CAUSING INJURY BY NEGLIGENCE.

252. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person. R. S. C. c. 162, s. 33.

Fine, s. 958.

This clause is not in the English Act. It is nearly in the same terms as s. 251, except that this last one applies only to passengers by railway endangered by the unlawful act or neglect, or omission of duty.

An injury resulting from an omission does not subject the person causing it to punishment unless such omission be unlawful. An omission is deemed unlawful whensoever it is a breach of some duty imposed by law, or gives cause to a civil action: 2nd Report Cr. L. Com. 14 May, 1846; *see* R. v. Instan, [1893], 1 Q. B. 450.

Mr. Starkie, one of the English Commissioners, in a separate report, objected strongly to such an enactment, and the framers of the Imperial Statutes have thought proper to leave it out.

This section uses the term "bodily injury" instead of "bodily harm" used in the next section and in s. 241, *et seq.* Did the drafter intend to make a distinction between the two? Probably not.

INJURY BY FURIOUS DRIVING.

253. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who, having the charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person. R. S. C. c. 162, s. 28. 24-25 V. c. 100, s. 35 (Imp.).

Indictment.— being then a coachman, and then having charge of a certain carriage and vehicle called an omnibus, unlawfully did, by the wanton and furious driving of the said carriage and vehicle by him the said (*defendant*) cause certain bodily harm to be done to one J. N.

This section includes all carriages and vehicles of every description, both public and private. *Wilful* means *voluntary*: Greaves, Cons. Acts, 63.

See remarks under s. 251 as to the word "wilful," and under s. 262 as to the words "bodily harm."

PREVENTING ANY SHIPWRECKED PERSON FROM SAVING HIS LIFE. (*As amended in 1893.*)

254. Every one is guilty of an indictable offence and liable to *seven years'* imprisonment—

(*a*) Who prevents or impedes, or endeavours to prevent or impede any shipwrecked person in his endeavour to save his life; or

(*b*) Who without reasonable cause prevents or impedes, or endeavours to prevent or impede, any person in his endeavour to save the life of any shipwrecked person. R. S. C. c. 81, s. 36. 24-25 V. c. 100, s. 17 (Imp.).

"Shipwrecked person" defined, s. 3.

Indictment.— that before and at the time of the committing of the offence hereinafter mentioned, to wit, on a certain ship was wrecked, stranded and cast on shore, and that A.B., on the day and year aforesaid, did unlawfully prevent and impede (*or endeavour to prevent and impede*) one C.D., a shipwrecked person then endeavouring to save his life from the said ship so wrecked, stranded, and cast on shore, in his endeavours to save his life.

LEAVING HOLES IN THE ICE, ETC., ETC., UNGUARDED.

255. Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour (or both) who—

(*a*) Cuts or makes, or causes to be cut or made, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, uninclosed by bushes or trees or unguarded by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein; or

(*b*) Being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which any excavation has been or is hereafter made, of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling thereinto; or

(*c*) Omits within five days after conviction of any such offence to make the inclosure aforesaid or to construct around or over such exposed opening or excavation a guard or fence of such height and strength.

2. Every one whose duty it is to guard such hole, opening, aperture or place is guilty of manslaughter if any person loses his life by accidentally falling therein while the same is unguarded. R. S. C. c. 162, ss. 29, 30, 31 & 32.

This sub-section (*b*) provides for what would be manslaughter under s. 220, or at common law. An analogous enactment in England is contained in 50 & 51 V. c. 19.

SENDING OR TAKING AN UNSEAWORTHY SHIP TO SEA.

256. Every one is guilty of an indictable offence and liable to *five years'* imprisonment who—

Sends, or attempts to send, or is a party to sending, a ship registered in Canada to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place on the inland waters of the United States to any port or place on the inland waters of Canada in such unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that he used all reasonable means to insure her being sent to sea or on such voyage in a seaworthy state or that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V. c. 22, s. 3.

257. Every one is guilty of an indictable offence and liable to five years' imprisonment who, being the master of a ship registered in Canada, knowingly takes such ship to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place in the United States to any port or place on the inland waters of Canada, in such unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V. c. 22, s. 3. 39-40 V. c. 80 (Imp.).

Fine, s. 958.

By s. 546, as amended in 1893, no prosecution is allowed for the offences under s. 256 and s. 257 without the consent of the Minister of Marine and Fisheries. This consent must precede the information or complaint before the magistrate, when prosecution begins by information or complaint.

PART XX.

ASSAULTS.

Definition.

258. An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has present ability to effect his purpose, and in either case, without the consent of the other *or with such consent if it is obtained by fraud.*

As to the words in italics: *see* R. v. Clarence, 16 Cox, 511, 22 Q. B. D. 23, Warb. Lead. Cas. 130. This definition covers an assault and battery, as well as a simple assault: *see post* remarks under ss. 262 and 265.

Indecent Assaults on Females.

259. Every one is guilty of an indictable offence and liable to *two years'* imprisonment, and to be whipped, who—

(*a*) Indecently assaults any female; or

(*b*) Does anything to any female by her consent which but for such consent would be an indecent assault, such consent being obtained by false and fraudulent representations as to the nature and quality of the act. 53 V. c. 37, s. 12. 24-25 V. c. 100, s. 52 (Imp.).

Fine, s. 958

See s. 685, *post*, as to evidence of young children upon a charge of an indecent assault; also s. 25 of *The Canada Evidence Act 1893*, and s. 261.

Indictment.— one A. D. a female, unlawfully and indecently did assault, and her, the said A. D. did then beat, wound and ill treat, and other wrongs to the said A. D. did, to the great damage of the said A. D.

Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault evidence was tendered of the conduct of the prisoner towards her subsequent to the assault: *Held*, that the evidence was admissible as tending to show the indecent

quality of the assault, and as being, in effect, a part or continuation of the same transaction as that with which the prisoner was charged: R. v. Chute, 46 U. C. Q. B. 555; *see* R. v. Drain, under s. 262, *post*.

As to sub-section (*b*) of s. 259, *see* R. v. Bennett, 4 F. & F. 1105; R. v. Case, 1 Den. 580; R. v. Clarence, 16 Cox, 511, 22 Q. B. D. 28, Warb. Lead. Cas. 130.

INDECENT ASSAULTS ON MALES.

260. Every one is guily of an indictable offence and liable to *ten years* imprisonment and to be whipped who assaults any person with intent to commit sodomy, or who, being a male, indecently assaults any other male person. R. S. C. c. 157, s. 2. (*Amended*).

Attempt to commit sodomy is provided for by s. 175.

See ante, notes under ss. 174, 175, 178, and *post*, under s. 261.

An indictment under this clause is defective even after verdict if it does not aver in express terms that the accused and the assaulted party are males: R. v. Montminy on a case reserved, Q. B. Quebec, May, 1898.

See form, *ante*, under s. 178.

CONSENT OF CHILDREN UNDER 14 NO DEFENCE.

261. It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency. 53 V. c. 37, s. 7. 43-44 V. c. 45, s. 2 (Imp.).

This enactment applies to assaults on males as well as on females; R. v. Mehegan, 7 Cox, 145; R. v. Johnson, L. & C. 632, and that class of cases are not now law; *see* R. v. Brice, 7 Man. L. R. 627.

This enactment applies to all offences which include an indecent assault.

ACTUAL BODILY HARM.

262. Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to *three years'* imprisonment. R. S. C. c. 162, s. 35.

Fine, s. 958.

In R. v. Clarence, 16 Cox, 511, 22 Q. B. D. 23, Warb. Lead. Cas. 130, it was held that a husband who communicates a venereal disease to his wife cannot be indicted for causing her actual bodily harm.

Indictment for an assault occasioning actual bodily harm.

— that J. S., on in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound and ill-treat, thereby then occasioning to the said J. N. actual bodily harm, and other wrongs to the said J. N. then did, to the great damage of the said J. N.

The defendant may be convicted of a common assault upon an indictment for occasioning actual bodily harm: R. v. Oliver, Bell, 287; R. v. Yeadon, L. & C. 81; s. 713, *post*.

The intent to do bodily harm, or premeditation, is not necessary to convict upon an indictment under this section; thus a man who commits an assault the result of which is to produce bodily harm is liable to be convicted under this section, though the jury find that the bodily harm formed no part of the prisoner's intention, and was done without premeditation, under the influence of passion: R. v. Sparrow, Bell, 298.

The actual bodily harm mentioned in this section would include any hurt or injury calculated to interfere with the health or comfort of the prosecutors; it need not be an injury of a *permanent* character, nor need it amount to what would be considered to be *grievous* bodily harm.

On an indictment for assault and battery occasioning actual bodily harm the evidence proved only a common assault or an assault and battery: *Held*, on a case reserved, that the accused was not a competent witness on his own behalf under c. 174, s. 216.

A statement by the man assaulted, made immediately after the assault and in presence of the accused, was held admissible: R. v. Drain, 8 Man. L. R. 535.

AGGRAVATED ASSAULTS, ETC.

263. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who—

(*a*) Assaults any person with intent to commit any indictable offence; or

(*b*) Assaults any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or

(*c*) Assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person, for any offence; or

(*d*) Assaults any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure. R. S. C. c. 162 s. 34.

(*e*) On any day whereon any poll for any election, parliamentary or municipal, is being proceeded with, within the distance of two miles from the place where such poll is taken or held, assaults or beats any person. R. S. C. c. 8, s. 77.

Section 77 of c. 8, R. S. C. (unrepealed), of which the above s-s. (*e*) is a partial re-enactment, applies only to battery, and the prosecution if taken under that Act is limited by one year, and punishable by five years, s. 951, *post*.

Fine, s. 958. "Public officer" and "peace officer" defined, s. 3.

Indictment under (*a*). in and upon one J. N. unlawfully did make an assault, and him the said J. N. did beat, wound and ill-treat with intent him the said J. N. unlawfully to kill and murder. (*Add a count for a common assault*).

Every attempt to commit an offence against the person of an individual without his consent involves an assault. Prove an attempt to commit such an offence, and prove it to have been done under such circumstances that, had the attempt succeeded, the defendant might have been convicted of the offence. If you fail proving the intent, but prove the assault, the defendant may be convicted of the common assault.

Indictment under (*b*). in and upon one J. N. then being a peace officer, to wit, a constable (*any peace officer in the execution of his duty, or any person acting in aid of*) and then being in the due execution of his duty as such constable, did make an assault, and him, the said J. N., so being in the execution of his duty as aforesaid, did then beat, wound and ill-treat, and other wrongs to the said J. N., then did, to the great damage of the said J. N. (*Add a count for a common assault.*)

Prove that J. N. was a peace officer, as stated in the indictment, by showing that he had acted as such.

It is a maxim of law that "*omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium,*" upon which ground it will be presumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed: R. v. Verelst, 3 Camp. 432; R. v. Gordon, 1 Leach, 515; R. v. Murphy, 8 C. & P. 297; R. v. Newton, 1 C. & K. 469; Taylor, on Evidence, par. 139, 431. Prove that J. N. was in the due execution of his duty, and the assault: MacFarlane v. R., 16 S. C. R. 393, and R. v. King, 18 O. R. 566; R. v. Lantz, 19 N. S. Rep. 1. If you fail in proving that J. N. was a peace officer, or that he was acting lawfully as such, the defendant may be convicted of a common assault.

The fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, is no defence: R. v. Forbes, 10 Cox, 362.

Sections 144 & 263 (*b*) ought to form only one: 144 s-s. 1, is for resisting or obstructing a *public* officer in the execution of his duty: punishment, ten years; 263 is for assaulting a *public* or *peace* officer in the execution of his duty: punishment, two years; then s-s. 2, s. 144, again provides for the offence of resisting or wilfully obstructing any *peace* officer in the execution of his duty: punishment, two years. Ten years for resisting a *public* officer, and, by the same clause, two years for resisting a *peace* officer. By the interpretation clause, s. 3, the expression "peace officer" includes a "Mayor, Warden, Reeve, Sheriff, Deputy Sheriff, Sheriff's officer and Justice of the peace, and also the Warden, Keeper or guard of a penitentiary, or of any prison, and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process."

So that, by 263, an *assault* on a Mayor, Reeve or Warden, in the execution of his duty, is punishable by *two*

years, and by 144, *obstructing* him in the execution of his duty is punishable by *ten* years.

In an indictment for obstructing a sheriff's officer in executing a writ of *fi. fa.* the writ contained a mis-statement as to the date of the judgment on which it was issued.

Held, on a case reserved, that the writ being regular on its face the sheriff was bound to execute it The error was a mere irregularity which might have been amended and the prisoner was rightly convicted: R. v. Monkman, 8 Man. L. R. 509.

Indictment under (*c*).— in and upon one J. N., did make an assault, and him, the said J. N., did then beat, wound and ill-treat with intent in so doing to resist and prevent (*resist or prevent*) the lawful apprehension of (*himself or of any other person*) for a certain offence, that is to say (*state the offence generally*). (*Count for common assault*).

It must be stated and proved that the apprehension was lawful: *see* R. v. Davis, L. & C. 64. If this and the intent be not proved a verdict of common assault may be given. But it must be remembered that resistance to an illegal arrest is justifiable, and if, in a case where a warrant is necessary and the officer making an arrest has not the warrant with him, the party whom he tries to arrest, resists and assaults him, he cannot be convicted of an assault on an officer in the due execution of his office: Codd v. Cabe, 13 Cox, 202.

Indictment under (*d*).— in and upon J. N. did unlawfully make an assault, the said J. N. then and there making in his quality of a duly appointed bailiff of a lawful seizure under authority of justice, and whilst the said J. N. was making the said lawful seizure in his said quality.

Indictment under (*e*).— in and upon one J. N., unlawfully did make an assault, on a day whereon a poll for

an election for was being proceeded with at in to wit, on and within the distance of two miles from the place where such poll was held.

KIDNAPPING.

264. Every one is guilty of an indictable offence and liable to *seven years'* imprisonment who, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent—

(*a*) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(*b*) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(*c*) to cause such other person to be sold or captured as a slave, or in any way held to service against his will.

