absolute privilege and qualified privilege—absolute if it justifies the publication, whatever may be the state of mind of the publisher; qualified if it justifies such publication only under particular circumstances, as, for instance, when the publisher in good faith believes the defamatory matter to be true, when the defamatory matter actually is true, and its publication is for the public good, &c.

The law thus falls into the singular condition of a see-saw between two legal fictions, Implied Malice on the one hand, and privilege absolute or qualified on the other.

I will give a single instance of the intricacy to which this leads. A. writes of B. to C., "B. is a thief." Here the law implies malice from the words used. It appears that B. was a servant, who had been employed by A., and was trying to get into C.'s employment, and that A.'s letter was in answer to an inquiry from C. Here the occasion of publication raises a qualified privilege in A., viz., the privilege of saying to C. that B. is a thief qualified by the condition that A. really thinks that he is one, and the qualified privilege rebuts the implied malice presumed from the fact of publishing the defamatory matter. But, however, proves not only that he was not a thief, but that A. must have known it when he said that he was. This raises a presumption of express malice, or malice in fact in A., and proof of the existence of express malice overturns the
presumption against implied malice raised by the proof of the qualified privilege.

This machinery of express and implied malice and qualified and absolute privilege is only a roundabout and intricate way of saying that as a general rule it is a crime to publish defamatory matter; that there are, however, certain exceptions to that rule by virtue of which it is not a crime to defame a man—

(a) If the defamatory matter is true, and its publication is for the public good.

(b) Although the defamatory matter is false,
   
   (i) if the libeller in good faith believes it to be true, and publishes it for certain specified reasons.

(ii) Although he knows it to be false, if he publishes it in a particular character.

By working out this scheme, and stating in general terms that the publication of a libel is always malicious unless it falls within one or more of the specified exceptions, the intricate fictions about malice in law and in fact, and absolute and qualified privilege, may be dispensed with. They are merely the scaffolding behind which the house was built, and now that the house is convenient and proximately complete, the scaffold may be taken down.

NOTE XL

(to Article 281, on Possession in Relation to the Law of Larceny).

I do not think it would be possible to assign to the expressions “possession,” “actual possession,” “constructive possession,” “legal possession,” senses which would explain and reconcile all the passages in which these phrases occur in works of authority. Some of them indeed are absolutely contradictory. Thus it is said that the taking in larceny must be a taking out of the possession of the owner. It is also said that the owner retains the legal possession notwithstanding the larceny. If both of these propositions were true, it would follow that larceny could never be committed at all. Again, we are told on the other hand that the taking in larceny must be a taking out of the possession of the owner, the inference from which would naturally be
that when a thing is out of the owner's possession it cannot be stolen. We are then told, in order to avoid this conclusion, that a thing is always in its owner's possession; so that a box of plate at the bottom of the Thames, things of the existence of which the owner is not aware, as money vested in him as executor, and which without his knowledge is in the actual custody of another person, or a dead rabbit in his wood, are all in the owner's possession and capable of being taken out of it. This way of stating the matter makes the assertion that the taking in larceny must be a taking out of the owner's possession insignificant. If, from the nature of the case, every taking must be a taking out of the possession of the owner, it is impossible to see how the takings which do, differ from those which do not, constitute larceny. All men, being mortal, it is useless to define an Englishman as a mortal man living in England. However, though it is impossible either to justify the manner in which the word "possession" is used, or to free it entirely from the fictions with which it has been connected, it is, I think, not impossible to define it in such a manner as to express all the distinctions which it is intended to mark in language differing very slightly, if at all, from that which has generally been used upon the subject.

As I have shown in the articles on theft, and in the notes upon them, there are five different ways in which theft can be committed, viz:—

1. By taking and carrying away goods which do not belong to the thief from any place where they happen to be.

2. By converting property entrusted by the owner to a servant.

3. By obtaining the possession of property (as distinguished from the right of property) from the owner by fraud with intent to convert it.

4. By converting property given by the owner to the thief under a mistake.

5. By converting property bailed to the thief.

It will be found upon consideration that the distinctions

\[1\] A put 900 guineas in a secret drawer in a bureau and died. B, her son and executor, lent the bureau to his brother C, who took it to India, kept it there for several years, and brought it back. B then sold it to D, who gave it to E to repair, who found the money. This was held to be such a taking by E out of the possession of A, as to constitute larceny. Carterright v. Green, 5 Ves. 465.
between these cases all arise out of the doctrine of possession, but it is, I think, less generally perceived that the important point is not the taking out of the possession of the owner, but the taking into the possession of the thief. The five cases in question may be thus arranged:

In No. 1 (common larceny) the thief has neither the possession nor the custody of the stolen property at the time when the theft is committed, and it is immaterial whether the owner has it or not.

In No. 2 (larceny by a servant) the thief at the time of his offence may have either the custody or the possession. If he has the custody his offence is theft. If he has the possession his offence is embezzlement.

In No. 3 (larceny by trick) the thief obtains the possession by a mistake, caused by his own fraud.

In No. 4 (larceny by taking advantage of a mistake) the thief receives the possession by a mistake not caused by his own fraud.

In No. 5 (larceny by a bailee) the thief receives the possession under a contract of bailment.

Besides this view of the subject the doctrine of possession is important in relation to procedure, and in that case the matter to be considered is not the possession of the thief but the possession of the owner. It is necessary in indictments for theft that the ownership of the stolen property should be correctly stated, and as possession constitutes special ownership (at all events, as against a thief) it is important, with a view to this subject, to understand what possession implies.

Passing from the law upon this subject, let us examine the facts to which the law applies—the different relations which, as a fact, exist between men and things—in reference to the common use of language.

The most obvious case of possession is that of a person who holds something in his hand. But it must appear upon the slightest consideration that neither this nor any other physical act whatever can be accepted as more than an outward symbol of the state of things which the word denotes. Unless the article possessed is very small, part of it only can be held in the hand, trodden on by the foot, or so dealt with by any other part of the possessor's body as to exclude a similar dealing with it by others. It would however, I think, be felt by every one that neither actual bodily contact with an object, nor even exclusive bodily contact
with it, was essential to what, in the common use of language, is meant by possession. No one would think of using different words to express the relation of a man to a coin clenched in his fist, to a pocketbook in his pocket, to a portmanteau of which he carried one end and a railway porter the other, to a carriage in which he was seated whilst his servant was driving it, to a book on the shelves of his library, and to the plate in his pantry under the charge of his butler. He would, in the common use of language, be said to be in possession of all these things, and no one would feel any difficulty in perceiving the correctness of the expression even if it were added that he was not the owner of any one of them, that some had been lent, and others let to hire to him. On the other hand, any one but a lawyer would be surprised at the assertion that a man, whether the owner or not, was in possession of a watch which he had dropped into the Thames, of sheep which had been stolen from his field and driven to a distance by the thief, of a dead grouse which, having been wounded at a distance from his moor, had managed to reach it and die there without his knowledge or that of any other person.

The common feature of all the cases to which the word "possession" would obviously be applicable is easily recognised. It is to be found in the fact, that the person called the possessor has in each instance the power to act as if he were the owner of the thing possessed, whether he actually is the owner or not. Several of the illustrations given, however, show that though this is one of the things which the word conveys, it is not the only thing conveyed by it. The butler in charge of the plate, the porter helping to carry the portmanteau, the coachman who is driving the coach, have the physical power of acting as the owner of those things as much as their master or employer. Indeed, in two of the three cases their physical control over the object is more direct than his. The difference is that the circumstances are such as to raise a presumption that their intention is to act under the orders of their superior, and that he (at least for the present) has no definite superior whose orders he intends to obey. Take, for instance, the case of a dinner party: there is no visible difference between the master of the house and his guests; each uses the article which he requires for the moment, and they are, from time to time, removed from place to place by the servants; as, however, the master retains throughout not merely the legal right to dispose of them absolutely, but the immediate means of enforcing that right
THE CRIMINAL LAW.

if from any strange circumstance it should become necessary to
do so, the assertion that the plate is in his possession, and that his
guests and servants have merely a permission to use it under his
control, has a plain meaning: nor would that meaning be altered
or obscured if the fact were added that the plate did not belong to
the master of the house, but was hired by him for the occasion.
Indeed, if he had stolen the plate, or received it knowing it to be
stolen, the fact denoted by the word "possession" would remain.
These illustrations, which might be multiplied to any extent,
appear to me to shew clearly that possession means, in the common
use of language, a power to act as the owner of a thing, coupled
with a presumable intention to do so in case of need; and that the
custody of a servant, or person, in a similar position, does not
exclude the possession by another, but differs from it in the pre-
sumable intention of the custodian to act under the orders of the
possessor with reference to the thing possessed, and to give it
up to him if he requires it. Thus far, I think, my definitions
correspond with the common use of language, though of course
popular language upon such a subject is not, nor is there any
reason why it should be, minutely exact.¹

I will now compare it with the way in which the word is used
by legal authorities. I know of no set dissertations on the subject
of the use of the word "possession" in English law like those
which are to be found in abundance upon the corresponding word
in Roman law. It would be an endless and a useless labour to
go through the cases in which the word has been used, endless
on account of their great number, useless because it is the charac-
teristic of English judges to care little for technical niceties of
language in comparison with substantial clearness of statement in
reference to the actual matter in hand. Upon such a matter as
this accordingly, it is better to consider the different authorities
in groups than individually.

Possession (in reference to the subject of theft) is usually divided
into two branches—actual possession and constructive possession.
It seems to have been pretty generally assumed that the words
"actual possession" were sufficiently plain for practical purposes

¹ This view was suggested by a study of Savigny's Recht des Besitzes, which,
however, deals with many topics to which nothing in English law corresponds.
Mr. George Lang's article on "Possessio" in the Dictionary of Greek and Roman
Antiquities contains the substance of Savigny in a very convenient form. Mr.
Hunter's Roman Law, pp. 193-222, may also be consulted.
without further explanation; but it would be easy to show, by a multitude of cases, that actual possession differs from possession as I have defined it only in one point. It is usual to say that a thing in the possession of a servant on account of his master is only constructively in the possession of the master. But the expression "constructive possession" has another meaning besides this. As it was considered necessary that a thing stolen should be taken out of the possession of the owner, and as in very many instances goods are stolen which are not in any natural sense in the possession of any one whatever, it has become a maxim that goods are always in the possession of the owner; if not in his actual, then in his constructive possession, or, as it is sometimes called, in his legal possession.

Thus, constructive possession means:

1. The possession of goods in the custody of a servant on account of his master, and

2. The purely fictitious possession which the owner of goods is supposed to have, although they are in reality possessed by no one at all.

The phrase thus appears to me to be objectionable, not only because it is ambiguous, but because, in the first of its two senses, it conceals a truth, whilst in the second it needlessly conveys a false impression. The truth concealed is that a man may have, and may intend to use, the power implied in the word "possession," although he acts through a servant. The false impression conveyed is that things cannot be out of possession, or that if they are, they cannot be stolen.

I avoid this by abstaining altogether from the use of the expression "constructive possession." In "possession" I include that which has to be exercised through a servant, and my language implies, that a person may commit theft on objects which are not in the possession of any one at the time of the theft. The existing law may by these means be expressed in well-recognised and established phraseology, without any resort to legal fictions.

The point upon which the most subtle questions as to possession arise, is the distinction between theft and embezzlement—a perfectly useless distinction, no doubt, and one which the legislature has on two separate occasions vainly tried to abolish. So long, however, as it is allowed to exist, it is necessary to understand it.
I have already explained how a man may retain the possession of a thing of which he gives his servant the custody. He retains a power over the thing which is not the less real or effective because he has to exercise it through the will of another person, who has undertaken to be the instrument of his will. Suppose, however, that instead of the master's having given his horse to his groom or his plate to his butler, a 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 Court, 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 (Decr. 287). B. sent A., his servant, with a cart to fetch coals. A. put the coals into the cart, and on the way home sold some of them and kept the money. A. was convicted of larceny, and the question was whether he ought to have been convicted of embezzlement. It was held that the conviction was right, because though A. had the custody of the cart all along, yet the possession of it and its contents was in B., and though A. had the possession of the coals whilst he was carrying them to the cart, that possession was reduced to a mere custody when they were deposited in the
cart, so that A.'s offence was larceny, and not embezzlement, which it would have been if he had misappropriated the coals before they were put into the cart.

These explanations will, I hope, render the article in the Digest intelligible. In order to justify it legally, it is necessary to state the manner in which I arrived at it. I examined a large number of cases, of which I have put eleven in the form of illustrations to the article. In some of these cases it was decided that the offence was theft; in others that the offence was embezzlement. I have assumed (as I was entitled to do, as appears from the explanations given above) that whenever an offence was held to be theft the property stolen was in the possession of the owner or master, although it might be in the custody of a guest or servant; and that whenever the offence was held to be embezzlement the property embezzled was in the possession, as distinguished from the custody, of the servant. I might easily have enlarged the number of illustrations to any conceivable extent; but if those given are not enough to make the matter plain, I despair of making it plain or understanding it, and I do not wish to make it darker than it is. It is, perhaps, just worth while to add once more, that I am in this work merely stating, and not attempting to justify, the law. The technicalities on this subject appear to me to be altogether superfluous, and I think they might be easily dispensed with by re-defining the offence of theft, or even by removing the distinction between theft, embezzlement, and false pretences.
INDEX.

A.

ABANDONED ARTICLES,
  larceny of, 231
ABANDONING CHILDREN, 207
ABDUCTION, 201, 202, 203: See Person (Abduction).
ABETTING SUICIDE, 173
ABORTION, procuring, 180, 182: See Person (Malicious Injuries).
ABUSES, of public authority: See Public Authority (Offences by Officers).
ACCESSORY,
  incitement a misdemeanor, 38
  conspiracy to commit a crime, 38
  principals in first degree, 30
    crime partly in one place, partly in another, 30
    innocent agent, 30
  principals in second degree, 31
  aidsers and abetors, 31
    common purpose, 32
  before the fact, 33
    definition, 33
    in misdemeanors, 33
    mere knowledge of act not sufficient, 33
  instigation, commission of a different crime, 35
  crime committed in a different way, 34
  crime, probable consequence of, 34
  countermand of, 35

after the fact, 36
  definition, 36
  married woman, 36
trial and punishment of, 36, 37
  in treason, 45
  in manslaughter, 173.
INDEX.

ACCIDENT, death caused by, 150: See Person (Homicide).
ACCOMPlice: See Accessory.
ACCOUNTS, falsifying, 253
ACTUAL BODILY HARM, 186
ADMIRALTY: See Person (Piracy).
            personation in fraud of, 320
ADULTERY, 118, 123
AFFRAY, 49: See Public Order (Internal by Force).
AGENTS,
         frauds by, 286, 288: See Property (Frauds).
         innocent, 29: See Accessory.
AGGRAVATED ASSAULTS, 189: See Person (Assault).
AMBASSADORS, privileges of, 85: See Public Order (External).
ANATOMICAL PREPARATIONS,
            larceny of, 231
ANIMALS,
            larceny of, 229, 231: See Property (Larceny).
            killing with intent to steal, 262: See Property (Larcenies of other
            Things).
            straying, 246
            stealing domestic, 270
            wounding, 337, 345: See Property (Malicious Injuries).
APPREHENSION,
            assaults to prevent, 186: See Person (Assault).
            bodily harm done in course of, 142: See Person (Lawful Injury).
APPRENTICES,
            breach of contract in not providing for, 359: See Property (Trade).
            injury to the person in not providing for, 207: See Person (Appren-
            tices).
ARMS,
            going armed, 49, 137: See Public Order (Internal by Force).
            in pursuit of game, 54
            unlawful drilling, 57
ARREST,
            bodily harm done in course of, 142: See Person (Lawful Injury).
            assaults to prevent, 186: See Person (Assault).
ARSON, 332: See Property (Malicious Injuries).
ART,
            damaging works of, 346
ASPORTATION, 233: See Property (Larceny).
ASSAULTS, 143, 154: See Person (Assault),
            on Queen, 47
            on gamekeeper, 347
ASSEMBLY, unlawful, 49: See Public Order (Internal by Force).
INDEX.