2. Upon the trial of any offence under this section the non-resistance of the person so kidnapped or unlawfully confined thereto shall not be a defence, unless it appears that it was not caused by threats, duress or force or exhibition of force. R. S. C. c. 162, s. 46.

At common law kidnapping is a misdemeanour, punishable by fine and imprisonment: 1 Russ. 962.

The forcible stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish and also by the civil law. This is unquestionably a very heinous crime, as it robs the sovereign of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships: 4 Blacks. 219.

By the above section transportation to a foreign country is not necessarily an ingredient in this offence.

The defendant may be found guilty of an attempt to kidnap upon an indictment for kidnapping, s. 711.

A verdict of assault may also be given if the evidence warrants it, s. 713.

Indictment.— with force and arms unlawfully an assault did make on one A. B., and did then and there, without lawful authority, unlawfully and forcibly seize and imprison the said A. B., within the Dominion of Canada (*or confine or kidnap*) with intent the said A. B. unlawfully

and forcibly to cause to be unlawfully transported out of Canada, against his will.

Held, on the trial of an indictment for kidnapping under 32 & 33 V. c. 20, s. 69, that the intent required applies to the seizure and confinement as well as to the kidnapping, and the indictment should state such intent: Cornwall v. R., 33 U. C. Q. B. 106.

COMMON ASSAULT.

265. Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to *one year's* imprisonment, or to a fine not exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or to two months' imprisonment with or without hard labour. R. S. C. c. 162, s. 36.

See s. 109, *ante*, as to pointing firearms at any person, and s. 258 as to definition of an assault.

Indictment for a common assault.— that C. D., on the at in and upon one A. B., an assault did make, and him the said A. B. then and there did beat, wound and ill-treat, and then and there to him other wrongs and injuries did.

A common assault may be prosecuted either by indictment or under the Summary Convictions clauses, 839, *et seq. post*.

Costs on conviction for assault, s. 834, *post*.

An assault is an attempt or offer, with force and violence, to do a corporal hurt to another, whether from malice or wantonness; as by striking at him with or without a weapon, though the party striking misses his aim; so drawing a sword, throwing a bottle or glass with intent to wound or strike, presenting a loaded gun or pistol at a person within the distance to which the gun or pistol will carry, or pointing a pitchfork at a person standing within reach, holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against his person, will amount to an assault: 1 Burn, 308.

It had been said that the presenting a gun or pistol at a person within the distance to which it will carry, though in fact not loaded, was an assault, but later authorities have held that, if it be not loaded, it would be no assault to present it and pull the trigger: 1 Burn, *loc. cit*: *see* s. 109, *ante*.

One charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery; but every battery includes an assault; therefore on an indictment for assault and battery, in which the assault is ill-laid, if the defendant be found guilty of the battery it is sufficient: 1 Hawk. 110; *see* note to R. v. Read, 1 Den. 377.

Mere words will not amount to an assault, though perhaps they may in some cases serve to explain a doubtful action: 1 Burn 309.

If a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. But if A. advances in a threatening attitude with his fists clenched towards B., with an intention of striking him, so that his blow would have almost immediately reached B., if he had not been stopped by a third person, this would be an assault in point of law, though at the particular moment when A. was stopped he was not near enough for his blow to take effect: Stephens v. Myers, 4 C. & P. 349.

To collect a number of workmen round a person who tuck up their sleeves and aprons and threaten to break his neck if he did not go out of the place, through fear of whom he did go out, amounts to an assault. There is the intention and present ability and a threat of violence causing fear: Read v. Coker, 13 C. B. 850.

So riding after a person and obliging him to run away into a garden to avoid being beaten is an assault: Mortin v. Shoppee, 3 C. & P. 373.

Any man wantonly doing an act of which the direct consequence is that another person is injured commits an

assault at common law, though a third body is interposed between the person doing the act and the person injured. Thus to drive a carriage against another carriage in which a person is sitting, or to throw over a chair on which a person is sitting, whereby the person in the carriage or on the chair, as the case may be, is injured, is an assault. So encouraging a dog to bite, or wantonly riding over a person with a horse, is an assault: 1 Burn, 309; 1 Russ. 1021.

In R. v. Wollaston, 12 Cox, 182, Kelly, C.B., said: "If anything is done by one being upon the person of another, to make the act an assault it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case there was actual participation by both parties in the act done, and complete mutuality:" and the defendant was acquitted as the boys, aged above fourteen, upon whom he was accused of having indulged in indecent practices, had been willing and assenting parties to what was done. But *see* now s. 178, *ante*.

But if resistance be prevented by fraud it is an assault. If a man, therefore, have connection with a married woman, under pretense of being her husband, he is guilty of an assault: R. v. Williams, 8 C. & P. 286; R. v. Saunders, 8 C. & P. 265; now, of rape; s. 266 *post*.

In R. v. Lock, 12 Cox, 244, upon a case reserved, it was held that the definition of an assault that the act must be *against the will* of the patient implies the possession of an active will on his part, and, therefore, the mere submission by a child of tender years (eight years old) to an indecent assault, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of criminal law.

In R. v. Woodhurst, 12 Cox, 443, on an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault, it was held on the latter count that, although consent would be a defence, consent extorted by terror or induced by the influence of a person in whose power the girl feels herself, is not really such consent as will have that effect; following R. v. Day, 9 C. & P. 722; R. v. Nichol, R. & R. 130; R. v. Rosinski, 1 Moo. 19; R. v. Case, 1 Den. 580; 1 Russ. 933.

An unlawful imprisonment is also an assault for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the King's peace, a loss which the State sustains by the confinement of one of its members, and an infringement of the good order of society: 4 Blacks. 518. It has been supposed that every imprisonment includes a battery, but this doctrine was denied in a recent case, where it was said by the Court that it was absurd to contend that every imprisonment included a battery: 1 Russ. 1025.

A battery in the legal acceptation of the word includes beating and wounding: Archbold, 659. Battery seemeth to be, when any injury whatsoever, be it ever so small, is actually done to the person of a man in an angry or revengeful, or rude, or insolent manner, as by spitting in his face, or throwing water on him, or violently jostling him out of the way: 1 Hawk. c. 15, s. 2. For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stages of it, every man's person being sacred, and no other having a right to meddle with it in any, the slightest, manner: 1 Russ. 1021.

The touch or hurt must be with a hostile intention, and, therefore, a touch given by a constable's staff, for the purpose of engaging a person's attention only, is not a battery: 1 Burn, 812.

Whether the act shall amount to an assault must in every case be collected from the intention; and if the injury committed were accidental and undesigned it will not amount to a battery: 1 Russ. 1025.

Striking a horse, whereon a person is riding and whereby he is thrown, is a battery on him, and the rider is justified in striking a person who wrongfully seizes the reins of his horse, and in using all the violence necessary to make him loose his hold. A wounding is where the violence is such that the flesh is opened; a mere scratch may constitute a wounding: 1 Burn, 312.

Even a mayhem is justifiable if committed in a party's own defence. But a person struck has merely a right to *defend* himself, and strike a blow in his defence, but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary he commits an assault and battery. And in no case should the battery be more than necessary for self defence: 1 Burn, 312; ss. 45, 46, 58, *ante*.

The mere offer of a person to strike another is sufficient to justify the latter's striking him; he need not stay till the other has actually struck him.

A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant and a servant in defence of his master; but in all these cases the battery must be such only as was necessary to the defence of the party or his relation, for if it were excessive, if it were greater than was necessary for mere defence, the prior offence will be no justification: s. 47, *ante*. So a person may lay hands upon another to prevent him from fighting, or committing a breach of the peace, using no unnecessary violence. 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.

Churchwardens and private persons are justified in gently laying their hands on those who disturb the performance of any part of divine service, and turning them out of church: 1 Burn, 314.

A parent may in a reasonable manner chastise his child or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, and a captain of a ship any of the crew who have mutinously or violently misconducted themselves: 1 Burn; ss. 55, 56, 58, *ante*.

So might a military officer order a moderate correction for disobedience of orders: 1 Burn, 314.

A party may justify a battery by showing that he committed it in defence of his possession, as, for instance, to remove the prosecutor out of his close or house,—or to remove a servant, who, at night, is so misconducting himself as to disturb the peace of the household,—or to remove a person out of a public house, if the party be misconducting himself, or to prevent him from entering the defendant's close or house,—to restrain him from taking or destroying his goods,—from taking or rescuing cattle, etc., in his custody upon a distress,—or to retake personal property improperly detained or taken away,—or the like: ss. 48 *et seq. ante*.

In the case of a trespass in law merely *without actual force*, the owner of the close, or house, etc., must first request the trespasser to depart, before he can justify laying his hands on him for the purpose of removing him; and even if he refuse he can only justify so much force as is necessary to remove him. But if the trespasser use force then the owner may oppose force to force; and in such a case, if he be assaulted or beaten he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer to a justification in defence of his possession it may be shown that the battery was excessive, or that the party assaulted, or some one by whose authority he acted, had a right of way or other easement over the close, or the like: 1 Burn, 313.

"It should be observed with respect to an assault by a man on a party endeavouring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such a case to oppose force by force; therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. If a person enters another's house with force and violence the owner of the house may justify turning him out, using no more force than is necessary, without a previous request to depart; but if the person enters quietly the other party cannot justify turning him out without previous request": 1 Russ. 1028; *see* ss. 53, *et seq. ante.*

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence; but a subsequent decision has established the contrary: R. v. Benfield, 2 Burr. 984.

There is a manifest distinction between endeavouring to turn a person out of a house into which he has previously entered quietly, and resisting a forcible attempt to enter; in the first case a request to depart is necessary but not in the latter. In a criminal prosecution by the wife of O., for assault made upon her in entering her husband's house, the defence was that she had no right to enter, and that her intention was to take away property which she had no legal right to take, but *held*, on a case reserved, that this would not justify the assault, there being no previous request made of her to leave the house, nor any statement of her intention, or an attempt to take anything: R. v. O'Neill, 3 P. & B. (*N.B.*) 49.

An indictment declaring that the prisoner did "beat, wound and ill-treat" A. was held to be substantially an

indictment for a common assault: R. v. Shannon, 23 N. B. Rep. 1.

If the charge is, as under s. 864, *post*, before the magistrate on a legal complaint, and the evidence goes to prove an offence committed which he has no jurisdiction to hear and determine, as if, on a complaint of an assault, the evidence go to show that a rape or assault with intent to commit a felony has been committed, he may, if he disbelieves the evidence as to the rape or intent, convict as to the residue of it of an assault: Wilkinson v. Dutton, 3 B. & S. 821; Anon, 1 B. & Ad. 382.

In this last case Lord Tenterden held that the magistrate had *found* that the assault was not accompanied by any attempt to commit felony, and that, *quoad hoc*, his decision was final.

In R. v. Walker, 2 M. & Rob. 446, Coltman, J., gave the same interpretation to the clause.

In R. v. Elrington, 1 B. & S. 688, it was held that the magistrate's certificate of dismissal, as under s. 865, 866 *post*, is a bar to an indictment for an unlawful assault occasioning actual bodily harm, arising out of the same circumstances: *see* Wemyss v. Hopkins, L. R. 10 Q. B. 378.

In R. v. Stanton, 5 Cox, 324, Erle, J., said that, in his opinion, a summary conviction before justices of the peace (in England, the law requires two) is a bar to an indictment for a felonious assault arising out of the same facts.

In R. v. Miles, 17 Cox, 9, Warb. Lead. Cas. 320, a conviction of assault was held to be, at common law, a bar to a subsequent indictment for unlawful wounding: *see* ss. 866 & 969, *post*. *See* Reed v. Nutt, 17 Cox, 86, 24 Q. B. D. 669, as to a magistrate granting a certificate illegally.

But a summary conviction for assault is no bar to a subsequent indictment for manslaughter, upon the death of the man assaulted consequent upon the same assault:

R. v. Morris, 10 Cox, 480; R. v. Basset, Greaves, Cons. Acts, 72; R. v. Friel, 17 Cox, 325.

Where an assault charged in an indictment and that referred to in a certificate of dismissal by a magistrate appear to have been on the same day it is *prima facie* evidence that they are one and the same assault, and it is incumbent on the prosecutor to show that there was a second assault on the same day if he alleges that such is the case. The defendant having appeared before the magistrate the recital in the certificate of the fact of a complaint having been made and of a summons having been issued is sufficient evidence of those facts: R. v. Westley, 11 Cox, 139.

When a question of title to lands arises before him the magistrate's jurisdiction is at an end, and he cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of a title to lands: R. v. Pearson, 11 Cox, 493; s. 842, *post*.

A person making a *bona fide* claim of right to be present as one of the public in a law court at the hearing of a suit is not justified in committing an assault upon a police constable and an official who endeavours to remove him. Such a claim of right does not oust the jurisdiction of the magistrate who has to try the charge of assault, and he may refuse to allow cross-examination and to admit evidence in respect of such a claim: R. v. Eardly, 49 J. P. 551.

By s. 864, *post*, a magistrate cannot now try summarily a charge of assault if either the person aggrieved or the accused objects thereto.

PART XXI.

RAPE AND PROCURING ABORTION.

DEFINITION.

266. Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, *or obtained by personating the woman's husband*, or by false and fraudulent representation as to the nature and quality of the act.

2. No one under the age of fourteen years can commit this offence.

"3. Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. R. S. C. c. 174, s. 226."

Sub-section 3 now forms s. 4*a*, in Part I. (amendment of 1893).

The words in italics reproduce the Imperial Act 48 & 49 V. c. 69. s. 4.

PUNISHMENT.

267. Every one who commits rape is guilty of an indictable offence and liable to suffer death, or to imprisonment for life. R. S. C. c. 162, s. 37. 24-25 V. c. 100, s. 48 (Imp.).

The repealed section enacted a minimum punishment of seven years.

ATTEMPT.

268. Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts to commit rape. R. S. C. c. 162, s. 38.

The repealed section enacted a minimum punishment of two years.

Rape and attempt to commit rape are not triable at quarter sessions, s. 540. *See* appendix to 2nd edit. of this book for a note on rape by Greaves.

Indictment.— that A. B. on in and upon one C. D., a woman, unlawfully and violently did make an assault and her the said C. D. violently and without her consent unlawfully did ravish and carnally know.

Averment of woman's age unnecessary: 2 Bishop, Cr. Proc. 954.

Rape has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will: 1 Russ. 904.

To constitute the offence there must be penetration, or *res in re*, in order to constitute the "carnal knowledge" which is a necessary part of the offence. But a very slight penetration is sufficient, though not attended with the deprivation of the marks of virginity: 1 Russ. 912.

A boy under fourteen years of age is presumed by law incapable to commit a rape, and therefore he cannot be guilty of it, nor of an assault with intent to commit it; and no evidence is admissible to show that, in point of fact, he could commit the offence of rape: *see* R. v. Read, 1 Den. 377. But on an indictment for rape he may be found guilty of a common assault or of an indecent assault: s. 713; R. v. Brimilow, 2 Moo. 122. A husband cannot be guilty of a rape upon his wife, but he may be guilty as an accessory before the fact or an aider and abettor to it: *see* R. v. Audley (Lord), 3 St. Tr. 402. The offence of rape may be committed though the woman at last yielded to the violence, if such her consent was forced by fear of death or by duress.

It will not be any excuse that the woman was first taken with her own consent if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher. Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury in favour of the party accused, especially in doubtful cases. The notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded: 1 Russ. 905.

Upon the trial of an indictment for rape upon an idiot girl the proper direction to the jury is that if they are satisfied that the girl was in such a state of idiocy as to

be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty: R. v. Barratt, 12 Cox, 498. In R. v. Fletcher, 10 Cox, 248, the law was so given, but the evidence of non-consent was declared insufficient. The accused upon such an indictment may now be found guilty of the offence provided for in s. 189, *ante*, if the evidence warrants it, s. 713.

If a woman is incapable of resisting it is no defence that she did not resist: R. v. Fletcher, 8 Cox, 131, Bell, 63; R. v. Camplin, 1 Den. 89; R. v. Flattery, 13 Cox, 388; R. v. Cardo, 17 O. R. 11. If a man has or attempts to have connection with a woman while she is asleep it is no defence that she did not resist, as she is then incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape: R. v. Mayers, 12 Cox, 311; R. v. Young, 14 Cox, 114.

It is clear that the party ravished is a competent witness. But the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony. Thus if she be of good fame; if she presently discovered the offence and made search for the offender; if she showed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the act was done were remote from inhabitants or passengers; if the party accused fled for it; these, and the like, are concurring circumstances which give greater probability to her evidence. But if, on the other hand, the witness be of evil fame, and stand unsupported by others; if, without being under the control or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining; if the place where the fact is alleged to have been committed was near to persons by whom she might probably have been heard, and yet she made no outcry; if she has given wrong descriptions of the

place; these, and the like circumstances, afford a strong though not conclusive presumption that her testimony is feigned: 1 Russ. 692.

The character of the prosecutrix as to general chastity may be impeached by *general* evidence, as by showing her general light character, etc., but evidence of connection with other persons than the prisoner cannot be received.

In R. v. Hodgson, R. & R. 211, the woman in the witness box was asked: Whether she had not before had connection with other persons, and whether she had not before had connection with a particular person (named). The court ruled that she was not obliged to answer the question. In the same case the prisoner's counsel offered a witness to prove that the woman had been caught in bed about a year before this charge with a young man. The court ruled that this evidence could not be received. These rulings were subsequently maintained by all the judges.

Although you may cross-examine the prosecutrix as to particular acts of connection with other men (and she need not answer the question unless she likes), you cannot, if she deny it, call witnesses to contradict her: R. v. Cockcroft, 11 Cox, 410; R. v. Laliberté, 1 S. C. R. 117.

But she may be cross-examined as to particular acts of connection with the prisoner, and if she denies them witnesses may be called to contradict her: R. v. Martin, 6 C. & P. 562; R. v. Riley, 16 Cox, 191, 18 Q. B. D. 481, Warb. Lead. Cas. 128.

On the trial of an indictment for an indecent assault, the defence being consent on the part of the prosecutrix, she denied on cross-examination having had intercourse with a third person, S. *Held*, that S. could not be examined to contradict her upon this answer. This rule applies to cases of rape, attempts to commit a rape, and indecent assaults in the nature of attempts to commit a rape: R. v. Holmes, 12 Cox, 137.

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death, but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused though never so innocent: 1 Hale, 634.

Upon an indictment under section 267, the jury may find the prisoner guilty of an attempt to commit rape under s. 268; R. v. Hapgood, 11 Cox, 471; or may find a verdict of common assault, or indecent assault.

Under s. 268, for an assault with intent to commit rape, the indictment may be as follows: in and upon one A. B., a woman (or girl), unlawfully did make an assault, with intent her, the said A. B., violently and unlawfully without her consent, to ravish and carnally know. (*Add a count for a common assault*), though it is not necessary.

If, upon trial for this offence, the offence under s. 267 be proved the defendant is not therefore entitled to an acquittal, s. 712, *post*.

On an indictment for an assault with intent to commit a rape Patteson, J., held that evidence of the prisoner having, on a prior occasion, taken liberties with the prosecutrix was not receivable to show the prisoner's intent; also, that in order to convict of assault with intent to commit rape the jury must be satisfied, not only that the prisoner intended to gratify his passion on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part: R. v. Lloyd, 7 C. & P. 318.

When a man is charged with rape all that the woman said to other persons in his absence shortly after the alleged offence is admissible in evidence: R. v. Wood, 14 Cox, 46; *see* R. v. Little, 15 Cox, 319.

In R. v. Gisson, 2 C. & K. 781, it was held that an acquittal on an indictment for a rape could not be successfully pleaded to a subsequent indictment for an assault

with intent to commit a rape, because a verdict for the attempt to commit the offence could not be received on an indictment charging the offence itself. But that case is not now to be followed. The case of R. v. Dungey, 4 F. & F. 99, is a clear authority that upon a trial for rape the defendant may be found guilty of an attempt to commit it. In fact there can now be no doubt upon this; s. 711, *post*, is clear. *See* cases cited under that section.

An assault with intent to commit rape is very different from an assault with intent to have an improper connection. The former is with intent to have connection by force and against the will of the woman: R. v. Stanton, 1 C. & K. 415; R. v. Wright, 4 F. & F. 967; R. v. Rudland, 4 F. & F. 495; R. v. Dungey, 4 F. & F. 99.

An indictment for an attempt to commit rape is always in the form of an assault with intent to commit rape, as in R. v. Riley, 16 Cox, 191, for instance. And in R. v. Dungey, *ubi supra*, the judge charged the jury that they could, on an indictment for rape, find the prisoner guilty of an assault with intent to commit rape.

In this Code, however, a difference is made between an attempt to commit an offence and an assault with intent to commit it; ss. 175-260.

In a case of John v. R., in British Columbia, upon a writ of error, the court held that, upon an indictment for rape, the prisoner had been lawfully convicted of an assault with intent to commit rape. That decision was upheld by the Supreme Court: John v. R., 15 S. C. R. 384.

In R. v. Wright, 4 F. & F. 967, the prisoner was indicted for rape and for assault with intent to commit rape. Under ss. 626 and 713, *post*, there is not the least room to doubt that this can now be done, whatever doubts may have existed in that case.

In a case of rape the counsel for the prosecution should not tell the jury that to acquit the prisoner is to find the

woman guilty of perjury: R. v. Rudland, and R. v. Puddick, 4 F. & F. 495, 497.

On trial for rape evidence was that of a woman alone which, in view of previous admissions and the circumstances, was unsatisfactory: *Held,* evidence was properly submitted to jury, but court directed that attention of Executive should be called to the case: R. v. Lloyd, 19 O. R. 352.

What is sufficient evidence? R. v. Bedere, 21 O. R. 189.

CARNALLY KNOWING A GIRL UNDER FOURTEEN

269. Every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife, *whether he believes her to be of or above that age or not.* 53 V. c. 37, s. 12 (*Amended*). 48-49 V. c. 69, s. 4 (Imp.).

The repealed section enacted a minimum punishment of five years; *see* remarks and form of indictment under next section.

The words in italics are not in the English Act. They are unnecessary. The girl there must be under thirteen. Proof of penetration is sufficient: R. v. Marsden, 17 Cox, 297.

ATTEMPT.

270. Every one who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped. 53 V. c. 37, s. 12. 48-49 V. c. 69, s. 4 (Imp.).

See s. 685 as to evidence of young children in trials under these two sections. This section 270 has no other effect but to reduce the punishment, which, without it, would be seven years' imprisonment, s. 528.

Indictment under s. 269.— in and upon one A. N., a girl under the age of fourteen years, to wit, of the age of twelve years, unlawfully did make an assault, and her, the said A. N., then and there did unlawfully and carnally know.

The evidence is the same as in rape, with the exception that the consent or non-consent of the girl is immaterial independently of the enactment contained in s. 261. *See* R. v. Brice, 7 Man. L. R. 627.

Upon the trial of an indictment under these clauses the jury may, under s. 713, find the defendant guilty of a common assault, or an indecent assault: R. v. Read, 1 Den. 377; R. v. Connolly, 26 U. C. Q. B. 317; R. v. Roadley, 14 Cox, 463; even if the girl assented: s. 261, *ante*.

Under s. 711, *post*, the defendant may be convicted, if indicted under s. 269, of an attempt to commit the offence charged, if the evidence warrants it: R. v. Ryland, 11 Cox, 101; R. v. Catherall, 13 Cox, 109; but a boy under fourteen cannot be convicted of such attempt: R. v. Waite, 17 Cox, 554.

An indictment for rape still lies for ravishing a girl under fourteen: R. v. Dicken, 14 Cox, 8; R. v. Ratcliffe, 15 Cox, 127.

Indictment that prisoner in and upon one J., a girl under fourteen, feloniously did make an assault, and her, the said J., then and there feloniously did unlawfully and carnally know and abuse, etc; evidence of consent; general verdict of guilty affirmed: R. v. Chisholm, Jacobs' Case, 7 Man. L. R. 613.

KILLING CHILD IN HIS MOTHER'S WOMB. (*New*).

271. Every one is guilty of an indictable offence and liable to imprisonment for life who causes the death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born.

2. No one is guilty of an offence who, by means which he in good faith considers necessary for the preservation of the life of the mother of the child, causes the death of any such child before or during its birth.

See ss. 219 & 239 *ante*: R. v. West, 2 C. & K. 784; R. v. Handley, 13 Cox, 79. This is a new offence. No verdict for concealment of birth can be given upon an indictment under this section, in the absence of an express enactment to allow it.

PROCURING ABORTION.

272. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses any

instrument or other means whatsoever with the like intent. R. S. C. c. 162, s. 47. 24-25 V. c. 100, s. 58 (Imp.).

WOMAN PROCURING HER OWN MISCARRIAGE.

273 Every woman is guilty of an indictable offence and liable to seven years' imprisonment who, *whether with child or not*, unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure miscarriage. R. S. C. c. 162, s. 47 (*Amended*). 24-25 V. c. 100, s. 58 (Imp.).

The words in italics are new.

SUPPLYING MEANS OF PROCURING ABORTION.

274. Every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child. R. S. C. c. 162, s. 48. 24-25 V. c. 100, s. 59 (Imp.).

Section 273, as it reads, is an absurdity. It ought to read as in the English Act, and s. 47, c. 162, R. S. C., "Every woman being with child."

Indictment for woman administering poison to herself, with intent or, etc. that C. D., late of on at and being then with child, with intent to procure her own miscarriage, did unlawfully administer to herself one drachm of a certain poison (*or noxious thing*) called (*or did unlawfully use a certain instrument or means*) to wit.

Indictment for administering poison to a woman, with intent to procure abortion.— that C. D. on unlawfully did administer to (*or cause to be taken by*) one S. P. one ounce weight of a certain poison, called (*or noxious thing called*) with intent then and thereby to cause the miscarriage of the said S. P.

Indictment for using instrument with the like intent. — unlawfully did use a certain instrument called a upon the person of one S. P., with intent then and thereby to cause the miscarriage of the said S. P.

In order to constitute an offence under s. 273, as it was in the repealed clause, the woman must be with child,

though not necessarily quick with child. The poison or other noxious thing must have been administered, or the instrument used, with the intent to procure the miscarriage. It must be proved, according to the fact stated in the indictment, that the woman administered to herself, etc., or that the defendant administered, etc., or caused to be taken, etc., the drug, as therein stated, and that the drug was noxious, or that the defendant used the instrument, *or other means*, mentioned in the manner described in the indictment: 1 Burn, 14.

Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix took it for that purpose in the prisoner's absence, this was held to be a causing of it to be taken within s. 272: R. v. Wilson, Dears. & B. 127; R. v. Farrow, Dears. & B. 164.

A man and woman were jointly indicted for feloniously administering to C. a noxious thing to the jurors unknown with intent to procure miscarriage. C., being in the family way, went to the male prisoner, who said he would give her some stuff to put her right, and gave her a light coloured medicine, and told her to take two spoonfuls till she became in pain. She did so and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L., and gave her some more of the stuff, which he said would take effect when she got there. They went together to L. and met the female prisoner, who said she had been down to the station several times the day before to meet them. C. then began to feel pain and told the female prisoner. Then the male prisoner told what he had given C. They all went home to the female prisoner's, and the male prisoner then gave C. another bottle of similar stuff in the female prisoner's presence, and told her to take it like the other. She did so and became very ill, and the next day had a miscarriage,

the female prisoner attending her and providing all things. *Held*, that there was evidence that the stuff administered was a noxious thing within the 24 & 25 V. c. 100, s. 58 (Imp.). Also that there was evidence of the female being an accessory before the fact, and a party, therefore, to the administering of the noxious thing: R. v. Hollis, 12 Cox, 463.

Under s. 272, the fact of the woman being pregnant is immaterial: R. v. Goodhall, 1 Den. 187. But the prisoner must have believed her to be pregnant, otherwise there could be no intent under the section. Under an indictment for this offence the prisoner may be convicted of an attempt to commit it: s. 711; *see* R. v. Cramp, 14 Cox, 390 & 401, and Warb. Lead Cas. 120.