ATTEMPTS,
to commit murder, 174: See Person (Murder).
definition of, 38
misdemeanors, 40

AVOWTERER, larceny by, 241: See Property (Larceny).

B.

BAILEES, larceny by, 246: See Property (Larceny).
BANKERS, fraud by, 286: See Property (Fraud).
BANK NOTES, forgery of, 304, 311: See Property (Forgery).
BANKRUPT, fraudulent, 363: See Property (Trade).
false claim on estate of, 356
BARRATRY, 99: See Public Authority (Misleading, Justice).
BATTERY, 184: See Person (Assault).
BAWDY HOUSES, 121, 127: See Public Mischief.
detaining women in, 204
BEGGARS, 135.
BETTING,
in street, 137

BETTING HOUSES, 123: See Public Mischief.

BIGAMY, 127: See Person.

BILLS OF EXCHANGE,
forgeries of, 305: See Property (Forgery).
drawing without authority, 308
forgeries of foreign, 314

BIRTH,
concealment of, 176: See Person (Murder).
registration of, 306

BLASPHEMY, 110: See Public Mischief.

BODILY HARM, 163, 166: See Person (Homicide; Malicious Injuries).

Bonds, forgery of, 305: See Property (Forgery).

BREACH OF TRUST, 269
by public officers, 85: See Public Authority.

BRIBERY, 86: See Public Authority.

BRIDGES,
nuisance to, 133: See Public Mischief.

dangerous, 334: See Property (Malicious Injuries).

BROKER, fraud by, 286, 288: See Property (Fraud).
BUILDINGS,
exploding, 179: See Person (Malicious Injuries).
exploding, 338: See Property (Malicious Injury).
See also House.

BUOYS,
damaging, 340: See Property (Malicious Mischief).

BURGLARY, 288: See Property,
possessing instruments, 137, 260

BURIAL,
prevention of, 123: See Public Mischief.
registration of, 306

BURNING WAR SHIPS, 330

C.

CANALS, damaging, 334, 339: See Property (Malicious Injuries).
CARDS, cheating at, 260.
CARNAL KNOWLEDGE, 193: See Child.

CATTLE,
wounding, 335: See Property (Malicious Injuries).
stealing, 220, 265: See Property (Larceny).

CAUSE OF DEATH, 151: See Person (Homicide).

CERTIFICATE OF ACQUITTAL, 192

CHALLENGING, to fight, 48: See Public Order (Internal by Force).
CHAMPERTY, 99: See Public Authority (Misleading Justice).
CHASTISEMENT, lawful, 145: See Person (Larceny).
CHEATING, 280, 293: See Property (False Pretenses).
CHEQUES, forgery of, 305: See Property (Forger).

CHILD,
under seven cannot commit crime, 20
under fourteen may, if it knew not was wrong, 20
carnal knowledge of, 135: See Person (Rape).
stealing, 204: See Person (Abduction).
abandoning, 107
not providing food for, &c., 200: See Person (Children).
when considered a human being, 123: See Person (Homicide).
concealing birth of, 176: See Person (Murder).

CHOKING, 179: See Person (Malicious Injuries).
CHOOSE IN ACTION, larceny of, 228, 267: See Property (Larceny).

CHRISTIANITY, denying, 112: See Public Mischief.

CLAIM OF RIGHT, 233: See Property (Larceny).
in cases of injury to property, 516: See Property (Malicious Injuries).
INDEX.

CLERGY,
  neglect to perform duty by, 87
  refusing to use prayer-book, 114
  interference with, 187: See Person (Assault).

CLUBS, unlawful, 61: See Public Order (Internal without Force).

COERCION: See Married Woman.

COIN, 322: See Property.

COLLISION,
  duty in, 365

COMBINATION, unlawful, 59: See Public Order (Internal without Force).

COMMON ASSAULT, 191: See Person (Assault).

COMMON NUISANCE, 123: See Public Mischief.

COMPOUNDING, 107: See Public Authority (Misprision).

COMPULSION: See Married Woman.
  if one by a number of offtenders, 28
  in taking unlawful oath, 69

CONCEALMENT,
  of birth, 176: See Person (Murder).
  of deeds and incumbrances, 281: See Property (False Pretences).

CONSENT,
  to bodily injury, 147: See Person (Lawful Injury).
  in assault, 184
  in rape, 184

CONSPIRACY,
  to commit a crime, 38
  overt act of treason, 48
  malicious, 65
  to defeat justice, 100
  to commit murder, 176: See Person (Murder).
  in restraint of trade, 357, 358
  injurious agreements amount to, 109
  to defraud, 232: See Property (False Pretences).

CONSTABLE,
  neglect to perform duty by, 87
  refusing office, 87
  assaults on, 130

CONTEMPTS against the Queen: See Public Order (Treason).

CONTRACTS of service, 358: See Property (Trade).

CONVERSION, 244: See Property (Larceny).

CONVICT,
  at large, 109

CO-PARTNERS,
  larceny by, 241
INDEX.

CORONER,
    neglect to perform duty by, 87
    giving notice of dead body to, 123
CORPORATION, larceny by members of, 241: See Property (Larceny).
CORRECTION, lawful, 145: See Person (Lawful Injury).
COUNTERFEITING COIN, 230: See Property (Coin).
COURT,
    rules, forgery of, 305: See Property (Forgery).
    process of, forgery of, 309, 310
COURTS OF JUSTICE, fair reports to libel, 216, 217
CORRUPTION, 89: See Public Authority.
CRIME, definition of, 29
    classification of, 12
    exceptions to definitions of crime, 20: See Child; Compulsion; Doli Incapax; Drunkenness; Ignorance; Insanity; Married Women; Necessity.
CUMULATIVE PUNISHMENTS, 13
CUSTODY, 222: See Property (Larceny).
CUSTOMS, 33: See Public Orders (Internal by Force).

D.

DANGEROUS ACTS, 116: See Person (Culpable Negligence).
DEAD BODIES, larceny of, 231: See Property (Larceny).
    preventing burial of, 123: See Public Mischief.
    disinterment, 123
DEATH, 158: See Person (Homicide).
    mode of inflicting punishment of, 4
    recording sentence of, 14
DEBTORS, forgery of, 208: See Property (Forgery).
DEBTORS, fraudulent, 253: See Property (Trade).
DECENCY, outrages on, 117
DEEDS,
    forgery of, 306: See Property (Forgery).
    larceny of, 229, 267: See Property (Larceny).
    concealment of, 267, 281: See Property (False Pretences).
DEER-STEALING, 250
DEFAMATORY MATTER, 209: See Person (Libel).
DEFILEMENT OF WOMEN, 121: See Public Mischief.
DEPRIVING (Lord's Supper and Common Prayer), 113, 114: See Public Mischief.
DESERTION,
    of wife, 137
    of ship, 353
INDEX.

DETAINEE, forcible, 54: See Public Order (Internal by Force).

DETAINEES, women in brothels, 204

DIRECTORS, fraud by, 200: See Property (Fraud).

DISOBEDIENCE TO LAWFUL ORDERS, 88

DISORDERLY HOUSES, etc., 126, 127, 373: See Public Mischiefs.

DISTURBING PUBLIC WORSHIP, 115

DIVIDEND WARRANTS, making false, 807: See Property (Forgery).

DOCKS, damaging, 334, 339: See Property (Malicious Injuries).

stealing from, 266

DOGS, stealing, 270: See Property (Larceny).

wounding, 245

DOLI INCAPAX (boy under fourteen cannot commit rape), 20, 195: See Person (Rape): See Child; Insanity.

DRAFT CODE, 3

DRILLING, unlawful, 57: See Public Order (Internal by Force).

DRIVING, furious, 138

DRUGGING, 179, 182

women, 121

DRUNKENNESS,

voluntary and involuntary, 22

intention to commit crime, 22

DUTY, neglect of, causing death, 152

DWELLING-HOUSE, 258: See Property (Burglary).

E.