Indictment under s. 274.— unlawfully did procure (*supply or procure*) a large quantity, to wit, two ounces of a certain noxious thing called savin, he the said (*defendant*) then well knowing that the same was then intended to be unlawfully used and employed with intent to procure the miscarriage of one A. N.

The drug supplied must be a poison or noxious thing, and the supplying an innoxious drug, whatever may be the intent of the person supplying it, is not an offence against the enactment: R. v. Isaacs, L. & C. 220.

In order to constitute the offence within the meaning of this section it is not necessary that the intention of employing the noxious drug should exist in the mind of the woman; it is sufficient if the intention to procure abortion exists in the mind of the defendant: R. v. Hillman, L. & C. 343.

The prisoner may be convicted of an attempt to commit this offence, upon an indictment under this section, s. 711.

Supplying a noxious thing with the intent to procure abortion is an offence under this section, whether the woman is pregnant or not: R. v. Titley, 14 Cox, 502.

Giving oil of savin to procure abortion is indictable: R. v. Stitt, 30 U. C. C. P. 30.

In R. v. Dale, 16 Cox, 703, upon the trial of an offence, as provided for in s. 272, *ante*, evidence was admitted that at various times, before and after the offence charged, the prisoner had caused other miscarriages by similar means.

See R. v. Whitchurch, 16 Cox, 743, 24 Q. B. D. 420, on a conspiracy to procure abortion.

PART XXII.

OFFENCES AGAINST CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION.

Definition.

275. Bigamy is—

(*a*) The act of a person who, being married, goes through a form of marriage with any other person *in any part of the world*; or

(*b*) The act of a person who goes through a form of marriage in *any part of the world* with any person whom he or she knows to be married; or

(*c*) The act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R. S. C. c 37, s. 10. (*The Act cited is on Railways*).

2. A "form of marriage" is any form either recognized as a valid form by the law of the place where it is gone through, or though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall for the purpose of this section be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage—

(*a*) *If he or she in good faith and on reasonable grounds believes his wife or her husband to be dead; or*

(*b*) If his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or

(*c*) If he or she has been divorced from the bond of the first marriage; or

(*d*) If the former marriage has been declared void by a court of competent jurisdiction. R. S. C. c. 161, s. 4.

4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage. R. S. C. c. 161, s. 4.

The words in italics settle the law as it was held to be heretofore by the decision in R. v. Tolson, 16 Cox, 629, 23 Q. B. D. 168, Warb. Lead. Cas. 72.

As to the competency of a colonial legislature to punish bigamy committed outside of the colony, *see* MacLeod v. The Attorney-General of New South Wales, 17 Cox, 341, [1891], A. C. 455; and R. v. Brierly, 14 O. R. 525; R. v. Topping, 7 Cox, 103.

PUNISHMENT.

276. Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every one who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. R. S. C. c. 161, s. 4. 53 V. c. 37, ss. 10, 11. 24-25 V. c. 100, s. 57 (Imp.).

Sub-section 2 is new.

Indictment.— that J. S. on at the parish of in the did marry one A. C., spinster, and her the said A. C. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A. C., as aforesaid, to wit, on the day at unlawfully did marry and take to wife one M. Y., and to her the said M. Y. was then and there married, the said A. C., his former wife, being then alive.

Bigamy is the offence of a husband or wife marrying again during the life of the first wife or husband. It is not strictly correct to call this offence *bigamy*; it is more properly denominated *polygamy*, i. e., having a plurality of wives or husbands at once, while bigamy according to the canonists consists in marrying two virgins successively, one *after* the death of the other, or in once marrying a widow.

Upon an indictment for bigamy, the prosecutor must prove: 1st, the two marriages; 2nd, the identity of the parties: Roscoe, 294.

The law will not, in cases of bigamy, presume a marriage valid to the same extent as in civil cases: R. v. Jacobs, 1 Moo. 140.

The first wife or husband is not a competent witness to prove any part of the case, but the second wife or husband is after the first marriage is established, for she or he is not legally a wife or husband: R. v. Ayley, 15 Cox, 328.

The first marriage must be a valid one. The time at which it was celebrated is immaterial, and whether celebrated in this country or in a foreign country is also immaterial: Archbold, 883.

If celebrated abroad it may be proved by any person who was present at it; and circumstances should also be proved from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated. Proof that a ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony, according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it so as to throw upon the defendant the *onus* of impugning its validity: R. v. Cresswell, 13 Cox, 126; *see* R. v. Savage 13 Cox 178; and R. v. Griffin, 14 Cox, 308; R. v. Brierly 14 O. R. 525.

In the case of R. v. McQuiggan, 2 L. C. R. note, 346, the proof of the first marriage was attempted to be made by the voluntary examination of the accused, taken before Thomas Clancy the committing magistrate, but this being irregular and defective its reception was successfully objected to by the counsel for the prisoner. The Crown then tendered the evidence of Mr. Clancy as to the story the prisoner told him when taken before him after his arrest. This the Court held to be good evidence, and allowed it to

go to the jury; this was the only evidence of the first marriage, the prisoner having on that occasion, as Mr. Clancy deposed, confessed to him that he was guilty of the offence as charged, and at the same time expressed his readiness to return and live with his first wife. The second marriage was proved by the evidence of the clergyman who solemnized it.

In R. v. Creamer, 10 L. C. R. 404, upon a case reserved, the Court of Queen's Bench ruled, that upon the trial of an indictment for bigamy the admission of the first marriage by the prisoner, unsupported by other testimony, is sufficient to support a conviction.

In R. v. Newton, 2 M. & Rob. 503: and R. v. Simmonsto, 1 C. & K. 164, it was held that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place: *contra*, R. v. Savage, 13 Cox, 178; R. v. Ray, 20 O. R. 212.

A first marriage, though *voidable*, if not absolutely *void* will support an indictment for bigamy: Archbold, 886: *see* R. v. Kay, 16 Cox, 292.

As to the second marriage it is immaterial whether it took place in Canada, or elsewhere, provided, if it took place out of Canada, the defendant be a subject of Her Majesty resident in Canada, whence he had left to commit the offence.

The offence will be complete, though the defendant assume a fictitious name at the second marriage: R. v. Allison, R. & R. 109; R. v. Rea, 12 Cox, 190.

Though the second marriage would have been void, in any case, as for consanguinity or the like, the defendant is guilty of bigamy: R. v. Brawn, 1 C. & K. 144.

In R. v. Fanning, 10 Cox, 411, a majority of the judges of the Irish Court of Criminal Appeal held, contrary to R.

v. Brawn, that to constitute the offence of bigamy the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage, but the Court of Criminal Appeal, by sixteen judges, in R. v. Allen, 12 Cox, 193, Warb. Lead. Cas. 75, since decided, as in R. v. Brawn, that the invalidity of the second marriage, on account of relationship, does not prevent its constituting the crime of bigamy. That is clearly so in Canada now by s. 275, *ante*.

It must be proved that the first wife was living at the time the second marriage was solemnized, which may be done by some person acquainted with her and who saw her at the time or afterwards: Archbold, 887. On a prosecution for bigamy it is incumbent on the prosecutor to prove that the husband or wife, as the case may be, was alive at the date of the second marriage. There is no presumption of law of the continuance of the life of the party for seven years after the date at which he or she was proved to have been alive. The existence of the party at an antecedent period may or may not afford a reasonable inference that he or she was alive at the date of the second marriage; but it is purely a question of fact for the jury: R. v. Lumley, 11 Cox, 274.

On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage she knew that he was alive, but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. It was held that upon this finding the conviction could not be supported: R. v. Briggs, Dears. & B. 98.

On this last case, Greaves, 1 Russ., 270, note 1, remarks: "The case was argued only on the part of the prisoner, and the court studiously avoided determining on which side the onus of proof as to the knowledge of the first husband being alive lay, and yet the point seems very clear.

It is plain that the latter part of the section in the 9 Geo. IV, c. 31, s. 22, and in the new Act is in the nature of a proviso. Now no rule is better settled than that if an exception comes by way of proviso, whether it occurs in a subsequent part of the Act, or in a subsequent part of the same section containing the enactment of the offence, it must be proved in evidence by the party relying upon it. Hence it is that no indictment for bigamy ever negatives the exceptions as contained in the proviso, and hence it follows that the proof of those exceptions lies on the prisoner; if it was otherwise, the prosecutor would have to prove more than he has alleged. Then the proviso in terms requires proof both of the absence of the party for seven years, *and* that the party shall not have been known by the prisoner to have been living within that time, and consequently it lies on the prisoner to give evidence of *both;* and as the Legislature has required proof of both, it never could have been intended that proof of the one should be sufficient evidence of the other. When, however, the prisoner has given evidence to negative his knowledge that the party is alive, the onus may be thrown on the prosecutor to shew that he had that knowledge; and in accordance with this view is the dictum of Willes, J., in R. v. Ellis, 1 F. and F. 309, that 'if the husband has been living apart from his wife for seven years, under such circumstances as to raise a probability that he supposed that she was dead when he was remarried, evidence may be necessary that he knew his first wife was alive.' As to the manner in which the case should be left to the jury, it should seem that the proper course is to ask them whether they are satisfied that the prisoner was married twice, and that the person whom he first married was alive at the time of the second marriage; and, if they are satisfied of these facts, to tell them that it then lies upon the prisoner to satisfy them that there was an absence for seven years, and also that during the whole of those seven years he was ignorant that his first wife was alive, and that unless he has proved both those facts to their

satisfaction they ought to convict him. It is perfectly clear that the question is not whether he knew that his first wife was alive *at the time of the second marriage*, for he may have known that she was alive within the seven years, and yet not know that she was alive at the time of the second marriage, and, if he knew that she was alive *at any time within the seven years*, he ought to be convicted."

If it appears that the prisoner and his first wife had lived apart for seven years before he married again mere proof that the first wife was alive at the time of the second marriage will not warrant a conviction, but some affirmative evidence must be given to show that the accused was aware of this fact: R. v. Curgenwen, 10 Cox, 152; R. v. Fontaine, 15 L. C. J. 141; *see* R. v. Jones, 15 Cox, 284.

In 1863 the prisoner married Mary Anne Richards, lived with her about a week and then left her. It was not proved that he had since seen her. In 1867 he married Elizabeth Evans, his first wife being then alive. The court left it to the jury to declare if they were satisfied that the prisoner knew his first wife was alive at the time of the second marriage, and ruled that positive proof on that point was not absolutely necessary. The prisoner was found guilty, and on a case reserved the conviction was affirmed: R. v. Jones, 11 Cox, 358.

In R. v. Horton, 11 Cox, 670, Cleasby, B., summed up as follows: "It is submitted that, although seven years had not passed since the first marriage, yet if the prisoner reasonably believed (which pre-supposes proper grounds of belief) that his first wife was dead he is entitled to an acquittal. It would press very hard upon a prisoner if under such circumstances he could be convicted, when it appeared to him as a positive fact that his first wife was dead. The case of R. v. Turner, 9 Cox, 145, shows that this was the view of Baron Martin, a judge of as great experience as any on the bench now, and I am not disposed to act contrary to his opinion. You must find the prisoner

guilty, unless you think that he had fair and reasonable grounds for believing, and did honestly believe, that his first wife was dead." The jury returned a verdict of guilty, and the judge sentenced the prisoner to imprisonment for three days, remarking that he was quite satisfied with the verdict, and that he should inflict a light sentence, as he thought the prisoner really believed his first wife was dead although he was not warranted in holding that belief: *see* R. v. Moore, 13 Cox, 544.

On an indictment for bigamy a witness proved the first marriage to have taken place eleven years ago, and that the parties lived together some years, but could not say how long, it might be four years. Wightman, J., said: "How is it possible for any man to prove a negative? How can I ask the prisoner to prove that he did not know that his wife was living?" There is no evidence that the prisoner knew that his wife was alive, and there is no offence proved: R. v. Heaton, 3 F. & F. 819.

In R. v. McQuiggan, 2 L. C. R. 340, the court ruled that in an indictment for bigamy, under the Canadian Statute, it is absolutely necessary, when the second marriage has taken place in a foreign country, that the indictment should contain the allegations that the accused is a British subject, that he is or was resident in this Province, and that he left the same with intent to commit the offence: *see also* R. v. Pierce, 13 O. R. 226.

On a trial for bigamy the Crown having proved the prisoner's two marriages it is for him then to prove the absence of his first wife during seven years preceding the second marriage; and when such absence is not proved it is not incumbent on the Crown to establish the prisoner's knowledge that the first wife was living at the time of the second marriage: R. v. Dwyer, 27 L. C. J. 201: *see* R. v. Willshire, 14 Cox, 541.

The prisoner was convicted of bigamy under 32 & 33 V. c. 20, s. 58. The first marriage was contracted in Toronto

and the second in Detroit. The judge at the trial directed the jury that if prisoner was married to his first wife in Toronto and to his second in Detroit they should find him guilty. *Held*, a misdirection, and that the jury should have been told, in addition, that before they found him guilty they ought to be satisfied of his being, at the time of his second marriage, a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence. *Held*, also, that it was incumbent on the Crown to prove these facts. *Quære*, *per* Wilson, C.J., whether the trial should not have been declared a nullity: R. v. Pierce, 13 O. R. 226.

FEIGNED MARRIAGES.

277. Every one is guilty of an indictable offence and liable to *seven* years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage. R. S. C. c. 161, s. 2.

The punishment was *two* years by the repealed section. The alteration gives twelve challenges instead of four.

See s. 684, *post*, as to evidence on a prosecution under this enactment.

Under the repealed statute any offence under the corresponding section had to be prosecuted within a year: that limitation of time has not been re-enacted.

This offence was first created by 49 V. c. 52, s. 3. The male offender only is punishable.

POLYGAMY.

278. Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who—

(*a*) Practices, or, by the rights, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

(i) any form of polygamy;

(ii) any kind of conjugal union with more than one person at the same time;

(iii) what among the persons commonly called Mormons is known as spiritual or plural marriage;

(iv) who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union; or

(*b*) Celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (*a*) of this section; or

(*c*) Procures, enforces, enables, is a party to, or assists in the compliance with or carrying out of, any such form, rule or custom which so purports; or

(*d*) Procures, enforces, enables, is a party to, or assists in the execution of, any such form of contract which so purports, or the giving of any such consent which so purports. 53 V. c. 37, s. 11.

As to evidence in trials for offences against this section: *see* s. 706, *post*.

See R. v. Labrie, M. L. R. 7 Q. B. 211, where it was held that mere cohabitation is not an offence punishable under this enactment. Also The People v. Mosher 2 Parker 195. In R. v. Liston, Toronto, April, 1893 (unreported), Armour, C.J., also held that adultery is not indictable under the above enactment.

SOLEMNIZATION OF MARRIAGE WITHOUT AUTHORITY.

279. Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who—

(*a*) Without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage; or

(*b*) Procures any person to solemnize any marriage knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony. R. S. C. c. 161, s. 1. 4 Geo. IV. c. 76, s. 21 (Imp.).

Limitation two years, s. 551. There was none under the repealed statute.

Indictment.— that A. B., on at without lawful authority, did unlawfully solemnize (*or pretend to solemnize*) a marriage between one C. D. and one M. N.

See R. v. Ellis, 16 Cox, 469.

SOLEMNIZING A MARRIAGE CONTRARY TO LAW.

280. Every one is guilty of an indictable offence and liable to a fine, or to one year's imprisonment, who, being lawfully authorized, knowingly and

wilfully solemnizes any marriage in violation of the laws of the province in which the marriage is solemnized. R. S. C. c. 161, s. 3.

A limitation of two years has not been re-enacted.

Indictment.— that A. B., at on being a clergyman of and lawfully authorized to marry, did unlawfully solemnize a marriage between one C. D., and one E. F., before proclamation of banns in violation of the laws of the Province of in which the said marriage was solemnized.

ABDUCTION.

281. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to marry or carnally know any woman, *whether married or not*, or with intent to cause any woman to be married to or carnally known by any other person, takes away or detains any woman of any age against her will. R. S. C. c. 162, s. 43 (*Amended*). 24-25 V. c. 100, s. 54 (Imp.).

The words in italics are new.

The words "by force" were inserted before "takes away" in the repealed clause; *see* notes under next section.

Indictment.— unlawfully did take away (*or detain*) one A. B., against her will, with intent her, the said A. B., to marry (*or*) *(If the intent is doubtful, add a count stating it to be to "carnally know," or to cause her to be married to one N. S., or to some persons to the jurors unknown, or to cause her to be carnally known by, etc.)*: 1 Burn, 12.

A verdict for assault or for an attempt to commit the offence charged, may be given, if the evidence warrants it: ss. 711, 713, *post*.

ABDUCTION.

282. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, *with intent to marry or carnally know* any woman, or with intent to cause any woman to be married or carnally known by any person—

(*a*) from motives of lucre takes away or detains against her will any such woman of any age who has any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or who is a presumptive heiress or co-heiress or presumptive next of kin to any one having such interest; or

(*b*) fraudulently allures, takes away or detains any such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, *with intent to marry or carnally know her*.

2. Every one convicted of any offence defined in this section is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress or next of kin; and if any such marriage takes place such property shall, upon such conviction, be settled in such manner as any court of competent jurisdiction, upon any information at the instance of the Attorney-General appoints. R. S. C. c. 162. s. 42. 24-25 V. c. 100, s. 53 (Imp.).

The words in italics in s-s. (*b*) are a repetition.

"Attorney-General" defined, s. 3.

On the trial of an indictment for an offence under s-s. (*b*) of this section, it is not necessary to prove that the accused knew that the girl he abducted had an interest in any property: R. v. Kaylor, 1 Dor. Q. B. R. 364.

It is not necessary that an actual marriage or defilement should take place. Under the first part of this section, the taking or detaining must be *from motives of lucre* and *against the will of the woman*, coupled with an intent to marry or carnally know her or cause her to be married or carnally known by any other person.

Indictment under (*a*).— from motives of lucre, did unlawfully take away and detain ("*take away or detain*") one A. N. against her will, she, the said A. N., then having a certain present and absolute interest in certain real estate (*any interest, whether legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate*) with intent her, the said A. N., to marry (*or carnally know her, or cause her to be married or carnally known by*). (*Add a count stating generally the nature of some part of the property and, if the intent be doubtful, add counts varying the intent.*) *See* another form, in 8 Chit. C. L. 818.

Indictment under (*b*).— fraudulently allured (*took away or detained*) one A. B., out of the possession and against the will of C. D., her father, she, the said A. B.,

then being under the age of twenty-one years, and having a certain present interest in with intent, her, the said A. B., to marry (*or carnally know, or cause to be married or, etc., etc., etc.*) (*Add counts, if necessary, varying the statement as to the property, possession, or intents.*)

Under the second part of the section the offence consists in the fraudulent allurement of a woman under twenty-one out of the possession of or against the will of her parent or guardian, coupled with an intent to marry or carnally know her, or cause her to be married or carnally known by another person, but, for this offence, no motives of lucre are mentioned, nor should it have been committed against the will of the woman, though she must be an heiress, or such a woman as described in the first lines of this section.

The taking under the first part of this section must be against the will of the woman; but it would seem that, although it be with her will, yet, if that be obtained by fraud practised upon her, the case will be within the Act; for she cannot whilst under the influence of fraud be considered to be a free agent.

If the woman be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, the offence is complete, because if she so refuse, she may from that time as properly be said to be taken against her will as if she had never given her consent at all, for, till the force was put upon her, she was in her own power: 1 Burn, 8.

Moveover the *detaining against* her will is by itself an offence.

It seems, also, that it is not material whether a woman so taken contrary to her will at last consents thereto or not, for if she were in force at the time the offence is complete at the time of the taking, and the offender is not to escape from the provisions of the statute by having prevailed over the weakness of the woman by such means.

The second part of this section expressly contemplates the case of a girl, under twenty-one, whose co-operation has been obtained by influence over her mind, and who has been taken out of the possession of her parent or guardian by means of a fraud practised upon them and against their will, or by force, against their will, but with her consent. If a girl, under twenty-one, is taken away or detained against her own will, or her consent is obtained through fear, that case would be within the first part of this section. The woman, though married, may be a witness against the offender: Archbold, 700.

"If, therefore," says Taylor, on Evidence, par. 1236, "a man be indicted for the forcible abduction of a woman with intent to marry her, she is clearly a competent witness against him if the force were continuing against her till the marriage. Of this last fact also she is a competent witness, and the better opinion seems to be that she is still competent, notwithstanding her subsequent assent to the marriage and her voluntary co-habitation; for otherwise, the offender would take advantage of his own wrong."

Under s. 711 the prisoner may be found guilty of an attempt to commit the offence charged and punished under s. 528.

Under s. 713 the prisoner may be found guilty of an assault, if the evidence warrants such finding.

ABDUCTION—GIRL UNDER SIXTEEN.

283. Every one is guilty of an indictable offence and liable to *five* years' imprisonment who unlawfully takes or causes to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

2. *It is immaterial whether the girl is taken with her own consent or at her own suggestion or not.*

3. *It is immaterial whether or not the offender believed the girl to be of or above the age of sixteen.* R. S. C. c. 162, s. 44 (*Amended*). 24-25 V. c. 100, s. 55, and 48-49 V. c. 69, s. 7 (Imp.).

Sub-sections. 2 and 3 are new enactments though not new law. Fine, s. 958.

The intent to marry or carnally know is not an ingredient of this offence. The only intent which is material is the intent to deprive the parent or legal guardian of the possession of the child. No motives of lucre are necessary. A woman may be guilty of this offence.

It is immaterial whether the girl consents or not, and the taking need not be by force, actual or constructive: R. v. Mankletow, 1 Russ. 954, Dears. 159. Where a parent countenances the loose conduct of the girl the jury may infer that the taking is not against the parent's will. Ignorance of the girl's age is no defence: 1 Russ. 952; R. v. Robins, 1 C. & K. 456. It is not necessary that the taking away should be for a permanency; it is sufficient if for the temporary keeping of the girl: R. v. Timmins, Bell, 276.

On an indictment for abducting a girl under sixteen years of age it appeared that the girl, when abducted, had left her guardian's house for a particular purpose with his sanction: *Held*, that she had not ceased to be in his possession under the statute: R. v. Mondelet, 21 L. C. J. 154; *see* R. v. Henkers, 16 Cox, 257.

On a trial for taking an unmarried girl under the age of sixteen out of the possession of her guardian:

Held, 1st. That evidence of her being badly treated by her guardian is inadmissible. 2nd. That secondary evidence of the age of the child is admissible. 3rd. That in this case the defendant was not guilty of taking the child out of the possession of the guardian: R. v. Hollis, 8 L. N. 229.

To pick up a girl in the streets and take her away is not to take her out of the possession of any one. The prisoner met a girl under sixteen years of age in a street, and induced her to go with him to a place at some distance, where he seduced her and detained her for some hours. He then took her back to where he met her, and she returned home to her father. In the absence of any evi-

dence that the prisoner knew, or had reason for knowing, or that he believed that the girl was under the care of her father at the time, *held* by the court of Criminal Appeal that a conviction under this section could not be sustained: R. v. Green, 3 F. & F. 274; R v. Hibbert, 11 Cox, 246.

One who takes an unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother is guilty of this offence, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go: R. v. Booth, 12 Cox, 231; R. v. Kipps, 4 Cox, 167.

The defence in Booth's case was that the prisoner, actuated by religious and philanthropic motives, had taken the girl from her parents in order to save her from seclusion in a convent. He was found guilty and sentenced.

A girl who is away from her home is still in the custody or possession of her father, if she intends to return; it is not necessary to prove that the prisoner knew the girl to be under sixteen; the fact of the girl being a consenting party cannot absolve the prisoner from the charge of abduction; this section is for the protection of parents: R. v. Mycock, 12 Cox, 28; R. v. Olifier, 10 Cox, 402; R. v. Miller, 13 Cox, 179.

Indictment.— unlawfully did take (*or cause to be taken*) one A. B. out of the possession and against the will of E. F., her father, she, the said A. B., being then an unmarried girl, and under the age of sixteen years, to wit, of the age of , etc. (*If necessary add a count stating E. F. to be a person having the lawful care and charge of the said A. B., or that the defendant unlawfully did cause to be taken one*): *see* R. v. Johnson, 15 Cox, 481.

It is no defence to an indictment under this section that the prisoner believed the girl to be eighteen: R. v. Prince, 13 Cox, 138, Warb. Lead. Cas. 89.

It was held in R. v. Bishop, 5 Q. B. D. 259, that under a statute which prohibits the receiving of lunatics for treatment in a house not duly licensed, the owner of a house who had received lunatics was guilty of the offence created by the statute, though the jury found that he believed honestly and on reasonable grounds that the persons received were not lunatics.

"I do not think that the maxim as to the *mens rea* has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowledge is of the essence of the offence created": *Per* Stephen, J., in Cundy v. LeCocq, 13 Q. B. D. 207.

See R. v. Tolson, 16 Cox, 629, 23 Q. B. D. 168, as to *mens rea*; also Betts v. Armstead, 16 Cox, 418, 20 Q. B. D. 771; Ford v. Wiley, 16 Cox, 683, 23 Q. B. D. 203; Wood v. Burgess, 16 Cox, 729; Pain v. Boughtwood, 16 Cox, 747; and cases under s. 14, *ante*.

STEALING CHILDREN UNDER FOURTEEN.

284. Every one is guilty of an indictable offence and liable to seven years imprisonment who, with intent to deprive any parent or guardian, or other person having the lawful charge, of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child, unlawfully—

(*a*) takes or entices away or detains any such child; or

(*b*) receives or harbours any such child knowing it to have been dealt with as aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child. R. S. C. c. 162, s. 45 (*Amended*). 24-25 V. c. 100, s. 56 (Imp.).

The words "by force or fraud" were in the repealed clause.

See R. v. Johnson, 15 Cox, 481, Warb. Lead. Cas. 91; and R. v. Barrett, 15 Cox, 658.

Indictment.— unlawfully did take away *(take away, or entice away, or detain)* one A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to deprive one A. S., the father of the said A. N., of the possession of the said A. N., his said child, against . And the jurors that the said afterwards, to wit, on the day and year aforesaid, unlawfully did take away *(or etc.,)* the said A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to steal, take and carry away divers articles, that is to say then being upon and about the person of the said child. *(Add counts stating that the defendant did entice away,* or *did detain, if necessary).*

Upon the trial of any offence contained in this section the defendant may, under s. 711, be convicted of an attempt to commit the same.

All those claiming a right to the possession of the child are specially exempted from the operation of this section, by s-s. 2.

PART XXIII.

DEFAMATORY LIBEL.

Definition.

285. A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person to whom it is published.

2. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

See remarks under s. 302.

PUBLISHING DEFINED.

286. Publishing a libel is exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person.

PUBLISHING UPON INVITATION.

287. No one commits an offence by publishing defamatory matter on the invitation or challenge of the person defamed thereby, nor if it is necessary to publish such defamatory matter in order to refute some other defamatory statement published by that person concerning the alleged offender, if such defamatory matter is believed to be true, and is relevant to the invitation, challenge or the required refutation, and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

PUBLISHING IN COURTS, ETC., ETC., ETC.

288. No one commits an offence by publishing any defamatory matter, in any proceedings held before or under the authority of any court exercising judicial authority, or in any inquiry made under the authority of any statute or by order of her Majesty, or of any of the departments of Government, Dominion or provincial.

PUBLISHING PARLIAMENTARY PAPERS, ETC., ETC.

289. No one commits an offence by publishing to either the Senate or House of Commons, or to any Legislative Council, Legislative Assembly or House of Assembly, defamatory matter contained in a petition to the Senate, or House of Commons, or to any such Council or Assembly, or by publishing by order or under the authority of the Senate or House of Commons, or of any such Council or Assembly, any paper containing defamatory matter or by publishing, in good faith and without ill-will to the person defamed, any extract from or abstract of any such paper.

See s. 705, *post*, and ss. 6 & 7, c. 163, R. S. C. p. 306, *post*.

PROCEEDINGS OF PARLIAMENT AND COURTS, ETC., 51-52 V. c. 64 (IMP.).