ELECTIONS, bribery at, 90: See Public Authority (Bribery).

persuasion at, 320

ELECTRICITY, subject of larceny, 229, 289

damage to electric line, 341, 344

EMBEZZLEMENT, 237, 248: See Property.

by clerks and servants, 248

distinction from larceny, 252

EMBRACE, 89: See Public Authority (Bribery).

EMPLOYMENT OF PRISONERS, 7

ENLISTMENT, FOREIGN, 70, 72: See Public Order (External).

ENTERING INTO RECOGNIZANCES, 11

ENTRY, forcible, 55: See Public Order (Internal by Force).

ESCAPE, 101: See Public Authority.

EVIDENCE, forgery of, 38: See Public Authority (Misleading Justice).

as to embezzlement, 235

as to theft, 247

self-incriminating, 201: See Property (Frauds).
INDEX.

EXCEPTIONS TO CRIMES, 20, 140
compulsion, 22
drunkenness, 22
ignorance of fact, 27
ignorance of law, 26
infancy, 20
insanity, 20
married women, 23
necessity, 24
presumption of sanity, 22

EXCHEQUER BILLS, forgery of, 304, 314: See Property (Forgery).

EXECUTION OF LAWFUL SENTENCES, 140

EXPLANATION OF TERMS, 1

EXPLOSIVE SUBSTANCES, etc., 170, 381, 341: See Person (Malicious Injuries).

EXTORTION, 83: See Public Authority (Offences by Officers).

F.

FALSE ACCOUNTING, 292: See Property (Frauds).
FALSE CERTIFICATES, 99
FALSE DEClarATION, 95
FALSE NEWS, spreading, 67
FALSE PERSONATION, 319
FALSE PRETENCES, 275: See Property.
  distinction between larceny and, 245
  receiving goods obtained by, 254
  theft by, 238

FALSEIFICATION OF ACCOUNTS, 292: See Property (Frauds).

FELO DE SE, 172

FELONY, 12
  commission of felony evidence of malice aforethought, 165: See Person (Murder).
  accessories in, 35
  consequences of conviction for, 12
  punishment for, where not expressly provided, 14
  previous conviction for, 15: See Previous Conviction.

FENCES,
damage to, 543: See Property (Malicious Injuries).
stealing, 272: See Property (Larceny).

FERAL NATURE: See Animals.

FINDING, larceny by, 241: See Property (Larceny).
INDEX.

FINE, nature of punishment by, 10
FIRE-ARMS: See Arms.
FIRST-CLASS MISDEMEANANTS, 7
FISH, 351: See Property (Game).
FISH-PONDS, damaging, 330, 340: See Property (Malicious Mischief).
FIXTURES, stealing, 268: See Property (Larceny).
FOOD,
    selling unfit, 131
FORCIBLE ENTRY, 55: See Public Order (Internal by Force).
FOREIGN ENLISTMENT, 70: See Public Order (External).
FOREIGN NATIONS, offenses against, 68: See Public Order (External).
FORGERY, 208: See Property (Forgery).
    forging evidence, 98: See Public Authority (Misleading Justice).
FORNICATION, 118, 122: See Public Mischief.
FORO DOMESTICO, 145: See Person (Lawful Injury).
FRAUD, larceny by means of, 238: See Property (Larceny).
FRAUDS, by agents and others, 268: See Property (Fraud).
    by public officers, 65: See Public Authority.
FREQUENTING, 137
FUNDS, forgeries relating to public, 304: See Property (Forgery).
FURIOUS DRIVING, 193: See Person (Malicious Injuries).

G.

GAMBLING,
    in street, 137
GAME, 347: See Property.
    being armed in pursuit of, 54: See Public Order (Internal by Force).
GAMING-HOUSES, 127: See Public Mischief.
GAS, larceny of, 229: See Property (Larceny).
GIRL,
    abduction of, 202, 203
    carnally knowing, 195
GOODS IN PROCESS OF MANUFACTURE,
    stealing, 268.
GRIEVIOUS BODILY HARM: See Person (Homicide; Malicious Injuries).
GUNPOWDER, 179
    setting fire to buildings by, 333, 336, 341: See Property (Malicious Injuries).
    making, 341

H.

HARD LABOUR, 5: See Imprisonment.
HARES: See Game.
HEALTH, nuisances to, 131: See Public Mischief.
INDEX.

HERESY, 111: See Public Mischief.
HIGH SEAS, 74
HIGH TREASON, 41: See Public Order.
HIGHWAYS, nuisances to, 132: See Public Mischief.
HOMICIDE, 152, 374: See Person.
HORSES, stealing, 265: See Property (Larceny).

unlawfully feeding, 264: See Property (False Pretences).
HOUSE, breaking into, 259: See Property (Burglary).

possessing instruments for, 137, 260

demolition of, 52: See Public Order (Internal by Force).
damage to, 53
HOUSEHOLDER, permitting defilement of girls, 122
HUSBAND AND WIFE: See Married Woman.

I.

IDIOT,
carnally knowing, 196

IGNORANCE,
of law will not excuse, 26
relevant as to intention, 26
of fact, 27

IMMORALITY: See Public Mischief.

IMPRISONMENT,
mode of inflicting, 5

hard labour, 5

separation of prisoners, 5.
without hard labour, 7

solitary confinement, 7
first-class misdemeanants, 7, 18

solitary confinement after previous conviction, 15

INCEST, 118

INCITING, 38, 370: See Accessory.

INCORRIGIBLE ROGUES, 138

INDECENCY, 117, 118: See Public Mischief.

INDECENT ASSAULT, consent to, 184, 187: See Person (Assault).

INDECENT EXPOSURE, 136

INDIA BONDS, forgery of, 304: See Property (Forgery).

INFANCY, 20

INFANT: See Child.

INFECTION,

communicating, 131
INDEX.

INNKEEPER,
refusing entertainment, 131

INSANITY,
act of insane person not a crime, 29
presumption of sanity, 23
defence to murder: See Person (Murder).

INSTIGATION 33: See Accessory

INTIMIDATION by workmen, 538: See Property (Trade).

J.

JESUITS, 64

JUDGES, bribery of, 39: See Public Authority (Bribery).

JUDICIAL DOCUMENTS, injuring, 288

JUVENILE OFFENDERS, punishment of, 17

K.

KIDNAPPING, 81
Pacific Islanders, 81: See Public Order (External).

KILLING, 158: See Person (Homicide).
presumption of murder, 173

L.

LARCENY, 233: See Property.
from the person, 265
from the dwelling-house, 265

LEAD,
stealing, 268

LEYING WAR, 41: See Public Order (Treason).

LIBEL, 208, 399: See Person (Libel).
seditious, 65: See Public Order (Internal without Force).
indiscreet, 119: See Public Mischief.

LODGINGS, damage by tenants to, 342: See Property (Malicious Injuries).
laurence from, 267

LOST PROPERTY, larceny of, 231, 242: See Property (Larceny).

LOTTERIES, 131: See Public Mischief.

LUNATIC: See Insanity.
INDEX.

M.

MACHINERY, damaging, 333, 338: See Property (Malicious Injuries).
MAINTENANCE, 99, 371: See Public Authority (Misleading Justice).
MALICE, 155: See Person (Murder).
in libel, 211: See Person (Libel).
MALICIOUS INJURIES
to person, 178: See Person.
to property, 330: See Property.
MANSLAUGHTER, 185, 376: See Person (Murder).
MAN-TRAPS, 183
MANUFACTURED GOODS, damaging, 333, 338: See Property (Malicious Injuries).
MARRIAGE: See Person (Bigamy).
MARRIAGE LICENCES, forgery of, 319: See Property (Forgery).
MARRIED WOMAN, 366
coercion of, 23
in cases of theft, 23
other cases, 23
when accessories, 35
offences relating to property, committed by and against, 226
larceny by, 241: See Property (Larceny).
MARTIAL LAW, 141
MAXIMUM PUNISHMENT, 1
MEDALS RESEMBLING COIN, 329: See Property (Coin).
MEETINGS, reports of proceedings at, 204
unlawful, 46, 56, 63
METALS,
stealing, 268, 259: See Property (Larceny).
concealing ore, 284
MILLBANK PRISON, 105
MINES,
stealing from, 299: See Property (Larceny).
concealing ore from, 284
damaging, 338: See Property (Malicious Injuries).
MISAPPROPRIATION, 286: See Property (Fraud).
- MISCARRIAGE, procuring, 120, 122: See Person (Malicious Injuries).
MISDEMEANOR, 12
punishment for, where no express provision, 18
first-class misdemeanant, 7, 18
what acts amount to, 108: See Public Mischief.
attempts are, 40
accessories in, 33
INDEX.

MISPRISION, 106, 372: See Public Authority (Misleading Justice).
MISTAKE, effect of, in larceny, 239: See Property (Larceny).
MONKS, 64
MORALITY, offences against, 117: See Public Mischief.
MURDER, 165, 376: See Person (Murder).
MUTINY, inciting to, 48: See Public Order (Treason).

N.

NAVIGABLE RIVER, nuisance to, 123,
NECESSARIES,
  duty to provide, 154: See Person (Culpable Negligence),
  neglecting to provide, 183, 206: See Person (Malicious Injuries).
NECESSITY, commission of crime through, 24
NEGLECT OF OFFICIAL DUTY, 96
NEGLIGENCE,
  criminal, 152: See Person (Culpable Negligence),
  death caused by, 164: See Person (Homicide).
NEWS, spreading false, 67: See Public Order (Internal without Force).
NIGHT,
  poaching, 347: See Property (Game),
  in burglary, 258: See Property (Burglary).
NOXIOUS DRUGS, 132
NUISANCE, 125: See Public Mischief.

O.

OATHS, unlawful, 59: See Public Order (Internal without Force).
OBSCENE PICTURES, 136
OBSTRUCTION,
  of public authority: See Public Authority,
  of sale of grain, 191
  of peace-officer, 186, 190
  of clergymen, 187
  of navigable river, 133
  of highway, 132
  of persons on wrecks, 180
  of railways, 394
  of mines, &c., 338
OBTAINING, 278: See Property (False Pretences).
OFFENSIVE TRADES, 132: See Public Mischief.
INDEX.

OFFICER: See Policeman.

offences by: See Public Authority.

OPPRESSION, 83: See Public Authority (Offences by Officers).

ORDERS, 83: See Public Authority (Offences by Officers).

for payment of money, forgery of, 305, 309: See Property (Forgery).

to employ force, 148

OBE, stealing, 269
concealing, 284

OYSTER-Beds, damaging, 271

OYSTERS, stealing, 269

P.

PARKHURST PRISON, 105

PARTNERS,
larceny by, 241: See Property (Larceny).
receiving goods stolen by, 295 note (2)

PAUPER, destroying clothes, 133

PESTILENCE, 2
mode of inflicting, 4
for felony where no express punishment, 14
for felony after previous conviction, 15
for larceny after previous conviction, 15
being at large, during term of, &c., 17

PENTONVILLE PRISON, 105

PERJURY, 85: See Public Authority (Misleading Justice).

PERSON, offences against the,

ABDUCTION with intent to marry, 201
of girls under sixteen, 202
of girls under eighteen, 203
detaining women in brothels, 204
stealing children under fourteen, 204

APPRENTICES, not providing for, 208

ASSAULT,
definition of, 184
actual force, 184
gesture, 184
imprisonment, 184
words, 185

consent, 184
battery, definition of, 184

batter, definition of, 184
INDEX.

PERSON, Offences against the—continued.

ASSAULT—continued.
assaults with intent to commit sodomy, 185
on persons protecting wrecks, 186
occasioning actual bodily harm, 186
with intent to commit felony, 186
to prevent apprehension, 186
on police officers, 186
indecent, 187
on officers preventing smuggling, 187
interfering with clergymen, 187
punishment for, 188
summary convictions for, 189
assaults not punishable by, 188
attempt to commit felony, 189
questions of title, 189
aggravated assaults, 190
on constables, 190
to prevent sale of grain, &c., 191
to prevent seamen from working, 191
common assaults, 191
certificate of conviction or acquittal, 192

BROAMY, 197
principals in second degree in, 199
irregular marriages, 199, 200

CHILDREN,
offences against, 205
not providing food 205
necessaries, 206
exposing child under two, 207

CULPABLE NEGLIGENCE, 152
bodily injury by omission to discharge duty, 152
other omissions, 154
duty to provide necessaries, 154
delegation of duty, 155
indirect performance of duty, 155
care in doing dangerous acts, 155
special skill, 156

HOMICIDE, 158
definition of, 158
child, a human being, 158
definition of killing, 158
cause of death, 160–163
exceptions to definition of, 162
death after a year, 162
without bodily injury, 162
by repeated acts, 163
INDEX.

PERSON—Offences against the—continued.

HOMICIDE—continued.
death by false testimony, 163
where homicide is unlawful, 163
death caused by intention, 163
by bodily harm, 164
by omission, 164
by accident in doing an unlawful act, 164

LAWFUL INJURY, 140
execution of lawful sentences, 140
suppression of riots, 141
prevention of crimes, 142
arrest of criminals, 142
private defence, 143
lawful correction, 145
orders of superior, 149
consent to bodily injury, 147
definition of consent, 147
right to consent, 148, 149
surgical operations, 148, 149
to being put in danger, 150
to breach of peace, 149
by accident, 150

LIES,
on private persons, 203
definition of libel, 203
things capable of being libelled, 209
defamatory matter, 209
by signs, 209
publication defined, 210
malice, 211
truth, 211
honest belief, 212
privilege, 212
public benefit, 211
belief of truth, 212
fair criticism, 213
parliamentary proceedings, 215
fair comment, 215
reports of proceedings at meetings, 215
proceedings of courts, fair report of, 217
publication in a court of justice, 216
punishment for libel, 218

MALIGNOUS INJURIES,
amounting to felony, 178
wounding with intent, 178
shooting, 178
INDEX.

PERSON—Offences against the—continued.

MALICIOUS INJURIES—continued.
amounting to felony—continued.
shooting by smugglers, 173
choking, &c., 179
dragging, 179
exploding, &c., 179
endangering persons on railways, 179, 180
preventing escape from wrecks, 180
procuring miscarriage, 180
exploding buildings and ships with intent to injure person, 181
administering poison endangering life, 181
not amounting to felony, 182
unlawful wounding, 182
poisoning with intent to injure, 182
neglecting to provide necessaries, 182
setting spring-guns, &c., 183
deroping safety of person on railway, 183
furious driving, 183

MURDER AND MANSLAUGHTER, definitions of, 165

Malice, 165
intention to cause death, 165
death probable consequence of act, 165
intention to commit felony, 165
intention to oppose officer, 166
notice of officer, 166
“officer” defined, 166
“notice” defined, 166

Provocation, 168
when it does not extenuate, 171
to third person, 172

Suicide, 172
abetting suicide, 172
no manslaughter, 173
accessories before the fact in manslaughter, 173
presumption that killing is murder, 173
punishment of murder, 174
of manslaughter, 174

Attempts to commit murder, 174

Threats and conspiracies to commit murder, 175

Concealing birth of children, 176

Rape,
definition of, 193
by husband, 194
by boy under fourteen, 195
consent, 194
carnal knowledge, 196
INDEX.

PERSON—Offences against the—continued.

RAPE—continued.
carnal knowledge—continued.
    of girls under thirteen, 195
    between thirteen and sixteen, 195

PERSONATION, 810, 320: See Property.

PETITIONS UNLAWFUL, 57: See Public Order (Internal without Force).

PIKETTING, 358: See Property (Trade).

PICTURES, damaging, 345

PIGEONS,
    stealing, 270
    killing, 271

PIRACY, 74: See Public Order (External).

PLANTS,
    stealing, 272

POACHING, 54, 347: See Property (Game).

POISON, administering, 179-182: See Person (Malicious Injuries).

POLICE,
    assaults on, 190: See Person (Assault).
    resisting, 133, 136, 166

POLICE SUPERVISION,
    nature of, 8
    after previous conviction for felony, 16
    after previous conviction for certain misdemeanors, 18 note (2)
    being at large, &c., 17

POLITICAL MEETINGS, 59: See Public Order (Internal without Force).

POSSESSION, 221, 401: See Property (Larceny).