290. No one commits an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of any such Council or Assembly, or any committee thereof, or of the public proceedings preliminary or final heard before any court exercising judicial authority, nor by publishing, in good faith, any fair comment upon any such proceedings.

PROCEEDINGS OF PUBLIC MEETINGS (*New*).

291. No one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if the meeting is lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit, and if the defendant does not refuse to insert in a conspicuous place in the newspaper in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor.

FAIR DISCUSSION.

292. No one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit.

FAIR COMMENT.

293. No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs.

2. No one commits an offence by publishing fair comments on any published book or other literary production, or any composition or work of art or performance publicly exhibited, or any other communication made to the public on any subject, if such comments are confined to criticism on such book or literary production, composition, work of art, performance or communication.

SEEKING REMEDY FOR GRIEVANCE.

294. No one commits an offence by publishing defamatory matter for the purpose, in good faith, of seeking remedy or redress for any private or public wrong or grievance from a person who has, or is reasonably believed by the person publishing to have, the right or be under obligation to remedy or redress such wrong or grievance, if the defamatory matter is believed by him to be true, and is relevant to the remedy or redress sought, and such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

ANSWER TO INQUIRIES.

295. No one commits an offence by publishing, in answer to inquiries made of him, defamatory matter relating to some subject as to which the person by whom, or on whose behalf, the inquiry is made has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, if such matter is published for the purpose, in good faith, of giving information in respect thereof to that person, and if such defamatory matter is believed to be true, and is relevant to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

GIVING INFORMATION.

296. No one commits an offence by publishing to another person defamatory matter for the purpose of giving information to that person with respect to some subject as to which he has, or is, on reasonable grounds, believed to have, such an interest in knowing the truth as to make the conduct of the person giving the information reasonable under the circumstances: Provided that such defamatory matter is relevant to such subject, and that it is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true.

See Coxhead v. Richards, 2 C. B. 569; Robshaw v. Smith, 38 L. T. N. S. 424; R. v. Perry, 15 Cox, 169.

RESPONSIBILITY OF PROPRIETOR OF NEWSPAPER OR OF SELLER OF A LIBEL.

297. Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such

presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part.

2 General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter, or continued such general authority knowing that it had been exercised by inserting defamatory matter in any number or part of such newspaper.

3. No one is guilty of an offence by selling any number or part of such newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper. R. S. C. c. 163, s. 5 (*Amended*).

"Newspaper" defined, s. 3, *ante*.

SELLING LIBELS, ETC.

298. No one commits an offence by selling any book, magazine, pamphlet or other thing, whether forming part of any periodical or not, although the same contains defamatory matter, if, at the time of such sale, he did not know that such defamatory matter was contained in such book, magazine, pamphlet or other thing.

2. The sale by a servant of any book, magazine, pamphlet or other thing, whether periodical or not, shall not make his employer criminally responsible in respect of defamatory matter contained therein unless it be proved that such employer authorized such sale knowing that such book, magazine, pamphlet or other thing contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical.

WHEN TRUTH IS A DEFENCE.

299. It shall be a defence to an indictment or information for a defamatory libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published, and that the matter itself was true. R. S. C. c. 163, s. 4.

See s. 634, p. 305, *post*.

EXTORTION BY DEFAMATORY LIBEL.

300. Every one is guilty of an indictable offence and liable to *two years'* imprisonment, or to a fine not exceeding six hundred dollars, or to both, who publishes or threatens to publish, or offers to abstain from publishing, or offers to prevent the publishing of, a defamatory libel with intent to extort any money or to induce any person to confer upon or procure for any person any appointment or office of profit or trust, *or in consequence of any person having been refused "any such money," appointment or office.* R. S. C. c. 163, s. 1 (*Amended*). 6-7 V. c. 96, s. 3 (Imp.).

PUNISHMENT OF DEFAMATORY LIBEL WITH SCIENTER.

301. Every one is guilty of an indictable offence and liable to *two years'* imprisonment or to a fine not exceeding four hundred dollars, or to both, who publishes any defamatory libel knowing the same to be false. R. S. C. 163, s. 2.

PUNISHMENT OF DEFAMATORY LIBEL.

302. Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel. R. S. C. c. 163, s. 3.

All of these sections from s. 285 are taken, with the exception of s. 291, from the Imperial Draft Code of 1879, which the commissioners reported to be a re-enactment of the existing law. On ss. 297 & 298 they remark, however, that they have made some alteration so as to meet a difference of judicial opinion on the construction of the corresponding enactments in 6 & 7 V. c. 96, citing R. v. Holbrook, 4 Q. B. D. 42.

The Imperial statutes on libel by newspapers are 44 & 45 V. c. 60, and 51 & 52 V. c. 64.

The costs of showing cause against a rule for the filing of an information are covered by s. 833, p. 306, *post*: R. v. Steel, 18 Cox, 159.

Indictment for a falsedefamatory libel.— . . . . that J. S., unlawfully, and maliciously intending to injure, and prejudice one J. N., and to deprive him of his good name and reputation, and to bring him into public contempt or ridicule and disgrace, on . . . , unlawfully and maliciously did write and publish, and cause and procure to be written and published, a false and defamatory libel, in the form of a letter directed to the said J. N. (*or, if the publication were in any other manner, omit the words, "in the form," etc.*), containing divers false and defamatory matters and things of and concerning the said J. N., and of and concerning etc., (*here insert such of the subjects of the libel as it may be necessary to refer to by the innuendoes, in setting out the libel*), according to the tenor and effect following, that is to say (*here set out the libel, together with such innuendoes as may be necessary to render it intelligible*), he, the said

J. S., then well knowing the said defamatory libel to be false : *see* form H, under s. 611 & s. 615, p. 304, *post.*

Imprisonment not exceeding two years, and fine, s. 301. If the prosecutor fail to prove the *scienter* the defendant may nevertheless be convicted of publishing a defamatory libel, and punished by fine, or imprisonment not exceeding one year, or both : s. 302 ; Boaler v. R. 16 Cox, 488, 21 Q. B. D. 284. The defendant may plead, in addition to the plea of not guilty, that the matters charged were true, and that it was for the public benefit that they should be published, setting forth the particular facts by reason of which the publication was for the public benefit.

The offence of libel is not triable at quarter sessions : s. 540.

The defendant may allege and prove the truth of the libel, in the manner and subject to the conditions mentioned in s. 299.

The following may be the form of the special plea : And for a further plea in this behalf, the said J. S. saith that Our Lady the Queen ought not further to prosecute the said indictment against him, because he saith that it is true that (*etc., alleging the truth of every libellous part of the publication*) ; and the said J. S. further saith, that before and at the time of the publication in the said indictment mentioned (*state here the facts which rendered the publication of benefit to the public*) ; by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published. And this, etc. This plea may be pleaded with the general issue. Evidence that the identical charges contained in a libel had, before the time of composing and publishing the libel which is the subject of the indictment, appeared in another publication which was brought to the prosecutor's knowledge, and against the publisher of which he took no legal proceedings, is not admissible under this section : R. v. Newman Dears. 85, 1 E. & B. 268. Where the plea con-

tains several charges, and the defendant fails in proof of any of the matters alleged in it, the jury must of necessity find a verdict for the crown; and the court, in giving judgment, is bound to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and form its own conclusion on the whole case.

The replication may be as follows:—And as to the plea of the said J. S., by him secondly above pleaded, the said A. B. (the clerk of assize or clerk of the peace) saith that by reason of anything in the said second plea alleged, Our said Lady the Queen ought not to be precluded from further prosecuting the said indictment against the said J. S., because he saith, that he denies the said several matters in the said second plea alleged, and saith that the same are not, nor are nor is any or either of them, true. And this he, the said A. B., prays may be inquired of by the country, etc. And the said J. S. doth the like. Therefore, etc.

Indictment for threatening to publish a defamatory libel, etc., with intent to extort money under s. 300.—unlawfully did threaten one J. N. to publish a certain libel of and concerning him the said J. N. ("*if any person publishes, or threatens to publish, any libel upon any other person, or offers to abstain from publishing, or offers to prevent the publishing of a defamatory libel*), with intent thereby then to extort money from the said J. N. ("*with intent to extort any money, or with intent to induce any person to confer upon or procure for any person any appointment or office of profit or trust, or in consequence of any person having been refused any such money, appointment or office*"). If it be doubtful whether the matter threatened to be published be libellous, add a count charging that the defendant "did propose to the said J. N. to abstain from printing and publishing a certain matter and thing touching the said J. N. (*or one J. F.*) with intent, etc."

What is a libel? Duties of grand jurors on an indictment for libel: 10 L. N. 361.

Information for a libel: *Ex parte* Gugy, 8 L. C. R. 353.

Under s. 299 the magistrate has no jurisdiction to receive evidence of the truth of the libel upon an information: R. v. Carden, 5 Q. B. D. 1, 14 Cox, 359.

In a case of libel it is no ground to change the venue that many of the defendant's witnesses reside at a distance, and the defendant has no funds to bring them to that venue: R. v. Casey, 13 Cox, 614.

On s. 299 *see* R. v. Laurier, 11 R. L. 184; on s. 297 *see* R. v. Holbrook, 3 Q. B. D. 60, 4 Q. B. D. 42, 13 Cox, 650, 14 Cox, 185. As to right of the Crown to set aside jurors in cases of libel: *see* R. v. Patteson, 36 U. C. Q. B. 129, and R. v. Maguire, 13 Q. L. R. 99; and s. 669, *post*.

It must be proved upon an indictment against the proprietor of a newspaper that the defendant was proprietor or publisher of the journal at the time of the publication of the libel. That he is such at the time of the trial is not sufficient: R. v. Sellars, 6 L. N. 197.

Under s. 634, p. 305, *post*, *see* R. v. Dougall, 18 L. C. J. 85.

The defendant was indicted for a malicious libel, and specially pleaded the truth of the libel as well as the plea of not guilty. Under this plea he endeavoured to prove justification. *Held*, that evidence was not admissible, as, under the statute, to be allowed to justify, the defendant has to plead not only that the publication was true, but also that it was made for the public good: R. v. Hickson, 3 L. N. 139; s. 299, *ante*.

See R. v. Labouchere, 14 Cox, 419, as to the sufficiency of a plea of justification, and R. v. Creighton, 19 O. R. 339.

As to what constitutes a guilty knowledge under s. 301, and that it is for the jury to decide under a plea of justifi-

cation if the statement complained of is true, and if it was published for the public benefit: *see* R. v. Tassé, 8 L. N. 98.

No action for libel by a wife against her husband: R. v. Lord Mayor, 16 Q. B. D. 772, 16 Cox, 81.

On an accusation for libel it is no defence that the libel was published with "no personal malice": R. v. "The World," 13 Cox, 305.

The truth of a seditious or blasphemous libel cannot be pleaded to an indictment for such libel. S. 299, *ante*, of the Act does not apply to such libels, but s. 297 applies: R. v. Bradlaugh, 15 Cox, 217; R. v. Ramsay, 15 Cox, 231; *Ex parte* O'Brien, 15 Cox, 180.

Held, 1. A criminal information (for libel) will not be granted except in case of a libel on a person in authority, and in respect of duties pertaining to his office.

2. Where a libel was directed against M., who was at the time attorney general, but alleged improper conduct upon his part when he was a judge, an information was refused.

3. The applicant for a criminal information must rely wholly upon the court for redress, and must come there entirely free from blame.

4. Where there is foundation for a libel, though it falls far short of justification, an information will not be granted: R. v. Biggs, 2 Man. L. R. 18.

See ss. 634 & 719, p. 805, *post*, as to plea of justification and trial, and R. v. Adams, 16 Cox, 544, 22 Q. B. D. 66, where an obscene letter sent to a young woman was held to constitute a defamatory libel.

PROCEDURE SECTIONS ON LIBEL.

Form of Indictment.

615. No count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof: Provided that the court may order that a particular shall be furnished by the prosecutor stating what passages in

such book, pamphlet, newspaper, printing or writing are relied on in support of the charge.

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment showing how that matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo.

PLEA OF JUSTIFICATION.

634. Every one accused of publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matters charged should be published in the manner and at the time when they were published. Such plea may justify the defamatory matter in the sense specified, if any, in the count, or in the sense which the defamatory matter bears without any such specification; or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each as if two libels had been charged in separate counts.

2. Every such plea must be in writing, and must set forth the particular fact or facts by reason of which it was for the public good that such matters should be so published. The prosecutor may reply generally denying the truth thereof.

3. The truth of the matters charged in an alleged libel shall in no case be inquired into without such plea of justification unless the accused is put upon his trial upon any indictment or information charging him with publishing the libel knowing the same to be false, in which case evidence of the truth may be given in order to negative the allegation that the accused knew the libel to be false.

4. The accused may, in addition to such plea, plead not guilty and such pleas shall be inquired of together.

5. If when such plea of justification is pleaded the accused is convicted, the court may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by the plea. R. S. C. c. 174, ss. 148, 149, 150 & 151.

TRIAL IN PROVINCE WHERE NEWSPAPER PUBLISHED.

640. (2) Every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed. 51 V. c. 44, s. 2.

JUROR CANNOT BE ORDERED TO STAND ASIDE.

669. The right of the Crown to cause any juror to stand aside until the panel has been gone through shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel. R. S. C. c. 174, s. 165.

TRIAL AND VERDICT.

719. On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon

the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury on the matter in issue as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do; and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of this Act. R. S. C. c. 174, s. 152. 32 Geo. III. c. 60. ss. 1, 2, 3, 4 (Imp.).

COSTS.

833. In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt. R. S. C. c. 174, ss. 153 & 154.

Costs against a defendant fall under s. 832.

The following sections of c. 163, R. S. C. are unrepealed.

6. Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, may bring before the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, first giving twenty-four hours' notice of his intention so to do, to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, stating that the report, paper, votes or proceedings as the case may be, in respect whereof such criminal proceedings have been commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such criminal proceedings, and the same shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue hereof. 24 V. (P. E. I.), c. 31, s. 1. 3-4 V. c. 9, s. 1 (Imp.).