POST-LETTERS, receiving, 294: See Property.

POST OFFICE (stealing post-letters, &c.), 284: See Property (Larceny).

POWERS OF ATTORNEY, forgery of, 310: See Property (Forgery).

PRAYER-BOOK,
    depriving, 113
    clergy refusing to use, 114

PREJUDICE as to intent in sedition, 67

PRETENDED TITLES, 99 note (2)

PREVENTION OF CRIME, 142

PREVENTION OF CRIMES ACT, 16

PREVIOUS CONVICTION,
    punishment after, 15, 16

PRINCIPAL, 30: See Accessory.

PRISON BREACH, 104: See Public Authority (Escape).
INDEX.

PRISONERS,
assisting escape of, 103

PRISONERS OF WAR,
assisting escape of, 102

PRIVILEGE OF AMBASSADORS: See Public Order (External).

PROCURING ABORTION, 180

PROCURING WOMEN, 121

PROPERTY, offences against, 220

BURGLARY, 258

definition of "night," 258
"house," 258
"dwelling-house," 258
within the curtilage, 258
"break," 258
"enter," 258

assault, 258

housebreaking, 239
entering with intent, 230
breaking out, 230
house-breaking instruments, 137, 260
punishment after previous conviction, 13

COIN,
interpretation of terms, 322
coining and possession of instruments for coining, 323
cipping gold or silver coin, 324
coining copper coin, 325
coining foreign gold and silver coin, 325
foreign copper coin, 326
uttering gold and silver coin, 326
copper coin, 327
foreign, 327
punishment after previous conviction, 16
punishment for possession after previous conviction, 16
defacing current coin, 327
making or selling medals, 328

EMBEZZLEMENT BY CLERKS AND SERVANTS,
who is a servant, 248
property must be master's, 251
distinction between, and theft, 252
evidence of, 254

FALSE PRETENCES, 275
punishment after previous conviction, 16
definition of "false pretences," 278
of "obtaining," 278
intent to defraud, 290
cheating at play, 290
obtaining credit by, 261
PROPERTY, Offences against—continued.

FALSE PRETENCES—continued.
concealing deeds, &c., 281
conspiracy to defraud, 292
punishment after previous conviction, 16
pretending to be a witch, 283
cheating, 283
servants feeding horses, &c., against orders, 284
concealing ore from mine, 284
removing marks from public stores, 285
concealing treasure trove, 285

FORGERY.
definition of, 296
making a false document defined, 208
"document" does not include trade-marks or other signs, 302
"utter," "resemble," "forge," "alter," 303
seals, 303, 306, 309
transfer of stock, 304
India bonds, 304
Exchequer bills, 304
bank notes, 304
funds, 304
deeds, bonds, &c., 305
signature of attesting witness, 305
wills, 306
bills of exchange, 306
requests, orders, &c., 305
court rolls, 305
cheques, 305
registers, 305
authorities for transfer of stock, 307
certificate of redemption of land tax, 307 note (4).

instruments for receiving money from Bank of England for the excise, 307 note (4)
debentures, 308
documents relating to registry of deeds, 308
instruments of certain officials, 238
drawing bills of exchange, &c., without authority, 308
demanding property by means of forged document, 308
seals of courts of record, 309
process of any Court, 309
certificates of record, 309
instruments made evidence by statute, 310
documents issued by justices of the peace, 310
marriage licences, 310
powers of attorney, 310
clerks of Bank of England issuing dividends, 311
PROPERTY—Offences against—continued.

FRAUDS—continued.
acts preparatory to the making of Exchequer bills, &c., 314
acts preparatory to forging bank notes, 311-314
acts preparatory to forging bills of exchange, 311-314
trade-marks defined, 315
forgery of trade-marks, 316
at common law, 317

FRAUDS,
by agents, trustees, bankers, &c., 286
punishment, 286
"misappropriate," 286
by persons under powers of attorney, 288
by factors or agents, 288
by clerks assisting in procuring advances, 290
by trustees, 290
by directors, &c., 290
evidence, answering criminating questions, 291
fraudulent, false accounting, 299

GAME,
three persons armed in pursuit of, 54
"right" and "game" defined, 347
night poaching, 347
assault on keepers, &c., 347
deer, hares, rabbits, and fish, 348

LARCENY,
how rights of property may be violated, 220
"property" in moveable things, 221
"possession" defined, 221
by servants, 223
special owner, 224
as against strangers, 224
"taking and carrying away," 224
bailment defined, 226
married women, 226

things capable of being stolen, 228
moveable things, 228
title-deeds, 228, 267
chooses in action, 228
water, 229
gas, 229
electricity, 229, 269
animals fera naturae, 229
tame animals, 229
living and dead, 231
dead bodies, 231
things abandoned, 231
things of no value, 232
PROPERTY, Offences against—continued.

Larceny—continued.

thief in general, 233
definition of theft, 233
of conversion, 233
claim of right, 233

thief by taking and carrying away, 234
without consent, 235
from the possession of owner, 235
actual violence, robbery, 235
by servant, 237
embezzlement, 237, 255
by fraud, 238
by taking advantage of mistake, 239
by bailees, 240

by and from whom theft may be committed, 240
owner, 240
co-partners, 211
corporators, 241
married women, 241
servitor, 241
by finding, 242
where taking a trespass, 244
where taking innocent, 244

acts not amounting to theft,
obtaining by false pretences, 245: See False Pretences, supra.
temporary taking, 248
tame animal wandering, 246
evidence of, 247
identification of property, 247
recent possession, 247

inventories of other things, 262
killing animals with intent, 262
valuable securities, 263
wills, 264
post letters, &c., 264
valuable securities by officers of bank, 265
horses, &c., 265
stealing from the person, 265
stealing in dwelling-house, 265
goods in course of manufacture, 266
in vessels, &c., 266
co-wharfs, &c., 266
of ships in distress, 266

embezzlement by clerk or servant, 256
by persons in employ of Her Majesty, 266
INDEX.

PROPERTY, Offences against—continued.

LARCENY—continued.

endowment by clerk or servant—continued.
chattels and fixtures in lodging, 267
title to lands, 267
judicial documents, 267
lead, &c., from buildings, 268
fixed metal, 268
trees and shrubs, 268
oysters, 269
electricity, 269
ore, &c., 269

offences resembling theft, 270
dog stealing, 270
bird stealing, 270
domestic animals, 270
wounding pigeons, 271
dredging for oysters, 271
stealing shrubs value 1s., 271
stealing fences, 272
stealing vegetable produce, &c., 272
goods belonging to ships in distress, 273

MALICIOUS INJURIES, 330

burning ships of war, &c., 330
explosives, 331, 341

arson, 332–337

by explosion, 331, 338, 336
damaging manufactured goods, 333
machinery, 333, 338
sea banks, &c., 334, 339
docks, canals, &c., 334, 339
bridges, &c., 334
railways, &c., 334, 339
ships, 335, 337, 340
mines, &c., 336, 338
fish-ponds, &c., 339, 340
hopfields, 337
salmon rivers, 340
buoys, &c., 340
electric lines, 341, 344
buildings by tenants, 342
vegetable produce, 340, 342, 343
fences, 343
turnpikes, 344
telegraphs, 341, 344
books and works of art, &c., 344
any real or personal property, 346
PROPERTY. Offences against—continued.

MALICIOUS INJURIES—continued.

wounding cattle, animals, &c., 337, 345
threatening to burn, 337
making gunpowder, &c., 341
claim of right, 346
punishments: See Schedules in notes.

PERSONATION, 319
acknowledging recognizance in false name, 319
in fraud of Admiralty, 320
at elections, 320

RECEIVING
stolen goods, 293
" receiving," defined, 293
property unlawfully obtained, 294
post-letters, 294
stolen goods, 295
goods obtained by false pretences, 295
stolen by a partner, 295 note (2)
taking rewards, 295

ROBBERY, 285
extortion by threats, 255
absconding bankrupt, 353

TRADE.

fraudulent debtors, 353
bankrupt obtaining credit, 356
false claim on bankrupt's estate, 356
conspiracies in restraint of, 357, 358
lawful acts in restraint of, 287
breaches of contract of service, 338
not providing for apprentices, 359
intimidation, 359
picketing, 299
breaches of employer's duty to seamen, 359
leaving seamen behind, 360, 361
sending unseaworthy ship to sea, 362
breach of seamen's duty to employer, 362
breach of seamen's duty to each other, 364
to other ship in collision, 365

PROSTITUTE, 135

PROVOCATION, 168, 171; See Trespass (Murder).

PUBLIC AUTHORITY, Offences against,

Bribery and Corruption, 89
judicial corruption, 89
official corruption, 89
embracery, 89.
INDEX.

PUBLIC AUTHORITY, Offences against—continued.

Bribery and Corruption—continued.

of voters, 90
undue influence, 92
punishment of bribery at elections, 92

Escape, 101
permitting voluntary, 101
negligent, 101

Recon, 101
felonious, 102
of murderers, 102
prisoners of war, 102
revenue prisoners, 103
helping to escape from prison, 103
escaping from custody, 104

Prison-breach, 104
escaping from certain prisons, 105
being at large after sentence, 106

Misleading Justice,

Perjury, 95
definition of, 95
subornation of, 97
punishment of, 97
false swearing, 97

Forging instruments of evidence, 98
tendering them in evidence, 98
officers giving false certificates, 99

Maintenance, 99
dissuading witnesses, 100

Mispriison of treason, 106
of felony, 106
agreement not to prosecute, 107
compounding penal actions, 107

Offences by Officers,

"public officer" defined, 88
extortion and oppression by public officers, 88
illegally imprisoning subjects beyond the seas, 85
frauds and breaches of trust by officers, 85
neglect of duty, 86
refusal to serve an office, 87
disobedience to lawful orders, 86
to statutes, 88
to orders, 88

Sale of Offices, 93
definition of office, 93
making interest for offices, 94
INDEX.

PUBLIC MISCHEIF.

LUDIBRIOUS ACTS, 108
undertaken misdemeanors, 108
in the nature of conspiracy, 109
in relation to official duty, 109
to prevent justice, 109
to disturb public peace, 109

COMMON NUISANCE, 125
a misdemeanor, 126
disorderly houses, 126, 127
punishment, 126
bawdy-houses, 127
gaming-houses, 127
betting-houses, 126
evidence, 129
disorderly places of entertainment, 129
disorderly inns, 130
lotteries, 131

Nuisances to health, life, property, 131
offensive trades, 132

Nuisances to highway, 132
to bridges, 133
to navigable rivers, 133

OFFENCES AGAINST MORALITY, 117
sodomy, 117
attempt to commit, 117
outrages on decency, 117
immorality, ecclesiastical censures for, 119
public indecencies, 118
obscene publications, 119
deluding women, 121
conspiracy to delude, 122
fornication, 122
householders permitting delusion of girls on their premises, 122
preventing burial of dead bodies, 123

OFFENCES AGAINST RELIGION, 110
blasphemy, 110
heresies, 111
denying the truth of Christianity, 112
depriving the Lord’s Supper, 113
the Book of Common Prayer, 113
clergymen refusing to use the Book of Common Prayer, 114
disturbing public worship, 115

VAGRANCY, 135
idle and disorderly persons, 135
rogues and vagabonds, 136.
INDEX.

PUBLIC MISCHIEF—continued.

VAUDRASY—continued.

incurribile rogues, 138
punishment of, 138

PUBLIC OFFICERS, 88: See Public Authority.

PUBLIC ORDER,
Offences against in general,

HIGH TREASON, 41
by imagining the Queen's death, 41
by levying war, 42
by adhering to the Queen's enemies, 43
by adherence to a de facto king, 43
by killing the King's wife or son, 43
by words, 43
by violating the King's wife, &c., 44
by killing judges, &c., 44
punishment for high treason, 45
all engaged are principals, 45

TREASONABLE FELONIES, 46
intending to depose the Queen, &c., 46
intending to levy war, 46
intending to stir any foreigner to invade, 46
inciting to mutiny, &c., 46

TREASONABLE MISDEMEANORS, 47
assaulting or attempting to assault the Queen, 47
contempts against the Queen, 48
assisting at marriage of member of Royal Family, 48

EXTERNAL PUBLIC ORDER, 88
(1) Against Foreign Nations, 88
violation of ambassadors' privileges, 88
arrest of ambassadors, 88
punishment, 88
libels on foreign powers, 89
interference in foreign hostilities, 89
foreign enlistment, 70
forfeiture of ships, 71
increasing force of foreign ships, 72
enlistment by misrepresentation, 73
presumption of knowledge, 73

(2) Against Person on High Seas, 74
piracy, 74
with violence, 75
foreign commissions, 75
adhering to enemies on sea, 75
boarding ships, &c., 76
favouring pirates, 76
PUBLIC ORDER—continued.

EXTERNAL PUBLIC ORDER—continued.

(2) Against Person on High Seas—continued.

piracy—continued.

trading or conspiring with pirates, 77
punishment, 77
not fighting pirates, 77
slave trading, 75
piratical slave trading, 79
punishment of, 90
serving on slave ship, 81
kidnapping Pacific Islanders, 81

INTERNAL PUBLIC ORDER, 49

(1) By force

challenging to fight, 49
going about armed, 49
affray, 49
unlawful assembly, 49
route, 50
riot, 50
punishment of the above, 51
riot during and after proclamation, 51
riotous demolition of houses, 52
riotous damage of houses, 53
persons assembled in order to smuggle, 53
game, persons armed in pursuit of, 54
riotously preventing the loading of ships, 55
forcible entry, 55
political meetings in Westminster, 56
getting signatures for petitions, 57
insurrectionary petitions, 57
unlawful drilling, 57

(2) Without force,

by unlawful combination, 50
by unlawful oaths, 59
to commit murder or treason, 59
other unlawful oaths, 59
to disturb peace, &c., 60
punishment, 59, notes 1 & 2.
compulsion, how far a defence, 60
unlawful societies, 61
exceptions, 63
punishment of members, 63
permitting meetings of unlawful clubs, 63
Jehuits and monks, 64
seditionous words, 65
seditionous libels, 65
INDEX.

PUBLIC ORDER—continued.
  INTERNAL PUBLIC ORDER—continued.
  (2) Without force—continued.
    seditious conspiracy, 65
    seditious intention, definition, 66
    presumption as to intention, 67
    spreading false news, 67

PUBLIC STORES, removing marks from, 235: See Property (False Pretences).

PUBLIC WORSHIP, disturbing, 115: See Public Meetings.

PUNISHMENTS,
  maximum, 1
  minimum, 2
  mode of inflicting different kinds of, 4–11
    cumulative, 18
    See Death; Fine; Imprisonment; Penal Servitude; Police; Recognizance; Reformatory; Solitary Confinement; Whipping.
    for particular offences: See those offences.
    after previous conviction, 15: See Previous Conviction.
    for felony, 14: See Felony.
    for misdemeanors, 18: See Misdemeanors.
    of juvenile offenders, 17: See Juvenile Offenders.
    for felony where no express punishment provided, 14

QUAKERS, 63

Q.

R.

RAILWAYS,
  damaging, 335, 345: See Property (Malicious Injuries).
  endangering persons travelling by, 173, 180, 183: See Person (Malicious Injuries).

RAPE, 193: See Person.

RECEIPTS, forging of, 304: See Property ( Forgery).

RECEIVING, 288: See Property (Receiving).

RECENT POSSESSION OF STOLEN PROPERTY, 247

RECOGNIZANCES, nature of punishment by, 11

RECORDING SENTENCE OF DEATH, 14

RECORDS, forging of, 309: See Property ( Forgery).

REFORMATORY, juvenile offenders sent to, 8
INDEX.