7. In case of any criminal proceedings hereafter commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant, at any stage of the proceedings, may lay before the court or judge such report, paper, votes or proceedings, and such copy, with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy; and the court or judge shall immediately stay such criminal proceedings, and the same shall be and shall be deemed to be finally put an end to, determined and superseded by virtue hereof. 24 V. (P.E.I.), c. 31, s. 2. 3-4 V. c. 9, s. 2 (Imp.).

LARCENY.

GENERAL REMARKS.

(From 2nd Edition.)

Larceny, at common law, is the wrongful taking and carrying away of the personal goods of any one from his possession, with a felonious intent to convert them to the use of the offender, without the consent of the owner: 2 East, P. C. 553; the word "felonious" showing that there is no colour of right to excuse the act, and the "intent" being to deprive the owner permanently of his property: R. v. Thurborn, 1 Den. 387; R. v. Guernsey, 1 F. & F. 394; R. v. Holloway, 1 Den. 370; 2 Russ. 146, note by Greaves; R. v. Middleton, 12 Cox, 417.

It is not, however, an essential ingredient of the offence that the taking should be for a cause of gain, *lucri causa*; a fraudulent taking, with intent wholly to deprive the owner of his property, or with intent to destroy it, is sufficient.

Larceny is either *simple*, that is, unaccompanied by any other aggravating circumstance, or *compound*, that is, when it is accompanied by the aggravating circumstances of taking from the house or person, or both.

Larceny was formerly divided into grand larceny and petit larceny; but this distinction is now abolished.

By s. 357, *post*, a more severe punishment may be inflicted when the value of the article stolen is over two hundred dollars, but then this value must be alleged in the indictment and duly proved on the trial, otherwise the larceny is punishable under s. 356, when no special punishment is provided for.

The requisites of the offence are:

The taking.
The carrying away.
The goods taken.
The owner of the goods
The owner's dissent from the taking.
The felonious intent in taking.

THE TAKING.

To constitute the crime of larceny at common law there must be a taking or severance of the thing from the actual or constructive possession of the owner; for all felony includes trespass, and every indictment must have the words *feloniously took* as well as *carried away;* from whence it follows that, if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away: 1 Hawk. p. 142. As in the case of a wife carrying away and converting to her own use the goods of her husband, for husband and wife are one person in law, and, consequently, there can be no taking so as to constitute larceny: 1 Hale, 514; and the same if the husband be jointly interested with others in the property so taken: R. v. Willis, 1 Moo. 375; *see* now s. 305, *post.*

The taking, however, may be by the hand of another: 2 East, P. C. 555; as if the thief procure a child within the age of discretion to steal goods for him, it will be the same as if he had taken them himself, and the taking in such case should be charged to him: 1 Hale, 507.

Where the offender unlawfully acquired the possession of goods, as by fraud or force, with an intent to steal them, the owner still retaining his property in them, such offender will be guilty of larceny in embezzling them. Therefore, hiring a horse on pretense of taking a journey, and immediately selling it, is larceny; because the jury found the defendant acted *animo furandi* in making the contract, and the parting with the *possession* merely had not changed the nature of the property: R. v. Pear, 1 Leach, 212. And so,

where a person hires a post-chaise for an indefinite period, and converts it to his own use, he may be convicted of larceny if his original intent was felonious: R. v. Semple, 1 Leach, 420.

So, where the prisoner, intending to steal the mail bags from the post office, procured them to be let down to him by a string from the window of the post office, under pretense that he was the mail guard, he was held guilty of larceny: R. v. Pearce, 2 East, P. C. 603.

Where the prisoner was hired for the special purpose of driving sheep from one fair to another, and, instead of doing so, drove them, the following morning after he received them, a different road, and sold them; the jury having found that, at the time he received the sheep, he intended to convert them to his own use, and not drive them to the specified fair, the judges were unanimously of opinion that he was rightly convicted of larceny: R. v. Stock, 1 Moo. 87.

Where the prisoner covered some coals in a cart with slack, and was allowed to take the coals away, the owner believing the load to be slack, and not intending to part with his property in the coals, it was held a larceny of the coals: R. v. Bramley, L. & C. 21.

Prevailing upon a tradesman to bring goods proposed to be bought to a given place, under pretense that the price shall then be paid for them, and further prevailing upon him to leave them there in the care of a third person, and then getting them from that person without paying the price, is a felonious taking, if, *ab initio*, the intention was to get the goods from the tradesman and not pay for them: R. v. Campbell, 1 Moo. 179.

In another case a person by false pretenses induced a tradesman to send by his servant to a particular house goods of the value of two shillings and ten pence, with change for a crown piece. On the way he met the servant, and induced him to part with the goods and the change for a crown piece, which afterwards was found to

be bad. Both the tradesman and the servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, though the former admitted that he intended to sell the goods, and never expected them back again: it was held that the offence amounted to larceny: R. v. Small, 8 C. & P. 46.

The prosecutor met a man and walked with him During the walk, the man picked up a purse, which he said. he had found, and that it was dropped by the prisoner. He then gave it to the prisoner who opened it, and there appeared to be about forty pounds in gold in it. The prisoner appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public house and had some drink. Prisoner then showed some money, and said if the man would let him have ten pounds, and let him go out of his sight, he would not say what he would give him. The man handed what seemed to be ten pounds in money, and the prisoner and prosecutor then went out together. They returned, and prisoner appeared to give the ten pounds back and five pounds more. Prisoner then said he would do the same for the prosecutor, and. by that means obtained three pounds in gold, and the prosecutor's watch and chain from him. The prisoner and the man then left the public house, and made off with the three pounds and the watch and chain At the trial the prosecutor said he handed the three pounds and the watch and chain to the men in terror, being afraid they would do something to him, and not expecting they would give him five pounds. *Held*, that the prisoner was properly convicted of larceny: R. v. Hazell, 11 Cox, 597.

Prosecutor sold onions to the prisoners who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore

the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning. *Held*, that the conviction was right: R. v. Slowly, *et al.*, 12 Cox, 269.

So, taking goods the prisoner has bargained to buy is felonious if, by the usage, the price ought to be paid before they are taken, and the owner did not consent to their being taken, and the prisoner, when he bargained for them, did not intend to pay for them, but meant to get them into his possession and dispose of them for his own benefit without paying for them: R. v. Gilbert, 1 Moo. 185.

So, getting goods delivered into a hired cart, on the express condition that the price shall be paid for them before they are taken from the cart, and then, getting them from the cart without paying the price, will be larceny if the prisoner never had the intention to pay, but had, *ab initio*, the intention to defraud: R. v. Pratt, 1 Moo. 250.

So, where the prosecutor, intending to sell his horse, sent his servant with it to the fair, but the servant had no authority to sell or deal with it in any way, and the defendants, by fraud, induced the servant to part with the possession of the horse under colour of an exchange for another, intending all the while to steal it; this was holden to be larceny: R. v. Sheppard, 9 C. & P. 121.

So, where the prisoner, pretending to be the servant of a person who had bought a chest of tea deposited at the East India Company's warehouse, got a request paper and permit for the chest, and took it away with the assent of a person in the company's service who had the charge of it, it was held that this was larceny: R. v. Hench, R. & R. 163.

Prisoner and a confederate went to prosecutor's shop to buy something, and put down a florin in payment. Prosecutor put the florin into the till and placed the change on the counter, which the prisoner took up. The confederate said, "You need not have changed," and threw down a

penny on the counter, which the prisoner took up, and put a sixpence in silver and sixpence in copper down, and asked prosecutor to give him a shilling for it. Prosecutor took a shilling from the till, and put it on the counter when prisoner said, "You may as well give me the florin back and take it all." Prosecutor took the florin from the till and put it on the counter, expecting to receive two shillings of the prisoner's money in lieu of it. Prisoner took up the florin, and prosecutor took up the silver sixpence and the sixpence in copper, and the shilling put down by herself, and was putting them in the drawer when she saw that she had only got one shilling of the prisoner's money and her own shilling; but, at that moment, her attention was diverted by the confederate, and both confederate and prisoner quitted the shop. *Held*, upon a case reserved, that this was a case of larceny, for the transaction of exchange was not complete; prosecutor had not parted with the property in the florin: R. v. McKale, 11 Cox, 32; R. v. Russett, 17 Cox, 534.

On the other hand, if the owner give his property voluntarily, whatever false pretense be used to obtain it, no felony can be committed: 1 Hale, 506; R. v. Adams, R. & R. 225; R. v. Buckmaster, 20 Q. B. D. 182, Warb. Lead. Cas. 158.

Thus where, in a case of ring-dropping, the prisoners prevailed on the prosecutor to buy the share of the other party, and the prosecutor was prevailed on to part with his money, intending to part with it for ever and not with the possession of it only, it was held by Coleridge, J., that this was not a larceny: R. v. Wilson, 8 C. & P. 111; *see* R. v. Solomons, 17 Cox, 93, Warb. Lead. Cas. 160; R. v. Russett, 17 Cox, 534.

It was the duty of the prisoner to ascertain the amount of certain dock dues payable by the prosecutors, and having received the money from their cash keeper to pay the dues to those who were entitled to them. He falsely

represented a larger sum to be due than was due, and, paying over the real amount, converted the difference to his own use. This was held not to be a larceny: R. v. Thompson, L. & C. 233.

So, where the prisoner was sent by his fellow workmen to get their wages, and received the money from the employer done up in separate pieces of paper, and converted the money to his own use, it was held upon an indictment laying the property in the employer that the prisoner could not be convicted, he being the agent of the workmen: R. v. Barnes, 12 Jur. N. S. 549; and *see* R. v. Jacobs, 12 Cox, 151.

A cashier of a bank has a general authority to part with his employer's money in payment of such cheques as he may think genuine; where, therefore, money has been obtained from a cashier at a bank on a forged cheque knowingly it does not amount to the crime of larceny: R. v. Prince, 11 Cox, 193. In this case Bovill, C.J., said: "The distinction between larceny and false pretenses is very material. The one is a felony and the other is a misdemeanour; and although, by reason of modern legislation, it has become not of so much importance as formerly, it is still desirable to keep up the distinction. To constitute a larceny there must be a taking of the property against the will of the owner, which is the essence of the crime of larceny. The authorities cited by the counsel for the prisoner show that where the property has been obtained voluntarily from the owner, or a servant acting within the scope of his authority, the offence does not amount to larceny. The cases cited for the prosecution were cases where the servant who parted with the property had a limited authority only. In the present case the cashier of the bank was acting within his authority in parting with the possession and property in the money. Under these circumstances the conviction must be quashed."

And if credit be given for the property, for ever so short a time, no felony can be committed in converting it: 2 East, P. C. 677.

Thus, obtaining the delivery of a horse *sold*, on promise to return immediately and pay for it, and riding off, and not returning, is no felony: R. v. Harvey, 1 Leach, 467; but *see* now s. 305, *post*.

So, where the prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him a piece of silk, to be paid for on delivery, and upon the silk being sent accordingly gave the servant who brought it bills which were mere fabrications, and of no value; it was holden not to be larceny on the ground that the servant *parted with the property* by accepting such payment as was offered, though his master did not intend to give the prisoner credit: Parkes's Case, 2 Leach, 614.

The prisoner, having entered into a contract with the prosecutors for the purchase of some tallow, obtained the delivery orders from the prosecutors by paying over to them a cheque for the price of the tallow, and, when the cheque was presented, there were no assets. *Held*, not to be a larceny of the delivery orders by a trick, but a lawful possession of them by reason of the credit given to the prisoner in respect of the cheque: R. v. North, 8 Cox, 433.

To constitute larceny at common law there must be an original felonious design. Lord Coke draws a distinction between such as gain possession *animo furandi* and such as do not. He says: "The intent to steal must be when it comes to his hands or possession; for if he hath the possession of it once lawfully, though he hath the *animus furandi* afterwards, and carrieth it away, it is no larceny." Therefore, when a house was burning, and a neighbour took some of the goods to save them but afterwards converted them to his own use, it was held no felony: 1 Leach, 411.

But if the original intent be wrongful, though not a felonious trespass, a subsequent felonious appropriation is larceny. So, where a man drove away a flock of lambs from a field, and in doing so inadvertently drove away along with them a lamb, the property of another person,

and, as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it. *Held*, that as the act of driving the lamb from the field in the first instance was a trespass, as soon as he resolved to appropriate the lamb to his own use the trespass became a felony: R. v. Riley, Dears. 149, 6 Cox, 88.

It is peculiarly the province of the jury to determine with what intent any act is done; and, therefore, though in general he who has a possession of anything on delivery by the owner cannot commit larceny thereof at common law, yet, that must be understood, first, where the possession is absolutely changed by the delivery, and next, where such possession is not obtained by fraud, and with a felonious intent. For if, under all the circumstances of the case, it be found that a party has taken goods from the owner, although by his delivery, with an intent to steal them such taking amounts to felony: 2 East, P. C. 685.

Overtures were made by a person to the servant of a publican to induce him to join in robbing his master's till. The servant communicated the matter to the master, and, some weeks after the servant, by the direction of the master, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master, having previously marked some money, it was, by his direction, placed upon the counter by the servant in order that it might be taken up by the party who had come for the purpose. It was so taken up by him. *Held*, larceny in such party: R. v. Williams, 1 C. & K. 195.

If the party obtained possession of the goods lawfully, as upon a trust for, or on account of, the owner, by which he acquires a special property therein, he cannot *at common law* be afterwards guilty of felony in converting them to his own use, unless by some new and distinct act of taking, as by severing part of the goods from the rest, with intent to convert them to his own use, he thereby determines the

privity of the bailment and the special property thereby conferred upon him: 1 Hale, 504; 2 East, P. C. 554. But that is not now law; *see* s. 305, *post.*

See R. v. Wells, 1 F. & F. 109, where it was held that a carrier who, receiving money to procure goods, obtained and duly delivered the goods but fraudulently retained the money, may be convicted of larceny as a bailee.

A man cannot, however, be convicted of larceny as a bailee unless the bailment was to re-deliver the *very same* chattel or money: R. v. Hoare, 1 F. & F. 647; R. v. Garrett, 2 F. & F. 14; R. v. Hassall, L. & C. 58.