REFUSAL TO TAKE OFFICE, 87
REGISTER, forgery of entries in, 303: See Property (Forgery).
REGISTRY of deeds, forgery relating to, 308: See Property (Forgery).
RELIGION, offences against, 10: See Public Mischief.
REPUTED THIEF, 137
RESCUE, 161: See Public Authority (Escape).
RESCUING STOLEN GOODS, 293: See Property.
REVENUE, prisoners, escape of, 183: See Public Authority (Escape).
RIOTS, 70: See Public Order (Internal by Force).
(bodily harm done in suppression of), 141: See Person (Lawful Injury).
RIVERS, nuisances to, 133: See Public Mischief.
putting lime in, 340
ROBBERY, 265: See Property.
definition of, 295
ROGUES, 138: See Public Mischief.
incorrigible, 138
ROUTS, 50: See Public Order (Internal by Force).

S.

SACRAMENT, depraving, 113
SACRILEGE, 285: See Property (Burglary).
SALE OF OFFICES, 58: See Public Authority.
SANDBOX ISLANDERS, kidnapping, 31
SANITY, presumption of, 22
SEA BANKS, damages, 334, 339: See Property (Malicious Injuries).
SEALS, forgery of, 283, 309: See Property (Forgery).
SEAMEN, offences relating to, 360-365: See Property (Trade).
SECURITIES, stealing, 285, 296
SEDITION, 65: See Public Order (Internal without Force).
SELF-DEFENCE, 143: See Person (Lawful Injury).
SEPARATE IMPRISONMENT, 5
SERVANT,
custody by, 222
larceny by, 237: See Property (Larceny).
embezzlement by, 237, 343: See Property (Embezzlement).
breach of contract by, 338: See Property (Trade).

SHIPS,
exploding, 175, 181: See Person (Malicious Injuries).
damaging, 335, 337, 340: See Property (Malicious Injuries).
equipping for foreign hostilities, 69
INDEX.

SHIPS—continued.
- forfeiture of, 71: See Public Order (External).
- stealing from, 285, 273: See Property (Larceny).
- burning, of war, 330
- sending to sea unseaworthy, 362
- violently preventing the landing, of, 55: See Public Order (Internal by Force).

SHOOTING, 178: See Person (Malicious Injuries).

SHRUBS,
- stealing, 268
- damaging, 314, 342

SKILL, special, in dangerous acts, 156: See Person (Culpable Negligence).

SLAVE TRADING, 78: See Public Order (External).

SMUGGLING,
- assaults on officers, 157: See Person (Assaults).
- assembling for purposes of, 53: See Public Order (Internal by Force).

SOCRATICS, unlawful, 61: See Public Order (Internal without Force).

SODOMY, 117: See Public Mischief.
- attempt to commit, 117
- assault with attempt to commit, 155: See Person (Assaults).

SOLITARY CONFINEMENT, 2, 7, 15

SPECIAL OFFENCES AFTER PREVIOUS CONVICTION, 16

SPECIAL OWNERSHIP, 324

SPRING-GUNS, setting, &c., 183: See Person (Malicious Injuries).

STATUE, damaging, 345: See Property (Malicious Mischief).

STATUTES, disobedience to, 88: See Public Authority (Offences by Officers).

STOCK, forgery of transfer of, 304, 307: See Property (Forgery).

STOLEN GOODS, receiving, 223: See Property (Larceny).

STRANGLING, 179: See Person (Malicious Injuries).

STUPOR, 179: See Person (Malicious Injuries).

SUBLORNATION OF PERJURY, 97: See Public Authority (Misleading Justice).

SUFFOCATING, 179: See Person (Malicious Injuries).

SUITIDE, 172, 173: See Person (Murder).

SUMMARY CONVICTION, for assaults, 191: See Person (Assaults).

SUPERIOR ORDERS TO EMPLOY FORCE, 146

SUPPRESSION OF RIOTS, 141

SURGEON,
- inflicting bodily harm by consent, 148: See Person (Lawful Injury).
- special skill, 157: See Person (Culpable Negligence).
INDEX.

T.

TELEGRAPHS, damage to, 241: See Property (Malicious Injuries).

TENANTS, damage by, 342: See Property (Malcious Injuries).

THEFT, 283: See Property (Larceny).

THREATS,

-- of arson, 337: See Property (Malicious Injuries).
-- extortion by, 225: See Property (Robbery).
-- to commit murder, 176: See Person (Murder).

THROWING CORROSIVE FLUID, 179: See Person (Malicious Injuries).

TITLE DEEDS,

-- larceny of, 228, 267
-- damaging, 267

TRADE,

-- conspiracies in restraint of, 337: See Property (Trade).
-- lawful acts in restraint of, 357
-- marks, forgery of, 302, 315, 316: See Property (Forgery).

TRANSPORTATION, 2

TREASON, 12, 41: See Public Order.

-- consequences of conviction for, 12

TREASURE-TROVE, concealing, 285: See Property (False Pretences).

TREES, &c.,

-- stealing, 208, 271: See Property (Larceny).
-- damaging, 340, 342: See Property (Malicious Injuries).

TRUSTEES, frauds by, 289: See Property (Fraud).

TUMULTUOUS PETITIONING, 57: See Public Order (Internal by Force).

TURNPIKES, damage to, 348: See Property (Malicious Injuries).

U.

UNDUE INFLUENCE, 22: See Public Authority (Bribery).

UNLAWFUL ASSEMBLY, 49: See Public Order (Internal by Force).

UNLAWFUL DRILLING, 57: See Public Order (Internal by Force).

UNLAWFUL OATHS, 69: See Public Order (Internal without Force).

UNLAWFUL WOUNDING, 182: See Person (Malicious Injuries).

UTTERING: See Property (Forgery).
T.

TELEGRAPHS, damage to, 341: See Property (Malicious Injuries).

TENANTS, damage by, 342: See Property (Malicious Injuries).

THEFT, 223: See Property (Larceny).

THREATS,
- of arson, 337: See Property (Malicious Injuries).
- extortion by, 225: See Property (Robbery).
- to commit murder, 176: See Person (Murder).

THROWING CORROSIVE FLUID, 179: See Person (Malicious Injuries).

TITLE DEEDS,
- larceny of, 226, 267
- damaging, 267

TRADE,
- conspiracies in restraint of, 337: See Property (Trade).
- lawful acts in restraint of, 337
- marks, forgery of, 302, 315, 316: See Property (Forgery).

TRANSPORTATION, 2

TREASON, 13, 41: See Public Order.
- consequences of conviction for, 12

TREASURE-TROVE, concealing, 285: See Property (False Pretences).

TREES, &c.,
- stealing, 268, 271: See Property (Larceny).
- damaging, 340, 349: See Property (Malicious Injuries).

TRUSTEES, frauds by, 289: See Property (Fraud).

TUMULTUOUS PETITIONING, 57: See Public Order (Internal by Force).

TURNPIKES, damage to, 343: See Property (Malicious Injuries).

U.

UNDUE INFLUENCE, 22: See Public Authority (Bribery).

UNLAWFUL ASSEMBLY, 49: See Public Order (Internal by Force).

UNLAWFUL DRILLING, 57: See Public Order (Internal by Force).

UNLAWFUL OATHS, 69: See Public Order (Internal without Force).

UNLAWFUL WOUNDING, 182: See Person (Malicious Injuries).

UTTERING: See Property (Forgery).
INDEX.

V.

VAGABONDS, 136
VAGRANCY, 135: See Public Miseries.
VALUABLE SECURITIES, larceny of, 223: See Property (Larceny).
VEGETABLE PRODUCE, damage to, 340, 342: See Property (Malicious Injuries).
VOTERS, bribery of, 80: See Public Authority (Bribery).

W
WATER, larceny of, 229: See Property (Larceny).
WESTMINSTER, political meetings at, 55
WHIPPING, 2
mode of inflicting, 0
for felony, where no express punishment, 14
after previous conviction, 15
WIFE: See Married Woman.
WILLS,
forgeries of, 305: See Property (Forgery).
larceny of, 284: See Property (Larceny).
WITCHCRAFT, 233: See Property (False Pretences).
WITNESSES, dissuading from giving evidence, 109: See Public Authority (Misleading Justice).
WORDS,
obscene, 185: See Person (Assaults).
libellous, 209: See Person (Libel).
WOUNDING, 178: See Person (Malicious Injuries).
WRECKS,
preventing escapes from, 180: See Person (Malicious Injuries).
assault on persons protecting, 186: See Person (Assaults).
stealing from, 266, 273: See Property (Larceny).