The prisoner was intrusted by the prosecutor with money to buy a load of coals, which were to be brought to the prosecutor's by the prisoner in his own cart, the prisoner being paid for his services including the use of his horse and cart. He bought a load of coals in his own name, and on the way to the prosecutor's abstracted a portion of the coal and converted it to his own use, delivering the rest of the coal to the prosecutor as and for the whole load. *Held*, that he was rightly convicted of larceny as a bailee: R. v. Bunkall, L. & C. 371, 9 Cox, 419.

A carrier employed by the prosecutor to deliver in his, the prisoner's, cart a boat's cargo of coals to persons named in a list, to whom only he was authorized to deliver them, and having fraudulently sold some of the coals and appropriated the proceeds, was properly convicted of larceny as a bailee: R. v. Davies, 10 Cox, 239.

If the goods of a husband be taken with the consent or privity of the wife it is not larceny: R. v. Harrison, 1 Leach, 47; R. v. Avery, Bell, 150; *see* now s. 313, *post.*

However, it is said that if a woman steal the goods of her husband, and give them to her avowterer, who, knowing it, carries them away, the avowterer is guilty of felony:

Dalt. c. 104. And where a stranger took the goods of the husband *jointly* with the wife this was holden to be larceny in him, he being her adulterer: R. v. Tolfree, 1 Moo. 243, overruling R. v. Clarke, 1 Moo. 376, note (*a*); *see* s. 318, *post*.

Also, in R. v. Featherstone, Dears. 369, the prisoner was charged with stealing twenty-two sovereigns and some wearing apparel. The prosecutor's wife took from the prosecutor's bedroom thirty-five sovereigns and some articles of clothing, and left the house, saying to the prisoner, who was in a lower room: "It's all right, come on." The prisoner and the prosecutor's wife were afterwards seen together, and were traced to a public house where they slept together. When taken into custody the prisoner had twenty-two sovereigns on him. The jury found the prisoner guilty on the ground that he received the sovereigns from the wife knowing that she took them without the authority of her husband. Upon a case reserved it was held that the conviction was right. Lord Campbell, C.J., in delivering the judgment, said: "We are of opinion that this conviction is right. The general rule of law is that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and the wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases": *see* R. v. Berry, Bell, 95.

And so it is even though no adultery has been committed, but the goods are taken with the intent that the wife shall elope and live in adultery with the stranger: R. v. Tollett, C. & M. 112; R. v. Thompson, 1 Den. 549.

And if a servant, by direction of his master's wife, carries off his master's property, and the servant and wife go off together with the property with the intention of committing adultery, the servant may be indicted for stealing the property: R. v. Mutters, L. & C. 511.

It seems, however, that if a wife elopes with an adulterer it is no larceny in the adulterer to assist in carrying away her necessary wearing apparel: R. v. Fitch, Dears. & B. 187, overruling on this point the direction of Coleridge, J., in R. v. Tollett, cited *supra*; *see* s. 313, *post*.

The prisoner who had lodged at the prosecutor's house left it, and the next day the prosecutor's wife also left, taking a bundle with her, which, however, was not large enough to contain the things which, the evening she left, it was found had been taken from the house. Two days after all the things were found in the prisoner's cabin, or on his person, in a ship in which the prosecutor's wife was, the prisoner and the prosecutor's wife having taken their passage in the ship as man and wife. It was held that from these facts the jury were justified in drawing the inference that the prisoner had received the property knowing it to have been stolen: R. v. Deer, L. & C. 240. But an adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his house, in which the adultery is afterwards committed, merely upon evidence of their being there, unless they be traced to his personal possession: R. v. Rosenberg, 1 C. & K. 233. When a wife absconds from the house of her husband with her avowterer the latter cannot be convicted of stealing the husband's money missing on their departure, unless he be proved to have taken some active part, either in carrying away or in spending the money stolen: R. v. Taylor, 12 Cox, 627.

Nor can an avowterer be found guilty of felonious receiving of the husband's property taken by the wife, as a wife cannot steal her husband's property: R. v. Kenny, 13 Cox, 397; *see* now s. 313, *post*.

The prisoner eloped with the prosecutor's wife, travelling in a cart which the wife took from her husband's yard. The prisoner sold the pony, cart and harness in the presence of the wife, who did not object to the sale, and received the proceeds, which she retained after paying the

prisoner a sovereign he had expended in obtaining lodging while they were living in a state of adultery. *Held*, that the presence of the woman did not alter the offence; that the fact that he negotiated the sale and received part of the proceeds was sufficient; from the circumstances, the prisoner must have known that the pony, cart and harness were not the property of the woman; and that if the jury were of opinion he had that knowledge they were bound to convict him: R. v. Harrison, 12 Cox, 19; R. v. Flatman, 14 Cox, 396.

Under certain circumstances, indeed, a man may commit felony of his own goods; as if A. bail goods to B. and afterwards, *animo furandi*, steal the goods from B. with design to charge him for the value of them, this is felony: 1 Hale, 513; 2 East, P. C. 558.

So where A., having delivered money to his servant to carry to a certain place, disguised himself, and robbed the servant on the road, with intent to charge the hundred, this was held robbery in A.: 2 East, P. C. 558.

If a man steal his own goods from his own bailee, though he has no intent to charge the bailee but his intent is to defraud the King, yet, if the bailee had an interest in the possession and could have withheld it from the owner, the taking is a larceny: R. v. Wilkinson, R. & R. 470. But it is said in Roscoe, Cr. Evid. 597: "It may be doubted whether the law has not been somewhat distorted in this case in order to punish a flagrant fraud."

Bishop, 2 Cr. L. 790, says: "If one, therefore, has transferred to another a special property in goods, retaining in himself the general ownership, or, if the law has made such transfer, he commits larceny by taking them with felonious intent."

So if a man steal his goods *in custodia legis*. But "if the goods stolen were the general property of the defendant, who took them from the possession of one to whose care they had been committed, as for instance, from an

officer seizing them on an execution against the defendant, it must be shown that the latter knew of the execution and seizure; otherwise the required intent does not appear. The presumption, in the absence of such knowledge, would be, that he took the goods supposing he had the right so to do": 2 Bishop, Cr. Proc. 749; *see* s. 306, *post.*

If a part owner of property steal it from the person in whose custody it is, and who is *responsible for its safety*, he is guilty of larceny: R. v. Bramley, R. & R. 478.

A wife may steal the goods of her husband which have been bailed or delivered to another person, or are in the possession of a person who has a temporary special property in them: 1 Hale, 513.

The wife cannot commit larceny in the company of her husband; for it is deemed his coercion, and not her own voluntary act. Yet, if she do in his absence, and by his mere command, she is then punishable as if she were sole: R. v. Morris, R. & R. 270; R. v. Robson, L. & C. 93; *see* now s. 13, *ante.*

THE CARRYING AWAY.

(See s. 305, s-s. 4, post.)

To constitute larceny there must be a *carrying away*, asportation, as well as a taking. The least removing of the thing taken *from the place where it was before* is sufficient for this purpose, though it be not quite carried off. And, upon this ground, the guest, who, having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. So, also, was he, who, having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. And such was the case of him who, intending to steal plate, took it out of the trunk wherein it was, and laid it on the floor, but was surprised before he could remove it any further: 2 East, P. C. 555; 3 Burn, 214. Or if a servant, *animo furandi*, take his master's hay

from his stable, and put it into his master's waggon: R. v. Gruncell, 9 C. & P. 365.

H. was indicted for stealing a quantity of currants, which were packed in the forepart of a waggon. The prisoner had laid hold of this parcel of currants, and had got near the tail of the waggon with them, when he was apprehended; the parcel was afterwards found near the middle of the waggon. On this case being referred to the twelve judges they were unanimously of opinion that, as the prisoner had *removed* the property from the spot where it was originally placed, with intent to steal, it was a *taking and carrying away*: Cozlett's Case, 2 East, P. C. 556.

Prisoner had lifted up a bag from the bottom of a boot of a coach, but was detected before he had got it out; it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specified part occupied: *Held*, that this was a complete *asportation:* R. v. Walsh, 1 Moo. 14.

The offence of simple larceny is complete, if the defendant drew a book from the inside pocket of the prosecutor's coat about an inch above the top of the pocket, though the prosecutor then suddenly putting up his hand the defendant let the book drop, and it fell back into the prosecutor's pocket: R. v. Thompson, 1 Moo. 78.

On the other hand, a mere change of *position* of the goods will not suffice to make out a carrying away. So, where W. was indicted for stealing a wrapper and some pieces of linen cloth, and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid length-way in a waggon, and that the prisoner set up the wrapper on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken anything; all the judges agreed that this was no larceny, although his intention to

steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were; and the felon must, for the instant at least, have the entire and absolute possession of them: R. v. Cherry, 2 East, P. C. 556.

So, where one had his keys tied to the strings of his purse in his pocket, which W. attempted to take from him and was detected with the purse in her hand, but the strings of the purse still hung to the owner's pocket by means of the keys, this was ruled to be no *asportation:* Wilkinson's case, 1 Leach, 321; *see* s. 711, *post.*

So in another case, where A. had his purse tied to his girdle, and B. attempted to rob him; in the struggle the girdle broke, and the purse fell to the ground; B. not having previously taken hold of it, or picked it up afterwards, it was ruled to be no taking: 1 Hale, 533; *see* s. 711, *post.*

Upon an indictment for robbery the prisoner was found to have stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down, or he would shoot him, on which the prosecutor laid the bed on the ground, but the prisoner was apprehended before he could take it up so as to remove it from the spot where it lay, the judges were of opinion that the offence was not complete: Farrell's case, 2 East, P. C. 557.

Where the prisoner, by means of a pipe and stopcock, turned off the gas belonging to a company before it came into the meter, and so consumed the gas, it was held that there was a sufficient severance of the gas in the entrance pipe to constitute an *asportavit:* R. v. White, Dears. 203; R. v. Firth, 11 Cox, 234.

If the thief once take possession of the thing the offence is complete, though he afterwards return it: 3 Burn, 215.

Where it is one continuing transaction, though there be several distinct *asportations* in law by several persons, yet all may be indicted as principals who concur in the felony

before the final carrying away of the goods from the virtual custody of the owner; 2 East, P. C. 557; and if several persons act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and another of them entice him away that the man who has his goods may carry them off, all are guilty of felony; the receipt by one is a felonious taking by all: R. v. Standley, R. & R. 305.

And where property which the prosecutors had bought was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, who let other persons take away the cart and dispose of the property for his benefit jointly with that of the other persons, it was held, that the carter's servant, as well as the other persons, was guilty of larceny at common law: R. v. Harding, R. & R. 125.

THE GOODS TAKEN.

The property taken must, to constitute larceny at common law, be *personal* property, and of some intrinsic value, though it need not be of the value of some coin known to the law: R. v. Morris, 9 C. & P. 349; 3 Burn, 216; R. v. Walker, 1 Moo. 155; *see* s. 303, *post*.

Things real, or which savour of the realty, choses in action, as deeds, bonds, notes, etc., cannot be the subject of larceny, at common law: *see* s. 303, *post*.

No larceny, at common law, can be committed of such animals in which there is no property, either absolute or qualified; as of beasts that are *feræ naturæ* and unreclaimed. But if they are reclaimed or confined, or are practically under the care and dominion of the prosecutor and may serve for food, it is otherwise: *see* s. 304, *post*.

So young pheasants, hatched by a hen, and under the care of the hen in a coop, although the coop is in a field at a distance from the dwelling-house, and although the pheasants are designed ultimately to be turned out and to

become wild, are the subject of larceny: R. v. Cory, 10 Cox, 23.

Partridges were reared from eggs by a common hen; they could fly a little, but still remained with the hen as her brood, and slept under her wings at night, and from their inability to escape were practically in the power and dominion of the prosecutor: *Held*, that they were the subject of larceny at common law: R. v. Shickle, 11 Cox, 189.

The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded, but was picked up or caught by the prisoner while it was alive but in a dying state: *Held*, that the indictment was not proved: R. v. Roe, 11 Cox, 554. What value necessary in property to be subject to larceny: R. v. Edwards, Warb. Lead. Cas. 132.

Rabbits were netted, killed, and put in a place of deposit, viz: a ditch, on the land of the owner of the soil on which the rabbits were caught, and some three hours afterwards the poachers came to take them away, one of whom was captured by gamekeepers who had previously found the rabbits, and lay in wait for the poachers: *Held*, that this did not amount to larceny: R. v. Townley, 12 Cox, 59, Warb. Lead. Cas. 133. But a trespasser who, having cut grass on another man's land, leaves it there, but returns and carries it away afterwards, commits larceny: R. v. Foley, 17 Cox, 142. Water in the pipes of a company may be the subject of larceny: Ferens v. O'Brien, 15 Cox, 332.

AGAINST OWNER'S CONSENT.

The taking must be against the will of the owner. The primary inquiry to be made is, whether the taking were *invito domino*, that is to say, without the will or approbation of the owner; for this is of the very essence of larceny and its kindred offence, robbery: 3 Burn, 218.

But where a servant, being solicited to become an accomplice in robbing his master's house, informed his

master of it, and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come: it was holden, that this conduct of the master was no defence to an indictment against the robbers: *see* Bishop, 1 Cr. L. 262, and 2 Cr. L. 811.

An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. eleven pence, and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her one shilling, and refused to give her the nineteen shillings change: *Held*, that the prisoner could not be convicted upon this indictment of stealing nineteen shillings: R. v. Bird, 12 Cox, 257.

B., making a purchase from the prisoner, gave him half a sovereign in mistake for a sixpence. Prisoner looked at it and said nothing but put it into his pocket. Soon afterwards B. discovered the mistake, and returned and demanded the restoration of the half sovereign. Prisoner said "all right, my boy; I'll give it to you," but he did not return it, and was taken into custody: *Held*, not to be a larceny: R. v. Jacobs, 12 Cox, 151. Obtaining money from any one by frightening him, is larceny: R. v. Lovell, 8 Q. B. D. 185; R. v. McGrath, Warb. Lead. Cas. 140.

THE FELONIOUS INTENT.

The taking and carrying away must, to constitute larceny at common law, be with a *felonious intent* entertained at the time of the taking: *see* now s-s. 3, s. 305, *post*.

Felony is always accompanied with an evil intention, and, therefore, shall not be imputed to a mere mistake.